Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock’s Attempts to Circumvent


David A. Elder*

I. THE SUPREME COURT AND THE TRUTH-ACCURACY DICHOTOMY .............................................................. 555
   A. Introduction ...................................................................... 555
   C. The Counter-Revolution: Gertz v. Robert Welch and Its Progeny ................................................................. 573
   D. A Brief Summary of the Court’s Jurisprudence ............ 600
   E. Semantic Confusion about the Meaning of “Truth” and the Media Jabberwock’s Erroneous Reliance on the Smith v. Daily Mail “Rule” ................................................................. 603

II. THE SUPREME COURT AND CALCULATED FALSEHOOD: AN UNEQUIVOCAL REJECTION OF MEDIA ABSOLUTISM .......... 613

III. NEUTRAL REPORTAGE AND THE PENNSYLVANIA SUPREME COURT ........................................................................... 627

IV. EDWARDS V. NATIONAL AUDUBON SOCIETY: A FRESH LOOK AT FLAWED PRECEDENT ............................................................. 640

V. NEUTRAL REPORTAGE REQUIREMENTS: A CRITICAL OVERVIEW ................................................................................... 655
   A. Introduction ...................................................................... 655
   B. The Public Person Requirement ........................................ 657
   C. The “Responsible, Prominent” Source Requirement .......... 664
   D. The “Neutrality” Requirement ............................................ 672

* Regents Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University; Columbia University, LL.M. (1973); Saint Louis University, J.D. (1972); Bellarmine University, A.B. (1969). The author would like to thank the professional staff of the College of Law library for their extraordinary conscientiousness and creativity in responding to my requests for arcane and often inaccessible materials. You are a scholar’s dream team!
In over four decades since the *New York Times v. Sullivan* decision, the United States Supreme Court has accorded the American media a level of freedom of expression that is unparalleled in the democratic world. Yet, the Supreme Court has also repeatedly affirmed its unwillingness to give the media a constitutional blank check, and has authorized redress where public persons can prove that the defendant published a “calculated falsehood.” As any lawyer knows, the calculated falsehood standard is so difficult to satisfy that often none but the impulsive, the intrepid or the naïve will contemplate suing for libel. However, *Sullivan* does allow for rare victories by public persons, and may impose a degree of caution on at least some media defendants.

The media Jabberwock finds this stringent standard to be insufficient. The media argues that if it must abide by the calculated...
falsehoods standard, self-censorship\(^9\) will reign supreme. In essence, the argument is that the public will suffer\(^{10}\) because the media won’t be allowed to publish lies. Calculated falsehoods, which the public needs to engage in its democratic functions,\(^{11}\) will not be available.

One should beware of the media spouting *pro bono publico* absolutism while hiding “[t]he claws that bite the claws that catch!”\(^{12}\) In *Edwards v. National Audubon Society*, the media Jabberwock succeeded in persuading a predisposed judge and a progressive circuit to manufacture an exception to *Sullivan* for “neutral reportage.”\(^{13}\) With “eyes of flame,”\(^{14}\) the media Jabberwock became free to ignore its own subjective doubts\(^{15}\) (*i.e.*, publish calculated falsehoods) and fulminate unfettered under the guise of the public interest.

The neutral reportage exception consists of the right to publish false information about public persons\(^{16}\) (and perhaps others\(^{17}\)) that originates from “responsible, prominent” sources (and possibly merely “prominent” or even “irresponsible” sources\(^{18}\)) as long as the information is printed “neutrally.”\(^{19}\) In its attempts to invoke this exception, the media Jabberwock encountered a “vorpal sword”\(^{20}\) in the form of a largely unsympathetic judiciary.\(^{21}\)

In 2004, the Pennsylvania Supreme Court’s “vorpal blade went snicker-snack”\(^{22}\) in *Norton v. Glenn*,\(^{23}\) and left neutral reportage dead, having “slain the Jabberwock.”\(^{24}\) In that case, the battle was brutal, with the state and national Jabberwockian horde\(^{25}\) elegantly defending the media’s right as “conduit . . . messenger” to print lies (“calculated falsehoods”) about public officials by a public official with

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9. See infra text accompanying notes 576-583.
10. See discussion infra Part III.
11. See id.
12. CARROLL, supra note 7, at 22.
14. CARROLL, supra note 7, at 22.
15. See infra text accompanying notes 679-683.
16. See discussion infra Part V.
17. See id.
18. See id.
19. See id.
20. CARROLL, supra note 7, at 22.
21. See discussion infra Part VI.
22. CARROLL, supra note 7, at 22.
24. CARROLL, supra note 7, at 24; see discussion infra Part III.
25. See infra text accompanying note 571.
impunity, as long as the lies were “neutral” and “accurate.”

But the media Jabberwock met its match in sophisticated counsel and a sanguine court that recognized the endemic unfairness of allowing the media to publish calculated falsehoods with impunity and to ignore the defendant’s reservations about the public official/source’s veracity and credibility. With pointed eloquence, the Pennsylvania Supreme Court circumscribed the media’s awesome power to destroy reputation and taint political discourse by subjecting the defendant disseminator of calculated falsehoods to liability under the Court’s *Sullivan* jurisprudence. Despite the Jabberwock’s diligent efforts, the Supreme Court denied *certiorari* without a single dissenting vote.

Although neutral reportage may no longer appear to be a viable constitutional doctrine, the future battle over the doctrine’s equally capricious surrogates is foreshadowed in the *Norton* briefs. The briefs referenced accuracy as pseudo-truth, fair report as extending to informal governmental investigations and unofficial statements, neutrality as *per se* negating constitutional malice, accurate recitation of charges with teaser protestations of innocence as non-defamatory, and *Sullivan*’s proscription of reckless journalism as contemplating, countenancing and authorizing dissemination of calculated falsehood under the rubric of so-called responsible journalism.

As this article will show, nothing in common law, the Supreme Court’s First Amendment jurisprudence, the needs and dictates of public discourse, or elemental fairness justifies either neutral reportage or its surrogate absolutes. In Section I, this article examines in detail the Court’s carefully calibrated and oft-misunderstood First Amendment jurisprudence. Section II analyzes the compelling justifications in the Court’s jurisprudence for rejecting media absolutism in reporting calculated falsehoods. Section III
focuses specifically on the doctrine of neutral reportage and the Pennsylvania Supreme Court case that effectively ended its viability. In Section IV, the article takes a fresh look at the Edwards case. Section V provides a critical analysis of the requirements of neutral reportage. In Section VI, the article examines Edwards’ progeny. Section VII provides a strong defense of traditional republisher liability and demonstrates why the Jabberwock’s suggested circumvention devices are indefensible. Finally, Sections VIII and IX delineate the logical (or illogical) portents of neutral reportage. In sum, the article demonstrates that Edwards’ “rendezvous with Death” no longer remains a “disputed barricade,”37 and that its surrogates similarly lack precedential value as either common law, public policy or constitutional doctrine.

I. THE SUPREME COURT AND THE TRUTH-ACCURACY DICHOTOMY

A. Introduction

The media Jabberwock has constructed several broad legal devices in an attempt to circumvent Sullivan and provide absolute immunity from defamation liability for most, if not all, types of accurate reportage. Disentangling the media’s hyperbolic interpretation of Supreme Court jurisprudence from what the Court has actually said and done necessitates a detailed, largely chronological, delineation of how the Court has delved into the “truth”-“accuracy” debate. This debate created confusion that the media Jabberwock has manipulated creatively in its attempts to expand First Amendment protection far beyond that envisioned by the Court. This detailed analysis will demonstrate conclusively just how little support exists for an absolute immunity for accurate reportage.


The Supreme Court first applied the First Amendment to protect defamatory falsity in the famous case of New York Times v. Sullivan.38 In this case, both media and non-media defendants39 were

37. ALAN SEEGER, I Have a Rendezvous with Death..., in POEMS (1917).
38. 376 U.S. 254, 299 (1964) (Goldberg, J., with Douglas, J., concurring) (“[W]e are writing upon a clean slate.”). Of course, the Court’s precedents convincingly evidence its sophisticated awareness of the potential for republisher liability in its pre-Sullivan jurisprudence. See, e.g., Farmers Educ. & Coop. Union of Am. v. WDay, Inc., 360 U.S. 525
sued for libel arising from an advertisement published\(^{40}\) in the *New York Times*\(^{41}\) as “an expression of grievance and protest” on race relations in Alabama.\(^{42}\) The Court had several options available to it

(1959) (5-4 decision) (adopting a federal statutory immunity from defamation liability for publishing uncensored statements by candidates for public office); Dorr v. U.S., 195 U.S. 138, 149-53 (1904) (upholding a criminal libel conviction against media defendants under a statute applicable to the Philippines and finding the qualified statutory fair report privilege forfeited because the account was not a “simple report” of judicial proceedings but included defamatory addenda in headlines). Indeed, an analysis of the common law minority fair comment decisions relied on in *Sullivan*, 376 U.S. at 280 n.20, discloses that several involved a qualified privilege defeasible by common law malice for reportage of third party statements. *See* Phoenix Newspapers v. Choisser, 312 P.2d 150, 151-55 (Ariz. 1957) (holding that an accurate reportage of a charge by a candidate at an open public meeting held by the junior chamber of commerce to hear from candidates in a city election was privileged and that the plaintiff had the burden then of proving both falsity and either malice in fact, actual malice or express malice); McLean v. Merriman, 175 N.W. 878, 879-81 (S.D. 1920) (bestowing privileged status on a reprint of libel from another periodical about plaintiff, a modern day public figure who took charge of an election campaign on “a matter of great public moment,” treating him as equivalent to a candidate for public office). In a third decision, *Stice v. Beacon*, a series of articles implicating a sitting judge and citing to police authorities (who often quoted informant statements) was covered by the “well settled” Kansas rule affording protection to reportage on violations of the law “based upon information obtained from the police department and other investigation agencies and from various public officials who had a legitimate concern with the matters under investigation.” *Stice v. Beacon Newspapers, Inc.*, 340 P.2d 396, 398-402 (Kan. 1959). The privilege was forfeited by proof of falsity and “actual malice, evil-mindedness, or a wicked purpose to injure the plaintiff.” *Id.* A fourth decision referenced upheld a substantial judgment in a case based largely on reportage of accusations and statements by businessmen-competitors of the plaintiff. *See* Chagnon v. Union Leader Corp., 174 A.2d 825 (N.H. 1961). The court found that proof of underlying truth (“justification”) had not been proven and that ample proof of malice such as “ill will, evil motives or intention to injure” or “wanton disregard of the rights of others” had been shown. *Id.* at 828-34.


40. See *id.* at app. For purposes of comparison with neutral reportage, the ad can be viewed as defendant New York Times’ publication of a cry for assistance critical of Alabama public officials coming from “responsible, prominent” persons. *See discussion infra* Part V. Indeed, in analyzing whether the constitutional malice standard had been met, and finding it was not, the Court cited testimony that the ad had come from an agency acting for a committee of sixty-four, together with a letter from A. Phillip Randolph, the committee’s chair, whom the advertising department viewed as a “responsible person.” *Sullivan*, 376 U.S. at 260. The head of the advertising acceptability department also testified he authorized the ad without further checking because it was endorsed by well-known persons whose reputations he had no reason to doubt. *Id.* at 260-61, 287. Two concurring Justices characterized the litigation in this way: “[I]f newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt, that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.” *Id.* at 300 (Goldberg, J., with Douglas, J., concurring in the result). The concurring Justices argued for absolute immunity. *See id.* For a further discussion of this neutral reportage parallel, see *infra* text accompanying notes 507-532.


42. *Id.* at 271.
in order to resolve the case, including granting absolute immunity to the defendants, a position espoused by several concurring Justices. In addition, the Court could have constitutionalized a liberal “substantial truth” defense, which arguably would have immunized the defendants in the case before it on very narrow grounds. Instead, in powerful, evocative terms, the Court rejected “truth” as an insufficient defense in itself (particularly the “true in all [its] particulars” version adopted in Alabama) and mandated that there be proof of constitutional malice regarding stratal falsity as a

43. The alternative holding dealt with the “of and concerning” the plaintiff issue. Id. at 292. The Court held that Sullivan, not identified by name or office, could not constitutionally fulfill the “of and concerning” element by making “an otherwise impersonal attack on governmental options . . . a libel of an official responsible for those operations.” Id. This absolute immunity for “impermissible attacks” on government is the one absolute immunity for defamatory false information the Court has apparently sanctioned. See David A. Elder, Small Town Police Forces, Other Governmental Entities and the Misapplication of the First Amendment to the Small Group Defamation Theory—A Plea for Fundamental Fairness for Mayberry, 6 U. PA. J. CONST. L. 881 (2004) [hereinafter Elder, Small Town].

44. See discussion infra Part II.

45. See Sullivan, 376 U.S. at 293-97 (Black J., with Douglas, J., concurring); id. at 297-305 (Goldberg J., with Douglas, J., concurring in the result).

46. Id. at 289 (“The ruling that these discrepancies between what was true and what was asserted were sufficient to injure [Sullivan]’s reputation may itself raise constitutional questions, but we need not consider them here.”) (majority opinion). In not so narrowly limiting its holding, possibly the Court was reflecting its statement five years earlier that defenses like “truth” have “always troubled courts.” Farmers Educ. & Coop. Union of Am. v. WDay, Inc., 360 U.S. 525, 530 (1959).

47. See Harry Kalven, Jr., The New York Times Case: A Note on “The Central Meaning of the First Amendment,” 1964 SUP. CT. REV. 191, 199-200 (stating that although each alleged defamatory statement had a “core of truth,” the common law applied “very stringent” standards—thus, the conclusion that the statements’ falsities were “harmless would not comport with established legal tests”).

48. Sullivan, 376 U.S. at 271 (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker.”); id. at 273-74, 276 (noting that the Sedition Act of 1798, first “crystalliz[ing] a national awareness of the central meaning of the First Amendment,” had allowed a defense of truth, but had been invalidated “in the court of history”); id. at 278 (“The state rule of law is not saved by its allowance of the defense of truth.”). However, implicit in the Court’s analysis was the conclusion that truth was required by but not sufficient for First Amendment needs. See id. at 271-83.

49. Id. at 254, 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel verdicts virtually unlimited in amount—leads to a comparable ‘self-censorship’ . . . The rule thus dampens the vigor and limits the variety of public debate . . . inconsistent with the First and Fourteenth Amendments.”) (emphasis added).

50. Clearly, the Court was looking at the underlying falsity of the ad. Id. at 271 (“The question is whether it forfeits that protection by the falsity of some of its factual statements.”); id. at 273 (noting that “neither factual error nor defamatory content suffice(d) to remove the constitutional shield”); id. at 279 (“The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a
threshold requirement in cases where public officials sue for
defamatory aspersions on their public capacities. The Court
narrowly defined “constitutional malice” as a knowing or reckless
disregard of falsity, and held that this level of protection was both
necessary and sufficient to meet “a profound national commitment to
the principle that debate on public issues should be uninhibited,
robust, and wide-open.”

Shortly after Sullivan, the Court reversed a criminal
defamation conviction in Garrison v. Louisiana. In that case, the

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51. Sullivan, 376 U.S. at 279-80. For a detailed discussion of public official status,
ELDER, DEFAMATION]. On the fitness regarding official conduct issue,
see id. § 5:2. See also infra text accompanying note 61.

52. Sullivan, 376 U.S. at 279-80. The Court's strong language suggested that the
affirmative burden imposed applied not only to fault but also to falsity. Id. However, that
issue was not definitively resolved (although it was widely assumed to be) until the Court's
decision in Philadelphia Newspapers, Inc. v. Hepps, over two decades later. See 475 U.S.
767 (1986); infra text accompanying notes 254-293. The Court also alluded descriptively to
required proof of "convincing clarity." Sullivan, 376 U.S. at 285-86. This later became
formalized into a rule of "clear and convincing evidence." See ELDER, DEFAMATION, supra
note 51, § 7:5.

53. Sullivan, 376 U.S. at 270. One authoritative commentator, Professor Harry
Kalven, agreed with Alexander Meiklejohn that Sullivan was “an occasion for dancing in
the streets.” Kalven, supra note 47, at 221 n.125.

54. 379 U.S. 64 (1964). Note that the Court reversed State v. Moity, 159 So.2d 149
(La. 1963), solely relying on Garrison. Moity v. Louisiana, 379 U.S. 201 (1964). Moity was
a criminal defamation prosecution for libeling a district attorney in a petition to the state
supreme court. Moity, 159 So.2d at 150. A single statement in a 106 article complaint
charged Moity and others with having secured the conviction of a named third party based
on perjured testimony. Id. Several aspects of the court’s opinion involving potential
republisher liability issues are interesting. First, the court rejected any suggestion that
evidence of proceedings brought in state and federal courts publishing similar or parallel
allegations was improperly admitted. Id. at 153-54. These were admissible as evidence of
Moity’s republication with malice. Id. The court also rejected a suggestion that the filing
with the Supreme Court was a “fair and true report” of the earlier perjury conviction. Id.
The court found it to be “one of Moity’s own fabrications.” Id. at 154. Lastly, the court
rejected any suggestion that the libels were made in a judicial proceeding. Id. at 155. The
trial judge had found the complaint was made for the purpose of achieving “wide publicity.”
Id. Indeed, Moity had noted in an attached certification his dissemination to over a dozen
named individuals. The court noted the receipt of such “wide publicity” via the radio
criminal defendant, the parish attorney for New Orleans, held a press conference excoriating the eight members of the criminal district court. The press conference was in response to a statement by one of the judges criticizing the parish attorney's conduct. Despite the backdrop of a seditious libel analogy, the Court affirmed the continuing constitutional validity of criminal defamation law if two requirements are met. First, truth, in the common law civil sense, is absolutely protected as to matters of public importance. Second, the government must prove constitutional malice in cases involving defamation of public officials as to matters "touch[ing] on . . . fitness for office." As in Sullivan, the Court emphasized that calculated falsehood is beyond the constitutional pale—"the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

After several attempts to tidy up the confusion raised by its "actual malice" terminology, the Court provided further guidance on
the “truth”-”falsity” dichotomy in Time v. Hill. Hill involved a false light/fictionalization claim brought under New York’s appropriation statute. The claim arose from a Life magazine article depicting a play as a reenactment of the plaintiffs’ experiences as hostages held by convicts. The Court noted and approved the New York Court of Appeals’ provision of an absolute defense of truth to newsworthy matters. In defining “fictionalization,” the Court also noted and tacitly adopted the Court of Appeals’ “minor error” versus “[m]aterial and substantial falsification . . . test.” In light of these determinations, the Court had to resolve only one issue: whether Life’s false portrayal met the controlling Sullivan standard of knowing or reckless disregard.

Shortly after Hill, the Court issued joint opinions in Curtis Publishing v. Butts and Associated Press v. Walker. In these confusing opinions, a majority of the Court applied the Sullivan.

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64. 385 U.S. 374 (1967).
66. See ELDER, PRIVACY, supra note 65, ch. 6 (discussing generally the appropriation tort).
68. Id. at 382-84 nn.6-7.
69. Id. at 386.
70. Id. at 386-97. While the latter standard may be open in private person-public interest cases post-Gertz, the other aspects of Hill remain constitutionally viable. See infra note 207. The Court’s analysis of defendants’ article about a play fictionalizing a hostage situation made it clear that the focus was on whether defendant’s entertainment editor knowingly or recklessly linked plaintiffs’ hostage to the fictionalized scenario in the play, which had been generated by a number of such incidents. Id. The Court analyzed several items of evidence that the editor may have been aware of in writing the substantially false depiction. Id. The Court’s unambiguous focus was the underlying falsity of the depiction. Id. at 393-94. The case was remanded for a jury resolution on the issue of constitutional malice. Id. at 394.
71. 388 U.S. 130 (1967).
standard to statements made about two public figures.\textsuperscript{72} The Court focused on fault in regards to the underlying falsity of the defamatory matter. The plurality applied Justice Harlan’s “highly unreasonable conduct”\textsuperscript{73} standard. The majority concurred in Chief Justice Warren’s adoption of the constitutional malice standard and held that public figures must demonstrate that publishers engaged in “that degree of reckless disregard” that \textit{Sullivan} and \textit{Garrison} required for liability.\textsuperscript{74} The Court reversed in \textit{Associated Press} and affirmed in \textit{Curtis Publishing},\textsuperscript{75} including a substantial award of actual and punitive damages.\textsuperscript{76}

\textsuperscript{72} Id. at 154-55 (Harlan, J.); id. at 162-65 (Warren, C.J., concurring in the result).

\textsuperscript{73} Justice Harlan concluded that \textit{Sullivan}, viewed in the context of the common law and statutes, had made it clear that competing interests of publisher and society did not bar damages “based on improper conduct which creates a false publication.” Id. at 152-53 (Harlan, J.). He then suggested that the \textit{Sullivan} rule was not the only appropriate balancing of the competing interests and would have imposed liability for any “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” Id. at 155.

\textsuperscript{74} Id. at 162-70 (Warren, C.J., concurring in the result).

\textsuperscript{75} Id. at 142, 156, 158-59 (Harlan, J.) (applying the “highly unreasonable conduct” standard). Justice Harlan noted the correspondent relied on was present at the scene—Ole Miss during James Meredith’s desegregation efforts—and there were strong indicia of the correspondent’s trustworthiness and competence. Id. at 159. Moreover, his statements about plaintiff Walker—that he had taken control of a riotous mob and led a charge against federal marshals—were not unreasonable to one aware of plaintiff’s prior statements on the controversy. Id. In light of the “hot news” nature of this incident, there was not a glimmer of “a severe departure from accepted publishing standards.” Id. See Chief Justice Warren’s concurrence based on \textit{Sullivan}. Id. at 165-70 (Warren, C.J., concurring). See also id. at 172 (Brennan, J., with White, J., concurring in Chief Justice Warren’s analysis and the result in \textit{Associated Press}).

\textsuperscript{76} Id. at 162-70 (Warren, C.J., concurring in the result).

Among a host of factors, Justice Harlan cited the following important considerations: the source who overheard the telephone conversation leading to the football game-fixing charges against Butts, the University of Georgia football coach, was on probation for bad check charges; his notes weren’t reviewed before publication; a third party witness to the overheard phone call was not interviewed; no attempt was made to review the game films to see if the source’s information was accurate; and no endeavor was made to discern whether the recipient coach had modified his game plans after the alleged disclosure. Id. at 157-58. Despite these factors, defendant proceeded, relying on the source without substantial other corroboration. Id. at 157. Later in his discussion of punitive damages Justice Harlan cited plaintiff’s and plaintiff’s daughter’s pre-publication warnings that the charges were false. Id. at 161 n.23. Despite such warnings and the absence of any review of the source’s “crucial notes,” no additional investigative efforts occurred. Id. Justice Harlan conceded such might also have met the \textit{Sullivan} standard. Id. Chief Justice Warren examined the punitive damages instructions at trial and concluded that such “most probably result[ed]” in a jury verdict “based on the requirement of reckless disregard for the truth” under \textit{Sullivan}. Id. at 166 (Warren, C.J., concurring). In applying the latter standards to the facts, he largely agreed with Justice Harlan’s analysis, but
In the pivotal case of *St. Amant v. Thompson*, the Court provided significant guidance as to the parameters of constitutional malice.\textsuperscript{77} This case involved a libel suit by the plaintiff, a deputy sheriff, against a candidate-defendant regarding republication of answers to the candidate’s questions provided by a non-suspect source.\textsuperscript{78} The Court determined that the plaintiff failed to show that the defendants were “aware of the likelihood that [they were] circulating false information.”\textsuperscript{79} Interpreting *Sullivan*, the Court made it clear that the “fault regarding underlying falsity” standard is subjective in tone: whether “defendant in fact entertained serious doubts as to the truth of his publication.”\textsuperscript{80} The Court emphasized that “[n]either lies nor false communications” effectuated First Amendment goals.\textsuperscript{81} Nonetheless, the Court determined that the First Amendment required protection of some false statements in order to “insure the ascertainment and publication of truth about public affairs.”\textsuperscript{82}

The Court remained steadfast, however, that no absolute privilege applies to false statements and that a defendant cannot guarantee success in litigation by mere protestations about honest belief in truth; rather, the fact finder is required to decide whether the defamation is “indeed made in good faith.”\textsuperscript{83} The Court provided the following guidance for making this determination: claims of good faith would likely fail where a defendant’s article or story is “fabricated,” “the product of his imagination,” “based wholly on an unverified anonymous phone call,” “so inherently improbable that only a reckless man would put [the false statements] in circulation,” or where there are “obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”\textsuperscript{85}

\textsuperscript{77} 390 U.S. 727 (1968).
\textsuperscript{78} Id. at 728.
\textsuperscript{79} Id. at 731.
\textsuperscript{80} Id. (emphases added).
\textsuperscript{81} Id. at 732.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. Clearly, the latter criterion dealt with reliance on sources and republications of the false content. *See also* ELDER, DEFAMATION, *supra* note 51, ch. 7. The Court
Two years later in *Greenbelt Publishing Association v. Bresler*, the Court found no liability arising from the defendant’s report of a public meeting of city council in which citizens had characterized the plaintiff, a developer and public figure, as engaged in “blackmail.” In applying *Sullivan*, the Court found that there was an “error of constitutional magnitude” in the jury instructions, which had allowed the jury to find knowing or reckless disregard based on proof of falsity plus general ill will or hostility. In analyzing the “blackmail” characterization, the Court also concluded that the reports of the public meetings were “accurate and full,” not “truncated or distorted” in a way that removed “blackmail” from the context in which it was actually used. The Court determined that the headlines made it clear that the report in question dealt with negotiations regarding a high school building site. Furthermore, the plaintiff’s building proposal was fairly described, as were both the “blackmail” characterization and disputes of that characterization. In light of these factors, the Court found that no reader could have concluded that either the speakers or the newspaper publishers were accusing the plaintiff of the crime of blackmail. In context, the term blackmail was mere “rhetorical hyperbole,” a “vigorous epithet” analyzed the fault regarding falsity issue as to defendant’s reliance on his dissident-Teamster source and found no evidence demonstrating defendant’s “awareness of probable falsity.” *St. Amant*, 390 U.S. at 732-33. The absence of any evidence as to the source’s credibility merely highlighted plaintiff’s failure to show “a low community assessment” of the source’s credibility or prior dissatisfaction with him. *Id.* at 733. In addition, there were a number of important indicia of reliability. *Id.*

87. *Id.* at 9-10. See also supra note 63. The Court also rejected the state court’s finding of constitutional malice, finding it was based on a faulty syllogism: since defendants admitted and knew that plaintiff had engaged in no such crime, republication of the word “blackmail” constituted a knowing falsehood. *Greenbelt Publ’g Ass’n*, 398 U.S. at 13.

88. *Id.* *Greenbelt Publishing Association* was followed in *Letter Carriers v. Austin*, 418 U.S. 264 (1974). See discussion infra notes 170-178. See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). The *Greenbelt Publishing* Court may have been a little too forgiving. The court below had disagreed, and with reason. 252 A.2d 755, 772-73 (Md. 1969). Among other things it cited the unqualified “blackmail” sub-headline. *Id.* More importantly, it relied on the fact that the characterizing term “skullduggery”—not used by any speaker—had been added by the newspaper. *Id.* The court held such was intended to impute dishonesty to plaintiff. *Id.* See also *Greenbelt Publ’g*, 398 U.S. at 21 (White, J., concurring, joining on limited grounds). Substantial case law would support the state court’s conclusion that such editorial embellishments or additions forfeited fair report. See *Elder, Defamation*, supra note 51, §§ 3:25-26; *David A. Elder, The Fair Report Privilege* §§ 2:06-2:08 (1988) [hereinafter Elder, FAIR REPORT].

89. *Greenbelt Publ’g*, 398 U.S. at 13-14.
90. *Id.* at 14.
91. *Id.*
attacked by speakers who viewed the plaintiff’s negotiating strategy as exceedingly unreasonable. Holding the defendants liable based on such facts would “subvert the most fundamental meaning of a free press.”

Three points from the opinion bear repeating in light of confused interpretations of Greenbelt Publishing. First, despite the Court’s reference to public meetings as of “particular First Amendment concern,” the opinion contains no suggestion that the Court was constitutionalizing fair report either in this context or in general. A fortiori, despite an ill-chosen aside, there is no indication in the opinion that fair and accurate reports of such proceedings are or should be absolutely privileged. Second, the Court’s express repudiation of knowing or reckless disregard of underlying falsity based on the state court’s faulty syllogism would not

92. Id.
93. Id.
94. Id. at 11.
95. The author has suggested elsewhere that the “nearly universal view” of American precedent adopts fair report in cases of local legislature proceedings. See Elder, Defamation, supra note 52, § 3:5, at 3-21. Note that the state court had rejected fair report as to such proceedings, 252 A.2d 755, 774-75 (Md. 1969), and fair report was not raised by the parties before the Court. The court followed an old out-of-state case, Buckstaff v. Hicks, 68 N.W. 403, 404 (Wis. 1896), which held that such a meeting, unlike an official report of a council meeting required by law to be published, was “a mere voluntary report, published as an item of news.”
96. For a more detailed discussion, see infra note 99 and accompanying text.
97. The Court followed a comment that the articles were “accurate and truthful reports” of what was discussed in the public meeting with the following: “In this sense, therefore, it cannot even be claimed that the [defendants] were guilty of any ‘departure from the standards of investigation and reporting adhered to be responsible publishers’ . . . much less the knowing use of falsehood or a reckless disregard of whether the statements were true or false.” Greenbelt Publ’g, 398 U.S. at 12-13 (dictum). It is unclear what Justice Stewart meant by the above. It is possible that “truthful” was meant in the sense of Cox Broadcasting Co. v. Cohn, that the underlying matter was indeed true. See infra text accompanying notes 187-207. But this is unlikely. The lower appellate court had found the matter was untrue. Greenbelt Publ’g, 252 A.2d at 779, 785-86. The trial court had so instructed and counsel had so conceded. Id. It is more likely Justice Stewart used it in the sense of “accurate,” a confused usage common in the Court’s opinions. See infra text accompanying notes 191-194. The suggestion that any accurately reported account is, by definition, not substantively false and a fortiori, neither of the above fault standards can be met is, of course, ludicrous. Both fair report under Restatement (Second) of Torts § 611 (1977) and neutral reportage assume the contrary—that there is absolute constitutional protection for accuracy—knowing underlying falsity be damned! This absolute protection may well be justified at least as to some or all fair report scenarios. It is not justified, however, for powerful countervailing reasons, as to neutral reportage. For a curious anomaly created by neutral reportage that tracks the absurdity suggested by Justice Stewart’s incoherent aside, see infra discussion of Konikoff v. Prudential Insurance Co. in Part IX.
98. See supra note 97; see also infra note 99.
bar an argument for forfeiture of fair report where a knowingly or recklessly published false fact (e.g., a specific charge of “blackmail” reasonably understood as imputing criminality) is accurately recounted.99 Finally, the Court does not suggest that, under Sullivan, all defendants can publish with absolute impunity ambiguous terms that are reasonably understood by the reader or viewer to impute either criminality or innocent conduct.100

In the year following Greenbelt, the Court issued three important libel decisions in a single day. In Monitor Patriot v. Roy,101 the Court applied the Sullivan standard to the issue of whether the plaintiff, a political candidate, had in fact been a bootlegger during Prohibition.102 The defendants in this case were a newspaper distributor and a newspaper that published a syndicated column.103 The Court’s focus on underlying falsity is apparent from its analysis of constitutional errors in the state court’s decision.104 The state court had found that matters regarding the plaintiff’s “private sector” were not protected because there was a total absence of reasonable grounds for belief in the truth of the published statement.105 There is no hint in the Court’s opinion that the defendants would have or should have

99. This view—fair report forfeited by knowing or reckless disregard as to underlying falsity—is followed by some jurisdictions but is inconsistent with the absolute privilege adopted by RESTATEMENT (SECOND) OF TORTS § 611, cmt. b, illus. 1 (1977), and the ambiguous dicta in Time, Inc. v. Firestone, 424 U.S. 448 (1976).

100. Significant precedent imposes liability where defendants report such in reckless disregard of the false impression created. See ELDER, DEFAMATION, supra note 51, § 7:25. See also Justice White’s analysis, where he suggested Sullivan should not bar liability any time a publisher uses a word with two meanings and then claims a good faith intent to use only the nondefamatory meaning. Greenbelt Pub’g, 398 U.S. at 23. He distinguished the potential for self-censorship in the latter case, which involved word choices by professional communicators. Id. (White, J., concurring) (dictum).


102. The case had been litigated below in part with the truth defense as a primary battleground, with both defendants seeking to prove that plaintiff had indeed been a bootlegger during Prohibition. Id. at 268.

103. The column was Drew Pearson’s “Merry-Go-Round.” Id. at 266-67 n.1.

104. Id. at 266-67.

105. Under the trial court’s instructions, Sullivan applied only to the libel maligned plaintiff with regard to his “public sector” and not his “private sector,” with the latter defined as “a bringing forward of . . . long forgotten misconduct in which the public has no interest.” Id. at 269. As to the newspaper alliance, the trial court instructed the jury that it had to find for defendant if the matter was in the public sector since there was no evidence of knowing or reckless falsehood. Id. If within the plaintiff’s private sector, the common law privilege was available only on good faith “founded on reasonable grounds of the truth of the matter published.” Id. at 269-70 (emphasis added). The Court deemed the latter “far less stringent” than the constitutional malice standard. Id. at 272.
been absolved for verbatim or accurate republication of a column by a reputable, responsible columnist\textsuperscript{106} about a political candidate.\textsuperscript{107}

The second case in this trilogy was \textit{Ocala Star Banner v. Damron}, which involved a mayor-candidate for tax assessor.\textsuperscript{108} Here, the Court extended its \textit{Monitor Patriot} broad relevance standard to a published statement that the plaintiff had been indicted for perjury in civil rights litigation.\textsuperscript{109} The statement was “false” as to the plaintiff, but it was “substantially accurate” as to his brother.\textsuperscript{110} Although the Court did not directly discuss the \textit{Sullivan} standard in the context of the specific facts, it is clear that \textit{Ocala} was a not entirely uncommon\textsuperscript{111} example of an abuse of the fair report doctrine based on misidentification.\textsuperscript{112}

The Court’s third decision, which has supplied much of the confused support for the doctrine of neutral reportage, was \textit{Time v. Pape}.\textsuperscript{113} This case’s unique facts are worth examining in detail. The Court was presented with a public official libel action against \textit{Time} magazine for its article about a report, titled \textit{Justice}, that was filed by the United States Commission on Civil Rights.\textsuperscript{114} The Seventh Circuit had held that the plaintiff had an actionable claim based on \textit{Time}'s

\begin{footnotes}
\item 106. He was undoubtedly a public figure. See \textit{Elder, Defamation}, \textit{supra} note 51, § 5:17.
\item 107. Indeed, any suggestion of a neutral reportage privilege confronts \textit{Monitor Patriot}'s express adoption of only a qualified \textit{Sullivan} standard and rejection of a media absolute privilege, a view espoused by only Black and Douglas but not by the rest of the Court. \textit{Id.} at 277-78 (Black, J., with Douglas, J., concurring in the judgment but dissenting in part).
\item 109. \textit{Id.} at 300-01.
\item 110. Defendant explained that the transposition was made due to a “mental aberration” by a new editor who had never heard of plaintiff’s brother. \textit{Id.} at 297. Plaintiff’s evidence tended to throw doubt on this. \textit{Id.} However, the trial court directed liability and instructed on libel per se (and that such warranted presumed damages and justified punitive damages), and denied a new trial based on the inapplicability of \textit{Sullivan}—in large part because neither the office held nor sought was mentioned in the article. 221 So.2d 459, 461 (Fla. Dist. Ct. App. 1969). The latter aspect was “not pursued” before the Court. \textit{401 U.S.} at 300 n.4.
\item 111. \textit{See Elder, Defamation}, \textit{supra} note 51, § 3.21; \textit{Elder, Fair Report}, \textit{supra} note 88, § 2.00.
\item 112. In such cases plaintiff is not required to prove the requisite quantum of fault as to underlying falsity of the defamatory matter reported but only that defendant “deviated with the requisite level of fault from the standard of a fair and accurate report by comparison of defendant’s account with the ‘four corners’ of the official report or proceeding.” \textit{Elder, Fair Report}, \textit{supra} note 88, § 3.04, at 335. For further discussion of the fault focus in abuse of fair report cases, see \textit{infra} note 224.
\item 113. \textit{401 U.S. 279} (1971). On the impact on \textit{Edwards}, see discussion \textit{infra} Part IV.
\item 114. \textit{Pape}, \textit{401 U.S.} at 280.
\end{footnotes}
calculated omission of the word “alleged” from its analysis of Justice’s description of a pivotal civil rights case, *Monroe v. Pape*. In its pre-Sullivan opinion, the Seventh Circuit affirmed that this omission and Time’s overall analysis portrayed the Commission’s report as concluding that the incident was *in fact true* rather than merely *alleged as true*. However, following Sullivan, the plaintiff’s focus shifted away from attacking Time’s portrayal of him as guilty of the civil rights violations to the accuracy of Time’s depiction of the Commission as having charged Pape with the violations. This shift was reflected in the arguments before the Court and in the Court’s opinion.

A comparison of Justice and Time’s article about Justice discloses that the specific paragraph in the report at issue cited the Court’s decision in *Monroe v. Pape* as permitting a plaintiff to sue in a civil rights action based on a “complaint” that “alleged” twenty-five lines of specifications underlying the claim. However, Time’s article a week later portrayed Justice as “a chilling text about police brutality” and “a grave indictment, since its facts were carefully investigated by field agents” and subscribed to by all the “noted

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115. Id. at 285; Pape v. Time, Inc. 419 F.2d 980, 982 (7th Cir. 1969).
117. *Pape*, 419 F.2d at 981 (reaffirming its view in prior two decisions in the same case). The Court then went on to say that it was concerned with defendant’s “ falsification” of what *Justice* said, not a “ falsification” about the “Monroe incident.” *Id.* at 982. Plaintiff Pape took the underlying falsity approach initially, introducing fellow officer participants in the raid, who repudiated any suggestion the actions described by *Time* as Commission findings had *in fact* happened. *Pape*, 401 U.S. at 282-83.
118. For an elaborate and stimulating exegesis of this shift, see Katherine Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 501-08 (1979) [hereinafter Sowle, *Defamation*]. Professor Sowle also definitively rejected any suggestion *Pape* itself was a fair report case. *Id.* See also Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1091 (3d Cir. 1988). Similar conclusions have been made as to *Pape*’s lack of precedent support for a doctrine of neutral reportage. See discussion infra Part IV.
120. *Pape*, 401 U.S. at 285. “This situation differs in a number of respects from the conventional libel case. First, the publication sued on was not *Time*’s independent report of the Monroe episode, but its report of what the . . . Commission had said about that episode. Second, the alleged damage to reputation was not that arising from mere publication, but rather that resulting from attribution of the Monroe accusations to an authoritative official source.” *Id.* (emphasis added).
educators” on the Commission. The article indicated that “the report cited police treatment” of Monroe and his family, awakened “by [thirteen] police officers, ostensibly investigating a murder.” The police, reported Justice, “broke through two doors, [and] woke the Monroe couple with flashlights.” The article quoted at some length from the complaint without disclosing that the specific charges were Monroe’s and not independent factual conclusions of the Commission.

At this point in the Court’s analysis, Time would seem to have forfeited any entitlement to fair report. It would have been suable under traditional common law doctrine as to the underlying falsity of the specific incidents themselves—incidents Time had adopted and endorsed as true, not merely accurately reported. However, there was more to the Commission’s report that the Court identified as “brist[ling] with ambiguities.” The Court cited Justice as a typical example where “the source itself has engaged in qualifying the information released, [and where] complexities ramify.”

The Court characterized Justice’s newsworthiness as based on a portrayal of police brutality against the citizenry, with many of the specific incidents “designed to shock, anger and alarm” the peruser and motivate him or her to support the Commission’s recommendations to Congress. Further, the Commission’s

122. Id. at 281-82.
123. Id.
124. Id. at 282. The negative inferences from the italicized language—that the police used the murder investigation as a subterfuge—were further enhanced by the concluding statement following Time’s detailing of the allegations: “The officers were not punished . . .” Pape v. Time, 318 F.2d 652, 655 (7th Cir. 1968). This language replicated defendant’s concluding language as to the incident in the paragraph preceding that of Pape, involving police brutality by an officer [Y] against one Brazier, characterized by Time as a “brutally frank report tell[ing].” Id. Time also concluded that officer “[Y] was never punished.” Id. Time did note Monroe had appealed to the Supreme Court. Id. at 654-55. Fascinatingly, the “not punished” comment regarding Pape and his fellow officers was never mentioned by the Supreme Court despite its highly negative intimation. Pape, 401 U.S. 279.
125. Pape, 401 U.S. at 282.
126. The Seventh Circuit concluded that a jury could have interpreted Time’s article as saying that plaintiff and his underlings “did what the Commission Report merely said the Monroe complaint alleged they did.” Pape v. Time, Inc., 419 F.2d 980, 981-82 (7th Cir. 1969) (emphasis added). See also 354 F.2d 558, 560 (7th Cir. 1965) (similar holding as in Pape); 318 F.2d 652, 655 (7th Cir. 1963) (similar holding as in Pape).
127. See infra note 126.
128. Pape, 401 U.S. at 290.
129. Id. at 286. The Court distinguished straightforward factual statements, such as an arrest on a specific criminal charge. Id.
130. Id.
perspective on the “factual verity of the episodes recounted was anything but straight-forward.”\(^\text{131}\) From the outset Justice indicated it was delving into “a problem of unquestionable reality and seriousness.”\(^\text{132}\) The Commission began its work of focusing public interest by shifting to a chapter headed in large type, “UNLAWFUL POLICE VIOLENCE,” with a description of “the alleged facts in 11 typical cases of police brutality,” some substantiated by convictions, some by independent findings of impartial government agencies, and some by sworn evidence, affidavits or field investigations by staff.\(^\text{133}\) The Commission did append a caveat that it had not “determined conclusively” whether the victims or officers were “correct” in any case, as that was the function of the judiciary.\(^\text{134}\) But the Commission also found that the examples “contributed to understanding of the problem” and that the “allegations [were] substantial enough to justify discussion in this study.”\(^\text{135}\) The Court termed the above introductory statement as “fairly . . . characterized as extravagantly ambiguous.”\(^\text{136}\) Justice’s reference to ultimate judicial resolution “capped the confusion,” providing a perspective making it impossible to discern whether the Commission was “seeking to encourage belief or skepticism” as to the specific incidents thereafter detailed.\(^\text{137}\)

On the following page, a capitalized heading, “PATTERNS OF POLICE BRUTALITY,”\(^\text{138}\) introduced the series of incidents, each with an italicized heading. The Court noted that Justice’s “tone of total neutrality as to the truth or falsity” of the brutality claims was “frequently marred” by asides that “appeared to indicate the Commission’s unexpressed views.”\(^\text{139}\) Although concededly the reference to the Monroe incident itself merely summarized the incident, the end chapter of “conclusions” stated that police brutality by some law enforcement officers represented “a serious and continuing problem,” with a disproportionate impact on African-Americans, such as the Monroes.\(^\text{140}\) The Commission then made

\(^\text{131}\). Id.
\(^\text{132}\). Id. Since most police officers never engaged in brutality or racial discrimination, such examples “stand out in bold relief.” Id. at 287. The report hoped to “contribute to their correction.” Id.
\(^\text{133}\). Id. (emphasis added).
\(^\text{134}\). Id.
\(^\text{135}\). Id. at 288 (emphasis added).
\(^\text{136}\). Id. at 287.
\(^\text{137}\). Id. at 288.
\(^\text{138}\). Id.
\(^\text{139}\). Id.
\(^\text{140}\). Id. at 289.
specific recommendations, including a federal statute making such brutalities a federal offense.\footnote{141} The Court found that the only bases for such recommendations—the cited eleven incidents—gave rise to the “logically inevitable implication” that the Commission “must have believed” the described incidents had in fact happened.\footnote{142}

In view of the entire report, the Court came to three conclusions, two explicit and one implicit. First, the Court rejected the argument that \textit{Time}'s deliberate failure to state that the \textit{Monroe} incident was merely alleged in a complaint constituted “a 'falsification' sufficient . . . to sustain a jury finding of 'actual malice.'”\footnote{143} The \textit{Time} author had testified that \textit{Justice}'s report of the Monroe matter, viewed in context, led him to conclude the Commission believed the Monroe charge had happened as depicted in the report and that his deliberate omission of the “alleged” qualification was not a falsification.\footnote{144} Second, the Court noted that this omission constituted mere endorsement of one of several “possible interpretations” of a report

\begin{footnotes}
\footnote{141} \textit{Id.}
\footnote{142} \textit{Id.}
\footnote{143} \textit{Id.} Since the Court’s existing case law both then, see supra text accompanying note 69, and subsequently, see infra text accompanying notes 181, 331-333, required materiality, the Court's narrow holding was that absence of “alleged” did not connote a material inaccuracy. See also infra text accompanying notes 344-345. For a parallel conclusion see David A. Anderson, \textit{Is Libel Law Worth Reforming?} 140 U. PA. L. REV. 487, 497 (1991) (noting that the Court’s analysis “related more to the issue of falsity” than constitutional malice and the Court treated it as a “minor discrepancy” paralleling a “substantial truth” inquiry). Falsity is, of course, a prerequisite to a finding of constitutional malice. See infra text accompanying note 171. The remainder of the Court’s analysis is technically dicta. Note that the Court’s dicta repeatedly and specifically rejected the court of appeals’ conclusion that this deliberate omission constituted constitutional malice, i.e., an “intent to deceive through falsehood.” \textit{Pape v. Time}, 419 F.2d 980, 982 (7th Cir. 1969). \textit{Compare Justice} Harlan’s dissent, where he rejected the Court’s second-guessing of whether the article’s depiction of the Commission report was “sufficiently inaccurate” to support a constitutional malice determination. \textit{Pape}, 401 U.S. at 293 (Harlan, J., dissenting). The Court majority found such an analysis might be appropriate as to a “direct account of events that speak for themselves.” \textit{Id.} at 285. For example, in \textit{St. Amant v. Thompson}, truth could be segregated from the issue of adequate grounds for belief in truth. 390 U.S. 727 (1968). But, much of what the media publishes “purports to be descriptive of what somebody said rather than of what anybody did”—including most of the actions of government reflected in news conferences, government reports, speeches, and so on. \textit{Pape}, 401 U.S. at 285 (emphasis added). “The question of ‘truth’ of such an indirect newspaper report presents rather complicated problems.” \textit{Id.} at 286. Actually, the Court grossly overstated the problem. While there are occasional problems with highly ambiguous reports, most official acts, proceedings and reports allow for a “four corners” analysis that is much simpler than investigating the truth of underlying facts in a non-fair report context. See infra note 212.
\footnote{144} \textit{Pape}, 401 U.S. at 285, 289. The Court noted in an asterisk that a jury awarded Monroe $8000 in his civil rights suit, Pape did not appeal, and the judgment was paid. \textit{Id.} at 283.}

\end{footnotes}
“bristl[ing] with ambiguities.”145 Viewed in the context of Justice in its entirety, any such arguable misinterpretation was insufficient for constitutional malice.146 In cases of long reports as ambivalent as Justice, the Court did not want to impose “a test of ‘truth’ that would not put a publisher virtually at the mercy” of a jury’s unfettered discretion.147 Third, the Court’s implicit conclusion is equally important: in this abuse-of-fair report case, the Court shifted its focus to whether Time had disseminated an inaccurate account of the Justice report with knowledge or in reckless disregard of the inaccuracy.148

Shortly after Pape, in Rosenbloom v. Metromedia, a divided Court resolved (albeit temporarily) the issue of extending Sullivan to matters of public interest or concern involving non-public figures.149

145. Id. at 290.

146. Id. In light of the extraordinary ambiguities of Justice viewed in its entirety and the testimony of the article’s author and fact checker, Time’s misfeasance was “at most an error in judgment.” Id. at 292. The Court emphasized that its decision was very fact specific as to the report in question and in no way abrogated the need for the word “alleged” in reporting third party reports. Id. See also Levine v. CMP Publ’ns, Inc., 738 F.2d 660, 669 (5th Cir. 1984) (stating that Pape was a “very fact specific case”).

147. Pape, 401 U.S. at 291. Thus, under the court of appeals’ rule, the non-liability for negligence doctrine of Sullivan would not exist for interpretative errors. Id. Once the fact-finder decided the interpretation was erroneous, that error would also suffice for constitutional malice. Id.

148. This analysis of Pape is consistent with that of Professor Sowle. See Sowle, Defamation, supra note 118, at 505-08. My sole disagreement with her analysis is in her choice of language in characterizing this shift, i.e. that Pape’s revised defamation focus had “the effect of ‘merging’ the common law defense of truth and the fair report privilege—they were now one and the same, with the [fair report] privilege no longer required since the ‘gist’ or ‘sting’ of the libel was now statement B—that the Commission had charged Pape with a crime—the common law defense of truth would require Time to prove that the Commission had in fact so charged him—the very proof required by the fair report privilege . . . Thus, the privilege was now superfluous. . . .” Id. at 507. Professor Sowle gave a parallel interpretation to “truth” and “fair report,” id. at 513-14, in analyzing Time, Inc. v. Firestone. See infra notes 217-221 and accompanying text. My concerns with this “merger” are the following. First, Philadelphia Newspapers, Inc. v. Hepps has held that a state cannot, consistent with the First Amendment, impose the burden of truth on defendants as to matters of public concern. See infra text accompanying notes 254-293. Plaintiffs have the burden of proving falsity as to matters of public interest. However, it is not at all clear to me that a burden of proving accuracy cannot be imposed on defendants consistent with Philadelphia Newspapers. See infra note 212. Indeed, the Court has hinted at such a burden on occasion. See infra note 212. Second, any suggestion that accurate republications equal truth gives fodder to a perverted notion of truth that decimates libel law. See discussion infra Part VII.

149. 403 U.S. 29 (1971). The plurality opinion by Justice Brennan was joined by Justice Blackmun. Id. at 30. He conceded “some illogic” in his and the Court’s view when he participated in Rosenbloom’s repudiation three years later in Gertz v. Robert Welch, Inc., 418 U.S. 323, 353-54 (1974) (Blackmun, J., concurring). See generally infra text accompanying notes 158-169. However, Justice Blackmun seems to have regretted this
The defamatory statements at issue involved the omission of the word “alleged” before an accusation of “obscenity” in reports about the two arrests of the plaintiff, a distributor of a nudist magazine, and multiple reports that the plaintiff had filed litigation against the police and other third parties. These reports characterized the plaintiff as involved in the “smut literature racket” and as one of the “girlie-book peddlers.” The case had been litigated below with a substantial verdict as an abuse of fair report case. The Court plurality analyzed the purportedly actionable statements under the Sullivan standard. The plaintiff’s strongest claim involved the defendant’s final broadcast after the plaintiff had talked with the defendant’s newscaster and disputed his comment that the district attorney had described the plaintiff’s magazines as obscene. The Court found no constitutional malice, citing the defendants’ general reliance on police sources and the fact that the defendants checked with the judge presiding over the litigation filed by the plaintiff. In sum, the Court held the use of and reliance on such responsible sources precluded a showing of reckless disregard of falsity as to the

decision later, as evidenced by his ardent support in dicta for neutral reportage. See infra text accompanying notes 357-360.

150. Rosenbloom, 403 U.S. at 33-37.
151. Id. at 34.
152. Id. at 36. Defendants’ state law defenses were truth and privilege. Id. Truth was an absolute defense. Under Pennsylvania law fair report was defeasible by proof defendant acted for the sole purpose of injuring plaintiff even if the official information was in fact false under the RESTATEMENT OF TORTS § 611 (1938) rule adopted in Sciandra v. Lyndra, 187 A.2d 586, 588-89 (Pa. 1963). The Court then said the “conditional privilege of the news media” was also defeasible by proof of lack of “reasonable care and diligence” in finding the truth before disseminating a false statement, citing Purcell v. Westinghouse Broadcasting Co., 191 A.2d 662, 668 (Pa. 1963). Rosenbloom, 403 U.S. at 38. The trial court in Rosenbloom had charged the jury that defendant had the burden of proving truth and that both the latter grounds would forfeit fair report. Id. at 39. However, analysis of the Purcell decision makes it clear that only “made solely for the purpose of causing harm” forfeited a fair and accurate report. See Purcell, 191 A.2d at 667. The discussion of lack of reasonable care and diligence was contained in a discussion of abuse of fair report—not as a mode of forfeiting fair report by failing to investigate the underlying facts. Id. Note that Justice Harlan, purporting to speak for all on this issue, said truth was a complete defense but was not enough to meet First Amendment standards. Rosenbloom, 403 U.S. at 64-66 (Harlan, J., dissenting). However, no member of the Court raised the slightest doubt about the two stated grounds for forfeiture of fair report under Pennsylvania law. Id. Note that in an earlier opinion Justice Harlan had cryptically referred to fair report as an absolute privilege. Curtis Publ’g Co. v. Butts, 388 U.S. 130, 152 n.18 (1967) (Harlan, J., with Clark, J., Stewart, J., and Fortas, J.).

154. Id. at 55.
155. Id. at 55-57.
defendant’s characterization of plaintiff.\textsuperscript{156} The Court’s conclusion is consistent with a plethora of precedent.\textsuperscript{157}

\textit{C. The Counter-Revolution: Gertz v. Robert Welch and Its Progeny}

In \textit{Gertz v. Robert Welch} the Court revisited and repudiated\textsuperscript{158} its “sadly fractionated”\textsuperscript{159} opinion in \textit{Rosenbloom}, and it returned to an emphasis on the plaintiff’s \textit{status} rather than focusing solely on the \textit{subject matter} reported.\textsuperscript{160} Accordingly, the Court reconsidered the appropriate balance between reputational and free expression values in the private person arena.\textsuperscript{161} The majority refuted the all-or-nothing \textit{Rosenbloom} position (\textit{Sullivan} or common law strict liability) in favor of negligence as a “more equitable boundary”\textsuperscript{162} and intimated that a defense of truth would be insufficient under its jurisprudence.\textsuperscript{163} The Court reasoned that requiring a broadcaster or publisher to insure, via common law strict liability, the truth of all its misstatements might promote self-censorship.\textsuperscript{164}

Reaffirming the continuing viability of \textit{Sullivan} for public persons,\textsuperscript{165} the \textit{Gertz} Court authorized a simple fault basis for compensatory damage liability in private person cases.\textsuperscript{166} In

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} See \textit{ELDER, DEFAMATION, supra} note 51, § 7:2, at 7-24 to -32.
\item \textsuperscript{158} 418 U.S. 323, 342-48 (1974); \textit{id.} at 353 (Blackmun, J., concurring) ("[The Court] withdraws to the factual limits of the pre-Rosenbloom cases."). The Court began with “the common ground” in famous dicta that gave rise to voluminous precedent for an “opinion” privilege: “Under the First Amendment there is no such thing as a false idea. However pernicious an idea may seem we depend for its correction not on the conscience of judges and juries, but on competition of other ideas.” \textit{Id.} at 339-40 (dicta).
\item \textsuperscript{159} \textit{Gertz}, 418 U.S. at 354 (Blackmun, J., concurring). For a further discussion see \textit{supra} text accompanying notes 149-157. The \textit{Gertz} Court noted plaintiff’s attempt to extricate himself from \textit{Rosenbloom} in the court of appeals by the “ingenious but unavailing attempt” of demonstrating that the defamatory accusations involved no issue of public concern since he was not in fact involved in the prosecution of the police officer. \textit{Gertz}, 418 U.S. at 331-32 n.4. The Court affirmed the court of appeals’ rejection of this argument. \textit{Id.} Such “might lead to arbitrary imposition of liability on the basis of an unwise differentiation of factual misstatements.” \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 352.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 344-48. Proof of negligence allowed plaintiff to collect actual damages. \textit{Id.}
\item \textsuperscript{163} “Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.” \textit{Id.} at 340 (emphasis added). Implicit was a suggestion that, at minimum, a truth defense was \textit{required} by the Constitution. \textit{See infra} notes 370-373.
\item \textsuperscript{164} \textit{Gertz}, 418 U.S. at 340.
\item \textsuperscript{165} \textit{Id.} at 342-43.
\item \textsuperscript{166} \textit{Id.} at 345-48. Presumed and punitive damages would be available only upon compliance with \textit{Sullivan}. \textit{Id.} at 349-50.
\end{itemize}
remanding for trial, the Court took note of defendant’s “serious inaccuracies”167 and the fact that the editor had conceded that he had made no attempt to “verify or substantiate” the author’s accusations. The editor had relied on the contributing author’s reputation and the editor’s own experiences with the author’s “accuracy and authenticity.”168 This suggests that underlying falsity was the focus on remand. Ultimately, Gertz won and collected a sizeable judgment, including punitive damages.169

Letter Carriers v. Austin,170 issued the same day as Gertz, involved a labor dispute that gave rise to libel claims. In Letter

167. Id. at 326. The article in defendant John Birch Society’s monthly magazine was entitled “FRAME-UP” and purported to show that a prosecution of a police officer was part of a Communist conspiracy against the police. Id. at 325-26. Plaintiff, a prominent civil rights lawyer for the injured party in civil litigation, was portrayed as the progenitor of the “frame-up,” as having a criminal file taking “a big, Irish cop to lift,” a “Leninist” and a “Communist-frontier,” and as a former official of one organization advocating violent overthrow of the government and another that planned the Communist assault on police during the 1968 Chicago convention. Id. at 326. The Court noted that plaintiff had no criminal record, was not a “Leninist” or “Communist-frontier,” and had been an officer in only one organization but that there was no evidence it or he had been involved in organizing the Convention demonstrations. Id. See also infra note 169.

168. Gertz, 418 U.S. at 264. Defendant put its “American Opinion” on sale at newsstands and then disseminated reprints of the article in Chicago, where the trial purportedly reported on took place. Id. at 325-27. In other words, it acted as republisher of its own prior article. There was no suggestion defendant was not liable as republisher for its later further dissemination. On remand the courts agreed. See infra note 169. See also the parallel scenario in Hutchinson v. Proxmire, 443 U.S. 111 (1979), discussed infra in text accompanying notes 535-539.

169. Gertz v. Robert Welch, Inc., 680 F.2d 527, 537-40 (7th Cir. 1982). On remand the court applied the Sullivan rule, apparently because defendant was reporting government documents and proceedings purportedly entitled to fair report. Id. at 538-39. The Seventh Circuit questioned this—no case law had been shown where reliance on rather than accurate reportage of such had been covered. Id. However, the issue was mooted by the court’s finding that Sullivan—the standard for forfeiting fair report under Illinois law—had been met. Id. The court affirmed the liability of defendant ($100,000 in compensatory damages, $300,000 in punitive damages) on two grounds. Id. First, that there were reasons to doubt the author/source’s reliability. Id. The court found that the editor had proposed the story line and then solicited the author (some of whose articles and books had been edited by the editor), who had “a known and unreasonable propensity” to denominate people and entities as Communist. Id. at 539. The author engaged in “virtually no effort” to check statements libelous of Gertz and the editor then added additional defamatory matter based on the author’s “facts.” Id. Second, the court also relied on the author’s conduct, finding it imputable to defendant based on an agency relation founded on substantial control over the article and its focused direction and content. Id. at 539 n.19. For a discussion of issues of vicarious liability see Elder, Defamation, supra note 51, §§ 7:9, 6:4, at 6-24.

Carriers, the Court held that the knowing or reckless disregard of falsity standard necessitated a threshold requirement of a falsehood.\textsuperscript{171} Furthermore, this standard could not be met by evidence of common law malice in the sense of ill will.\textsuperscript{172} With regard to the published material at issue, the epithet “scab” was “literally and factually true,” because the plaintiff had refused to join the union.\textsuperscript{173} The term “traitor,” when used as part of a “lusty and imaginative” definition of “scab,”\textsuperscript{174} could not reasonably be construed as a false statement of fact.\textsuperscript{175} It was “merely rhetorical hyperbole”\textsuperscript{176} that was protected under Greenbelt Publishing.\textsuperscript{178}

Shortly after Gertz and Letter Carriers, the Court issued its second false light/privacy case, Cantrell v. Forest City Publishing.\textsuperscript{179} This case involved a follow-up to a bridge disaster story in which forty-three people were killed.\textsuperscript{180} Applying the “[m]aterial and substantial falsification” and knowing or reckless disregard of falsity standards\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{171} 171. Id. at 283-84 (Falsity was a “\textit{sine qua non of recovery . . . [b]efore the test of knowing or reckless falsity can be met, there must be a \textit{false statement of fact}}”) (emphasis added). The Court implied that truth would be nonactionable in such contexts. \textit{Id.}
\item \textsuperscript{172} 172. Id. at 280-82.
\item \textsuperscript{173} 173. Id. at 283 (emphasis added). Note the Court looked at substratal or underlying truth. \textit{Id.}
\item \textsuperscript{174} 174. Id. at 286. The Court noted this epithet might be actionable if removed from context and misused to communicate a false statement of fact. \textit{Id.}
\item \textsuperscript{175} 175. Id. at 284-86.
\item \textsuperscript{176} 176. \textit{Id.}
\item \textsuperscript{177} 177. Id. at 285-86.
\item \textsuperscript{178} 178. See supra text accompanying notes 86-100. The Court applied its First Amendment jurisprudence by analogy and later treated Letter Carriers as part and parcel of First Amendment jurisprudence for “rhetorical hyperbole” and “imaginative expressive” in Milkovich v. Lorain Herald, 497 U.S. 1 (1990). Letter Carriers, 418 U.S. at 285-86. There is no indication the Court intended it to be limited to the labor context. See \textit{infra} note 318. Note that Justice Douglas interpreted the First Amendment as requiring absolute protection against liability in such cases. Letter Carriers, 418 U.S. at 287-91 (Douglas, J., concurring).
\item \textsuperscript{179} 179. 419 U.S. 245 (1974).
\item \textsuperscript{180} 180. Id. at 247.
\item \textsuperscript{181} 181. Id. at 249-54. See specifically the jury instruction imposing the burden on plaintiff. \textit{Id.} at 250 n.3. That the Court was focused on the underlying falsity of the impression created is also clear from its analysis of the malice discussion by the court of appeals, which had confused the trial court’s repudiation of punitive damages for failure to prove common law malice under state law with its upholding of compensatory damages under Sullivan. \textit{Id.} at 252. Common law malice focused on defendant’s “attitude toward the plaintiff’s privacy, not toward the \textit{truth or falsity of the matter published}.” \textit{Id.} (emphasis added). Cantrell has generally been interpreted as allowing states to impose higher standards on punitive (or other) damages (or to abolish punitive damages entirely) than the First Amendment minimally requires. See Elder, Defamation, supra note 51, § 7:6, at 9-33 to -35. This ill will/common law malice adds little, however, to plaintiff’s
from *Hill*, the Court held that the defendant's staff writer must have known several statements were false. In a profoundly important conclusion, the Court rejected any suggestion that the employer must have knowledge of the article's falsities. That the author had been acting within the *scope of his employment* was sufficient to sustain the damage award.

In *Cox Broadcasting v. Cohn*, the Court confronted the issue of First Amendment protection for the media in the context of a privacy-public disclosure tort involving embarrassing but true facts lawfully obtained from public records. Although the Court burden, as the same evidence will generally prove both. See Anderson, *supra* note 143, at 514.

182. See *supra* text accompanying notes 67-70. Since the case had been litigated under *Time, Inc. v. Hill*, the Court had “no occasion” to determine whether a lower standard applied in private person-public interest cases in light of *Gertz, Cantrell*, 419 U.S. at 250-51. But see the suggestion by Justice White in his concurrence in *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), infra note 206.


184. See the analysis of *respondeat superior/vicarious liability* in *Elder, Defamation, supra* note 51, at §§ 7:9, 6:4, at 6-24.


186. *Id.* at 253-54. Although the photographer was not held liable, it was because he was not responsible in any manner for the *false* statements or portrayal in the texts. His photos were “fair and accurate depictions” of what he saw. *Id.* at 253 n.5.


188. *Id.* at 489; *id.* at 493 n.22, 494 n.23, citing to and quoting from § 652D of the *Restatement (Second) of Torts* (Tentative Draft 1967). The claim was not that of the decedent/victim but of her surviving parent. *Cox Broad.*, 420 U.S. at 474-75. Georgia adopts the minority view allowing a relational privacy interest under exceptional circumstances. See *Elder, Privacy, supra* note 65, § 1:3. Note that *Cox Broadcasting* did not involve complaints filed by the criminal defendants. *Cox Broad.* 420 U.S. at 469. Any such claims would have involved the fair report privilege, as the underlying facts as to presumptively innocent defendants were not indisputably *true*—whether they had in fact raped and killed the decedent was quite a different issue from the unquestionably *true* fact that plaintiff's daughter was the victim of a rape-murder, the disclosure of which was the basis for the privacy claim.

189. *Id.* at 489. Truth is essential to a public disclosure claim. Indeed, the privacy tort of public disclosure arose, in part, from the obstacle that the truth defense provided in defamation. See *Elder, Privacy, supra* note 65, § 3:1. Of course, true facts can be juxtaposed or omitted to convey a false and libelous implication. On libel-by-implication see *Elder, Defamation, supra* note 51, § 1:7, at 1:28 to -34.

190. *Cox Broad.*, 420 U.S. at 472-73, 496-97 nn.3-4. Since the media defendant had won on “more limited grounds,” the Court did not reach the broader contention that the First Amendment barred “any sanctions” via a public disclosure tort—whether a matter of public record or otherwise—obtained by defendant's investigation. *Id.* at 497, n.27. On illegally obtained information and media liability, see *Elder, Privacy, supra* note 65, § 2:18. On whether the First Amendment would mandate truth in defamation cases involving illegal acquisition, see *Elder, Defamation, supra* note 51, § 2.3, at 2-18 to -19.
largely used *truth*\textsuperscript{191} and *accuracy*\textsuperscript{192} in a fungible and confusing way throughout the opinion, it is clear that the Court knew it was dealing with true,\textsuperscript{193} rather than false but accurately reported,\textsuperscript{194} information. Applying fair report’s\textsuperscript{195} common law and constitutional policies\textsuperscript{196} (agency,\textsuperscript{197} public supervisory\textsuperscript{198} and informational\textsuperscript{199} rationales), the Court correctly and unequivocally held\textsuperscript{200} that the First and Fourteenth Amendments “command nothing less than that the States may not impose sanctions on the publication of *truthful information* contained in official court records open to public inspection.”\textsuperscript{201}

Aside from its arguable portents for a constitutional privilege for accurately reported but false information covered by fair report,\textsuperscript{202} the Court’s opinion in *Cox Broadcasting* is also important for its post-*Gertz* analysis of the affirmative defense of truth in defamation actions.\textsuperscript{203} The Court, in extensive *dicta*, referenced the “prevailing

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\item \textsuperscript{191} *Cox Broad.*, 420 U.S. at 495 (noting that “truthful information available on the public record” was not within those restricted categories (such as “fighting words”) having little or no social value); *id.* (“A public benefit is performed by the reporting of the true contents” of public records by the mass media); *id.* at 496 (“Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”).
\item \textsuperscript{192} *Id.* at 491 (citing the “narrow interface” between privacy and a free press, i.e., whether a state can sanction “accurate publication” of a rape victim’s name obtained from public records); *id.* at 492 (noting “[t]he special protected nature of accurate reports” of judicial proceedings has “repeatedly been recognized”); *id.* at 496 (“At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully [which apparently equals “accurately”] publishing information released to the public in official court records”); *id* at 497 (“agreeing as to the truthful [i.e., accurate] publication of matters contained in open judicial records”) (White, J., concurring).
\item \textsuperscript{193} *Id.* at 493-94 (noting that public record information was “simply not within the reach” of the public disclosure and intrusion upon seclusion torts); *id.* at 489 n.18 (citing the truth defense in *RESTATEMENT (SECOND) OF TORTS* § 582 (Tentative Draft 1967) (now § 581A).
\item \textsuperscript{194} See infra note 212.
\item \textsuperscript{195} See discussion infra Part VII.
\item \textsuperscript{196} See ELDER, DEFAMATION, supra note 51, § 3:1; ELDER, FAIR REPORT, supra note 88, § 1.00; discussion infra Part VII.C.
\item \textsuperscript{197} *Cox Broad.*, 420 U.S. at 491-92 (noting that citizens—-with limitations—-rely on the press to bring them information on governmental operations).
\item \textsuperscript{198} *Id.* at 492 (noting that the press promotes fairness of judicial proceedings and “bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice”).
\item \textsuperscript{199} *Id.* at 492 (noting that without the information the media provides, many citizens and their representatives could not exercise the franchise in an intelligent fashion or offer opinions or criticism on government).
\item \textsuperscript{200} Note the Court’s very narrow holding and its rejection of broader proffers by the media. See supra note 190.
\item \textsuperscript{201} *Cox Broad.*, 420 U.S. at 495 (emphasis added).
\item \textsuperscript{202} See infra text accompanying notes 224-227.
\item \textsuperscript{203} *Cox Broad.*, 420 U.S. at 489-92.
view” of truth as a common law absolute defense and opined that *Sullivan* and its progeny mandated truth as a constitutional defense in public person cases. More importantly, the Court stated that its decisions required that such public individuals affirmatively prove dissemination with knowledge or in reckless disregard of its falsity. Justice Powell, concurring, thought that *Gertz* had “largely resolve[d]” the issue also as to the truth defense in private person defamation actions.

204. *Id.* 489-90 n.18 (dictum). The Court noted that at common law truth was not a defense to criminal libel prosecutions. *Id.* The Court also noted that several jurisdictions appended a benevolent motive/justification limitation to the truth defense in civil libel actions. *Id.* Note that this limitation may be constitutionally allowable in purely private civil or criminal defamation. *See* *ELDER, DEFAMATION*, *supra* note 51, § 4:5, at 4-20 to -21; *infra* text accompanying notes 251-253.


206. *Cox Broad.*, 420 U.S. at 490 (dictum). The Court noted that where the issue is privacy and the right to be free from “false or misleading information” (the false light tort) the plaintiff must affirmatively prove knowing or reckless disregard of falsity in cases involving matters of public interest. *Id.* The Court cited *Time, Inc. v. Hill*, discussed *supra* in text accompanying notes 67-70, but noted that its decision a year before *Cox Broadcasting, Cantrell*, *see supra* text accompanying notes 179-186, had left open the issue of whether *Hill* applied to all false light cases or whether *Gertz* would authorize a “more relaxed standard.” *Cox Broad.*, 420 U.S. at 419, n.19 (dictum). In concurring Justice White said *Gertz*’s repudiation of a public interest standard “calls into question the conceptual basis of *Hill* as to private persons. *Id.* at 498 n.2 (White, J., concurring). Note that the Court has never resolved this issue. *See* *ELDER, PRIVACY*, *supra* note 65, § 4:13A, at 4-157 to -145. The cases are divided. *Id.* at 4-145, 4-150 to -154. The probable majority applies the *Hill* standard, usually with little or no discussion. *Id.* at 4-150. The author has suggested that a negligence standard would be constitutionally defensible and appropriate in light of the Court’s equation of protected interests in defamation and false light, *see* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571-72 (1977) (noting that *Hill* was “hotly contested and decided by a divided Court”). *Hill*, 385 U.S. at 385, and the Court’s refusal to mandate reputational damage as a First Amendment prerequisite to collecting other items in *Gertz*’s actual damages list—for example, humiliation and mental suffering. *See* *Time, Inc. v. Firestone*, 424 U.S. 448, 460-61 (1976). *See generally* *ELDER, PRIVACY*, *supra* note 65, § 4:13A, pp. 4-144 to -145.

207. *Cox Broad.*, 420 U.S. at 497-99 (Powell, J., concurring) (dictum) (stating that the defense of truth was “equally implicit” under *Gertz* for private person plaintiffs). As one authoritative commentator has concluded:
In *Time v. Firestone* the following year, the Court analyzed the First Amendment standards applicable to an *inaccurately* reported judicial decree of divorce involving a private person.\(^{208}\) This case held that *Time*’s interpretation—that the Florida court had granted divorce on grounds of extreme cruelty and adultery—was inaccurate.\(^{209}\) The issuing court had not specified that the divorce was on either of those grounds.\(^{210}\) While the Court conceded that the divorce decree may have been ambiguous, this ambiguity did not permit the defendant to select the most condemnatory of alternative permissible interpretations.\(^{211}\) Having chosen this interpretation, the defendant had the burden of demonstrating the interpretation’s factual correctness.\(^{212}\) The Court rejected\(^{213}\) Pape’s “rational interpretation” of

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[Justice Powell’s] outcome . . . is probably sound, as a matter of both tort and constitutional policy, but as a reading of *Gertz* it is simply a non sequitur. Fault is distinguishable from falsity. A negligent reporter may report falsely, or may stumble on the truth despite himself. The negligence is there, whether or not the matter communicated is correct.

*Fowler v. Harper, et al.*, 2 *The Law of Torts* 162-64 n.18 (2d ed. 1986 supp. 2006). Justice Powell turned out to be right as to private person-public interest cases, at least as to media defendants. See infra notes 269-271. He also hinted at a fault regarding falsity standard under the Court’s precedents, including *Gertz*, suggesting all had tried to “identify a standard of care with respect to the truth of the published facts that will afford the ‘breathing space’ for First Amendment values.” Id. at 499 n.3 (dictum) (emphasis added). This was resolved a decade later in *Philadelphia Newspapers, Inc. v. Hepps*, 485 U.S. 767 (1986). See infra text accompanying notes 254-293.

209.  Id. at 458.
210.  Id.
211.  Id. at 459.
212.  Id. (“Having chosen to follow this tack [i.e., adopting the “most damaging” of several plausible interpretations of an ambiguous decree], petitioner must be able to establish not merely that the item was a conceivable or plausible interpretation . . . but that the item was factually correct.”) (emphasis added). The Court seems to impose on *Time* the burden of showing that the matter was accurately reported. This seems appropriate and consistent with settled law on the burden of showing entitlement to fair report. This is not inconsistent with the Court’s decision in *Philadelphia Newspapers, Inc. v. Hepps*, discussed infra in text accompanying notes 254-293. In *Elder, Defamation*, supra note 51, the author notes:

*Philadelphia Newspapers* is distinguishable—the reporter’s task in fair report does not involve the conduct of an investigation into the potentially limitless avenues and sources of truth but involves the constitutionally distinguishable, less intimidating and more manageable task for the reasonably prudent reporter of fairly and accurately reporting the ‘gist’ or ‘sting’ of a report, action, or proceeding with reasonably precise and finite contours. This ‘four corners’ analysis is inherently doable—by comparing the media account with the official report, action or proceeding covered—and does not involve the issue of unknowability inducing self-censorship, which may prevail in the truth-as-a-defense context.


an ambiguous document rule as inapplicable\textsuperscript{214} where the constitutional malice standard is inapplicable.\textsuperscript{215} Ultimately, the Court reversed for further proceedings, since no finding of Gertz-minimal fault had been made at any stage of the state court system.\textsuperscript{216}

The Court, as it had in \textit{Cox Broadcasting}, often confusingly interwove concepts of truth and accuracy and falsity and inaccuracy in \textit{Firestone}.\textsuperscript{217} Despite these ambiguities, three basic principles can be gleaned from the opinion. First, where a defendant materially deviates\textsuperscript{218} from fair report fairness and accuracy requirements,\textsuperscript{219} the applicable fault standard will be based on the plaintiff's status.\textsuperscript{220} Second, material inaccuracy is in many cases linked to the “four corners”\textsuperscript{221} of the official document or proceeding reported.\textsuperscript{222} In other words, the focus is one of facial accuracy, not substratal falsity.\textsuperscript{223} For example, in the case before it, the focus was not on whether the plaintiff was in fact an adulteress, but on whether \textit{Time} had 

\begin{enumerate}
\item \textit{Id.} at 454-57, 459 n.18.\textsuperscript{214}
\item \textit{Id.}\textsuperscript{215}
\item \textit{Id.} at 461-64.\textsuperscript{216}
\item \textit{Firestone}, 424 U.S. at 453 (“defamatorily false or inaccurate”). The Court noted that the jury had rejected accuracy under Florida’s “limited privilege for accurate reports of judicial proceedings,” upheld on appeal, but then proceeded to analyze \textit{Time}'s claim. It “faithfully reproduced the precise meaning” since “demonstration that an article was true would seem to preclude finding the publisher at fault.” \textit{Id.} at 458. The Court then approved the Florida courts’ finding of the report as “false.” \textit{See id.} at 459 (“factually correct”); \textit{id.} at 459 n.5 (noting petitioner's consistent contention the article was “true compared to the words of that judgment”); \textit{id.} at 461 (“inaccurately reporting that she had been found guilty of adultery”); \textit{id.} (no fault issue had been submitted to the jury—only a limited number of issues, including “whether it was true,” had been so tendered). The Court's comment quoted above that a “demonstration that an article was true would seem to preclude finding the publisher at fault” involves a “non sequitur.” \textit{See Harper et al., supra note 207, § 5:20, at 173-74 n.47 (quoting Firestone, 424 U.S. at 458).}\textsuperscript{217}
\item The Court found that the interpretation made—that plaintiff was divorced based on adultery—was factually incorrect. \textit{Firestone}, 424 U.S. at 458-59. The Court noted that the divorce decree was based on a new ground, “lack of domestication,” but that the Florida Supreme Court also found sufficient evidence of “extreme cruelty.” \textit{Id.} This finding of arguable material variance is consistent with the general rule of the common law. \textit{See Elder, Defamation, supra note 51, § 3.24, at 3-83; Elder, Fair Report, supra note 88, § 2.03, at 243.}\textsuperscript{218}
\item For detailed analyses see \textit{Elder, Defamation, supra note 51, §§ 3.18, 3.20-3.26, and Elder, Fair Report, supra note 88, § 1.21-1.26, ch. 2.}\textsuperscript{219}
\item As to private persons, it would be Gertz-minimal fault. \textit{Firestone}, 424 U.S. at 457. For public persons it would be knowing or reckless disregard regarding inaccuracy. \textit{Id.} at 455-57, 458 n.4.\textsuperscript{220}
\item \textit{See Elder, Defamation, supra note 51, § 3.19, at 3-68 to -71; Elder, Fair Report, supra note 88, § 3:05, at 346.}\textsuperscript{221}
\item \textit{Firestone}, 424 U.S. at 457-59; \textit{Sowle, Defamation, supra note 118, at 511-17.}\textsuperscript{222}
\item \textit{Firestone}, 424 U.S. at 457-59; \textit{Sowle, Defamation, supra note 118, at 511-17.}\textsuperscript{223}
\end{enumerate}
Third, the Court suggests, in unexplained ambiguous *dicta*, that accurate reports of judicial or official proceedings involving otherwise false defamatory matter will not be actionable as

224. *Firestone*, 424 U.S. at 457-59. This shift of fault analysis to a “four corners” analysis is “appropriate and defensible” for two reasons. Under the traditional view, fair report readily “absolved the republisher of any duty to concern itself with the underlying truth of matters entitled to fair report—objective truth was and is simply irrelevant to the privilege.” ELDER, FAIR REPORT, *supra* note 88, § 3:04, at 335-36. Secondly, a mandate that plaintiff meet either the *Sullivan or Gertz* standard in their traditional focus on *underlying falsity* “may impose a major obstacle to any effective redress by the plaintiff against the republisher and *accord a de facto absolute privilege* to the latter in most instances. . . .” *Id.* at 335-36 (emphasis added). This is well-illustrated by *Firestone*, where the Court remanded for further consideration of *Gertz*’s minimal fault requirement. See *Firestone*, 424 U.S. 428. Indeed, several members of the Court opined the *Gertz* standard could not be met on the record before the Court. *Id.* at 465-701 (Powell J., with Stewart, J., concurring); *id.* at 492-93 (Marshall, J., dissenting). The author has said elsewhere:

Imagine the difficulties that Mrs. Firestone would have encountered . . . had the court held that the defendant’s forfeiture [by inaccurate reportage] . . . logically entailed the imposition of the normal plaintiff burden of proof requirements regarding *substratal falsity*—that is, that plaintiff must show that defendant, exercising reasonable care, should have known that she was not an adulteress. Because the defendant had no burden to investigate and would only rarely (and, then, usually only adventitiously) have reason to disbelieve the underlying truth of the matter reported, the defendant would normally be free from fault regarding *substratal falsity*.

ELDER, FAIR REPORT, *supra* note 88, § 3:04, at 336. However, where defendant’s forfeiture abuses fair report by espousing, concurring or adopting official charges, not merely inaccurately synthesizing them or engaging in a misidentification, there is no apparent bar to using the traditional focus on underlying falsity:

If the defendant has made the quantum leap from report of a charge to *concurrency* therein without a basis in independent investigation, the plaintiff would normally have no difficulty in proving the applicable fault standard, whether negligence or actual malice. If the defendant has in fact investigated the substantial verity of the official report, there is no reason why the traditional fault analysis should not be used.

*Id.* at 341-42 n.43.

225. *Firestone*, 424 U.S. at 457 (dictum) (“The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting, . . .*”) (emphasis added). The Court repeated this again in the context of rejecting linkage to a judicial proceeding as sufficient for tort public figure status. Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 169 (1979). In *Firestone* the Court also stated that “[t]he details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support” for *Sullivan*. 424 U.S. at 457. This was said, however, in the quite different context of *Time*’s rejected argument for an exception to the *Gertz* rule of liability based on negligence for *inaccurate* reports of judicial proceedings. *Id.* at 455, 457. However, fair report, with its fairness and accuracy requirements and “public supervisory” functions, is quite different and distinguishable. For a parallel conclusion see Sowle, *Defamation, supra* note 118, at 517-19.
defamation. This is a quantum step beyond Cox Broadcasting, which had involved accurately reported, substratally true matters.

Three years later, the Court left the media reeling with a triple whammy: two very narrow interpretations of public figure status and liberal discovery for plaintiffs facing the Sullivan standard. Then, a period of five years passed in which the Court heard no libel cases. Finally, in 1984, the Court decided three libel cases. Two of the cases involved public persons and state court jurisdiction under the Due Process Clause, in which the Court rejected an infusion of First Amendment-based restrictions as a form of "double counting."

226. Firestone, 424 U.S. at 457. This suggestion of an absolute First Amendment defense for fair report is contrary to much of the precedent, see Elder, Defamation, supra note 51, § 3:17, but is consistent with Restatement (Second) of Torts and a growing number of precedent. The same lack of clarity exists in false light cases. See Elder, Privacy, supra note 65, § 4:13, at 4-136 to -137.

227. See supra text accompanying notes 187-207. The Firestone opinion did at one point appropriately describe Cox Broadcasting as barring civil liability "based upon the publication of truthful information contained in official court records open to public inspection." Cox Broad. Co. v. Cohn 424 U.S. 448, 455 (emphasis added).

228. Following its very narrow application of public figure status in Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974) (finding that a locally well-known civil rights attorney and author was not a public figure where his involvement in a wrongful death rights was the type of low key representation typical of any attorney), Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (finding, despite holding a number of press conferences, a prominent socialite was not a public figure regarding her divorce), the Court issued two important decisions in 1979. The first, Hutchinson v. Proxmire, 443 U.S. 111 (1979), involved republisher liability issues discussed infra in the text accompanying notes 535-539. The Court also rejected the suggestion that the media could impose public figure status on a scientist/recipient of federal grants by the publicity it gave to a matter of public interest. Hutchinson, 443 U.S. at 134-36 ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."). The second decision, Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 166-69 (1979), held that a person convicted of criminal contempt in failing to respond to a grand jury subpoena was not a public figure despite his awareness such result might result in a flare of publicity. The Court again reaffirmed its repudiations of newsworthiness as sufficient: "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of [Sullivan]." Id. at 167-68. The Court declined to "create an ‘open reason’ for all who sought to defame persons convicted of a crime." Id. at 169 (Blackmun, J., with Marshall J., concurring). Wolston also involved republisher liability issues discussed infra in text accompanying note 534. The Court’s very circumscribed interpretation of public figure status is often ignored. See Elder, Defamation, supra note 51, §§ 5.6-5.27.

229. In Herbert v. Lando, 441 U.S. 153, 158-77 (1979), the Court rejected the argument that the First Amendment gave the media broad protection from freedom from inquiry into the editorial process in libel cases brought by public persons. See infra text accompanying notes 485-493. On the republisher liability issues, see infra text accompanying note 534.

These concerns had already been accommodated in deciding the applicable substantive standard in similar cases. The Court returned to a fault-regarding-falsity analysis in its third decision, *Bose Corporation v. Consumers Union*. The Court reaffirmed its First Amendment-based duty of “independent examination” of the record for proof of constitutional malice and rejected application of a clearly erroneous standard to such determinations. *Bose* was a product disparagement case involving the defendant’s critique of the plaintiff’s unique loudspeaker system on the ground that individual instruments “tended to wander about the room.” The Court probably could, and should, have resolved the issue on grounds of immaterial falsity. Instead, it analyzed the evidence under *Sullivan*’s “honest liar” formula, i.e., whether the plaintiff had demonstrated a minimum of subjective serious doubts as to the truth. The Court refused to find that the author’s testimony, which contended that “about” meant “across,” was constitutionally

231. *Id.* at 790-91 (unanimous opinion) (noting that the Court had “declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws”). See also *Keeton v. Hustler Magazine*, 465 U.S. 770, 780-81 (1984), where a unanimous Court, with Justice Brennan concurring in a separate opinion, *Id.* at 782, allowed an out-of-state plaintiff to pursue “nationwide damages” under the “single publication rule” despite the fact that every state statute of limitations had run except New Hampshire’s. *Id.* at 778, 780-81. The Court “rej[e]ct[ed] categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction proper under the Due Process Clause.” *Id.* at 780 n.12. The Court also issued an opinion rejecting First Amendment restrictions on a judge’s discretion to prevent abuse of discovery by barring use of the information by the media defendant. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-37 (1984). *See infra* note 1522. Note that the Court has repeatedly rejected Due Process Clause and/or First Amendment-based special restrictions on libel trials and liability in addition to the substantive rules imposed by *Sullivan* and *Gertz*. *See ELDER, DEFAMATION*, supra note 51, § 4:1 at 4-2 (listing cases).

232. 466 U.S. 485, 498-514 (1984). The Court assumed but did not decide whether *Sullivan* controlled in product disparagement cases. *Id.* at 513. It also accepted, but did not resolve, the district court’s determination plaintiff was a public figure. *Id.* at 492 n.8.

233. *Id.*

234. *Id.*

235. *Id.* at 488.

236. See the Court’s analysis in *Time Inc. v. Pape*, 401 U.S. 279 (1971). *See supra* note 143. See also the analysis of *Masson v. The New Yorker*, infra in text accompanying notes 344-345, 393. Note that Justice Rehnquist’s dissent in *Bose Corp.* deemed both the issues of falsity and constitutional malice to be “close questions.” *Bose Corp.*, 466 U.S. at 519-20 (Rehnquist, J., with O’Connor, J., dissenting). The Court also agreed with the court of appeals’ view that the disparagement in question did “tread the line between fact and opinion.” *Id.* at 514 (majority opinion).

237. *Id.* at 502 n.10. The Court cited the link to the English cases involving scienter under the law of deceit. *Id.*

238. *Id.* at 502-03, 511 n.30, 513.
sufficient. 239 That testimony did not demonstrate that the author had been aware of the inaccuracy at the time of his statement. 240 Applying Pape’s “rational interpretation” of an ambiguous document rule, 241 the Court found that the author’s misinterpretation of matter posing “descriptive challenges” was within “the outer limits” of First Amendment protection. 242 Otherwise, any person making a misstatement could be liable “because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time,” a type of inaccuracy wholly permissible under Sullivan. 243

The following year, the Court delved into the issue of the First Amendment’s limitation to purely private defamation in the case of Dun & Bradstreet v. Green moss Builders. 244 This case involved the dissemination 245 of a factually false credit report that imputed insolvency to a business. 246 The Court rejected a media-non-media dichotomy 247 but nonetheless refused to impose the Gertz mandate of knowing or reckless disregard of falsity on the defendant as a threshold to recovery of presumed and punitive damages. 248 While the

239. Id.
240. Id. at 512.
241. See supra text accompanying notes 145-147.
243. Id. at 512-13.
244. 472 U.S. 749 (1985). Justice Brennan noted that the division on the issue before the Court should not “obscure the strong allegiance” to Sullivan by the Court. Id. at 776 (Brennan, J., with Marshall, J., Blackmun, J., and Stevens, J., dissenting). Note that neither he nor any member of the Court made any argument for an absolute privilege.
245. The credit report was confidential and disseminated only to five subscribers. Id. at 751, 762 (Powell, J., with Rehnquist, J., and O’Connor, J., concurring). Justice Brennan suggested the confidential dissemination might be the “linchpin” of Justice Powell’s analysis. Id. at 795 n.18 (Brennan, J., with Marshall, J., Blackmun, J., and Stevens, J., dissenting).
246. Id. at 751-52 (Powell, J., with Rehnquist, C.J., concurring). The insolvency imputed was that of one of plaintiff’s employees. Id. In essence, the case was an abuse of fair report/misidentification case by a non-media defendant. See ELD ER, DEFAMATION, supra note 51, § 3:21; ELD ER, FAIR REPORT, supra note 88, § 2.00.
247. Dun & Bradstreet, 472 U.S. at 772-74 (White, J., concurring in the judgment); id. at 763-64 (Burger, C.J., concurring in the judgment); id. at 781-84 & n.10 (Brennan, J., with Marshall, J., Blackmun, J., and Stevens, J., dissenting) (noting at least six Justices rejected the dichotomy and adding that Justice Powell’s plurality had not expressly rejected the media-non-media dichotomy but had declined to apply it to resolve the issues before it).
248. Id. Damages were presumed from the libelous per se nature of the statement. Punitive damages were awarded under a standard that included not only Sullivan but also intense focus on defendant’s attitude toward plaintiff rather than defendant’s attitude toward truth—“bad faith” and “reckless disregard of the rights an interests” of plaintiff or of the “possible consequences.” Id. at 454-55.
Court had neither the Gertz-minimal fault\textsuperscript{249} nor the plaintiff's burden of proving falsity\textsuperscript{250} issues before it, the logic of the Court's analysis suggests that the common law in its entirety remains largely intact,\textsuperscript{251} including the traditional affirmative burden of truth on the defendant in such cases.\textsuperscript{252} Indeed, the minority common law view qualifying the truth defense with a benevolent motive limitation likely survives constitutional scrutiny under a \textit{Dun & Bradstreet} analysis in purely private person or non-public interest situations.\textsuperscript{253}

A year later in \textit{Philadelphia Newspapers v. Hepps}, the Court confronted an issue upon which lower courts were at odds.\textsuperscript{254} In \textit{Hepps}, the Court reviewed the Pennsylvania Supreme Court's decision, which analyzed whether the Gertz-minimal fault standard

\begin{itemize}
\item \textsuperscript{249} Id. at 773 (White, J., concurring in the judgment) (suggesting that Gertz-minimal fault would likewise not be required in purely private cases). \textit{Contra} id. at 781 (Brennan, J., with Marshall, J., Blackmun, J., and Stevens, J., dissenting) (noting the parties did not question Gertz's requirement of fault to get a judgment and actual damages).
\item \textsuperscript{250} See supra text accompanying notes 254-293.
\item \textsuperscript{251} \textit{Dun & Bradstreet}, 472 U.S. at 761, n.7 (rejecting the dissenters' extension of Gertz to the purely private arena, suggesting such would "constitutionalize the entire common law of libel") (Powell, J., with Rehnquist, J., and O'Connor, J.); \textit{ELDER, DEFAMATION, supra} note 51, § 6:11, at 6-70 to -71.
\item \textsuperscript{252} \textit{ELDER, DEFAMATION, supra} note 51, §§ 2:3, 4:5, 6:11, at 6-70 to -71. See, e.g., \textit{People v. Ryan}, 806 P.2d 935, 936-37 (Colo. 1991) (upholding a conviction based on dissemination of a scurrilous and defamatory "Wanted" poster by an ex-boyfriend; finding truth was an affirmative defense); \textit{Ramirez v. Rogers}, 540 A.2d 475, 477-78 (Me. 1988) (holding the scurrilous charges by defendant that plaintiff/competitor was being investigated by the Attorney General and that Department of Human Resources had received a number of complaints about her involved purely private matter under \textit{Dun & Bradstreet}, which justified imposing the affirmative burden of proving truth of defendant); \textit{ROBERT SACK, SACK ON DEFAMATION, § 3.32 at 3-13 (PLI 2005)} (such a truth burden "may well survive" in non-public concern cases). \textit{But see RODNEY A. SMOLLA, THE LAW OF DEFAMATION} § 5.6 (2d ed. 2006) (noting that truth as a First Amendment defense in cases where strict liability might still be applicable was a matter where there was "still some doubt"); \textit{id.} § 5:10 (arguing that the "better view" is that truth, like opinion, "stands on its own footing . . . analytically distinct from fault rules" and is a First Amendment-based defense); \textit{id.} at § 5:13.
\item \textsuperscript{253} \textit{ELDER, DEFAMATION, supra} note 51, §§ 2:3, 4:5; \textit{Johnson v. Johnson}, 654 A.2d 1212, 1216 (R.I. 1995) (finding that the epithet "whore" by defendant hurled against his former wife/plaintiff was a purely private matter subject to a truth defense only if non-malicious and stating that any First Amendment issues could not be raised initially on appeal); \textit{People v. Heinrich}, 470 N.E.2d 966, 970-72 (Ill. 1984) (upholding a criminal defamation statutory limitation on the truth defense to scenarios involving "good motives and justifiable ends" in a case that involved dissemination of matter impugning a woman's virtue). Interestingly, the Supreme Court dismissed for "want of jurisdiction." \textit{Heinrich v. Illinois}, 471 U.S. 1011 (1985).
\item \textsuperscript{254} 475 U.S. 767, 771 n.2 (1986) (citing cases).
\end{itemize}
also required modification of the traditional truth defense, with its burden of proof on the defendant. The case involved a very sympathetic scenario for upholding Pennsylvania’s statutory codification of the common law. Several investigative pieces had suggested that the plaintiffs were linked to organized crime through a third party. Pennsylvania’s shield source protection statute substantially impeded the plaintiffs’ access to information needed to prove the falsity of the pieces. In a powerful opinion the Pennsylvania Supreme Court unanimously upheld the statute, holding that truth or falsity was not “inextricably bound" up with


257. Hepps, 485 A.2d at 377 (quoting 42 PA. CONS. STAT. ANN. § 8343(b)(i) (West 2005)). The court cited a number of reasons for the common law rule and statute: the presumption of innocence “equally applicable to the ordinary affairs of life” that resulted in the presumption of good character and its corollary presumption of falsity; the prejudice to the defendant if plaintiff were allowed to prove good character in his or her case-in-chief without having to apprise defendant and before defendant had introduced evidence to the contrary; the general likelihood that defendant had “peculiar means of knowledge of the particular fact.” Hepps, 485 A.2d at 378-79, n.1. The latter was of particular importance as to general accusations, where the absence of presumed falsity would compel plaintiff into the “the unenviable position of proving the negative.” Id. at 378. Note that this especially disadvantaged defendant position may dictate a different result than the Court adopted where defendant is asserting the privilege of fair report. See supra note 212; infra note 753.

258. Plaintiff/individual was the principal owner of a corporate co-plaintiff operating beer and other beverage distributorships, which had trademarks licensed to the other nineteen or so individual and corporate licensee co-plaintiffs. Hepps, 485 A.2d at 377. The five investigative pieces by the newspaper had an overall theme that plaintiffs had connections to organized crime and used their linkages to effect governmental decision-making in the administrative and legislative arenas. Phila. Newspapers, 475 U.S. at 769. The stories cited federal investigators’ conclusions in support and that a grand jury was apparently investigating such connections. Id. See infra text accompanying note 292.


260. 42 PA. CONS. STAT. ANN. § 5942(a) (West 2005).

261. The Pennsylvania Supreme Court referenced this enhanced media protection and the concomitant diminished ability of the plaintiff to prove falsity as providing a “further justification" for the truth defense. Hepps, 485 A.2d at 386-87.

262. The court noted that Gertz focused on avoiding the possibility of defamation liability despite the media defendant taking “every conceivable precaution to ensure” accuracy. Id. at 385. Pennsylvania’s requirement of negligence or malice barred such strict liability. Id. at 385-86.

263. Id. at 385 n.13. The court noted:
Gertz-mandated fault. The court argued that intimations of a burden of falsity in Sullivan and its progeny were non-controlling “loose characterizations” made by the Supreme Court when it was otherwise absorbed in defining the parameters of Sullivan.

The Court reversed by a surprisingly narrow 5-4 majority. In doing so, it imposed on private plaintiffs the burden of proving substratal falsity in cases of public concern involving media Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily flow that negligence of the defendant can only be shown by proving that the material was false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so . . . Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

Id. (emphases added).

264. Id.

265. Id. at 381 n.4. The Court cited the Cox Broadcasting discussion, see supra note 206, and Joel D. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond, 61 VA. L. REV. 1349, 1383-84 (1975).

266. Hepps, 485 A.2d at 381.

267. Justice O'Connor wrote for the Court. Philadelphia Newspapers, 475 U.S. at 768. Two justices wrote separately, disagreeing only on the reserved issue as to non-media defendants. Id. at 780 (Brennan, J., with Blackmun, J., concurring). Justice Stevens wrote the dissent. Id. at 781 (Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., dissenting).

268. Id. at 776-79 (majority opinion).

269. Citing the numerous intimations in earlier cases, id. at 772-73, the Court also concluded that a public person plainly also had the burden of proving falsity. This was presumably only as to matters of public concern, the standard applied as to private persons. Id. at 775. The Court resolved an issue the RESTATEMENT (SECOND) OF TORTS had left unresolved. RESTATEMENT (SECOND) OF TORTS § 581A, cmt. b, caveat to § 613(2), cmt. j. (1977). The drafters did note that meeting the Court’s fault requirement “has, as a practical matter, made it necessary” for the complainant to allege and prove falsity—“from a realistic viewpoint” the burden of falsity has been imposed on plaintiff. Id. § 613(2) cmt. j.; see also id. § 580B, cmt. j. (suggesting there remains little, if any, significance to the common law imposition of truth as an affirmative defense on the defendant). The author would agree with two caveats. One, the drafters note that the Court might limit Gertz’s fault requirement to matters of “public or general interest.” Id. § 580B cmt. c. The Court adopted this approach in Dun & Bradstreet—at least as to presumed and punitive damages and likely beyond. See supra text accompanying notes 244-253. Accordingly, truth as an affirmative defense, even if limited by a benevolent motive, likely survives in the “purely private” sector. See supra text accompanying notes 252-253.

270. Phila. Newspapers, 475 U.S. at 768-69, 776-79 (quoting the dicta in Garrison which foreshadowed Philadelphia Newspapers). See supra text accompanying note 60. The Court noted it had “no occasion” to decide the issue of burden of falsity as to a private plaintiff involved in a matter not of public concern, see supra text accompanying notes 249-
The Court conceded that the burden of proof would be determinative only when the fact-finding procedure is unable to “conclusively” resolve the truth/falsity issue, such as with cases involving an “unknowably true or false” statement. The Court also conceded that it had no way of knowing in cases of evidentiary ambiguity how much expression would be impacted by the burden of proof issue. Nonetheless, “where the scales are in such an uncertain balance . . . the Constitution requires us to tip them in favor of protecting free speech” because of the “chilling effect” the traditional rule would have on protected expression. The Court opined that imposing on the plaintiff the burden of falsity “adds only marginally”
to the plaintiff's existing burdens. The plaintiff's existing proof of the defendant's "fault in adequately investigating the truth" of the defamatory statements would "generally encompass" evidence of falsity.

In dissent, Justice Stevens excoriated the Court's imposed burden of falsity in cases where the plaintiff had already fulfilled, or could fulfill, the burden of proving minimal fault or constitutional malice as a "pernicious result" "grossly undervalu[ing]" the plaintiff's interest in protecting a "falsely dishonored" reputation. The dissent concluded that the constitutional fault assessment "makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale." This is "almost tautologically" so as to those with the constitutional malice burden, where the defendant must almost "willfully blind[ 
] itself to the falsity of its utterance." This is equally true in cases of minimal fault under Gertz, where society's interest in a non-self-censored press is at its lowest, and society's "equally compelling" interest in redressing reputational injuries is at its highest.

Justice Stevens tersely rejected the inconsequentiality argument as providing no rebuttal in cases where the burden of proof is determinative. Indeed, in cases where the plaintiff could prove

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275. Philadelphia Newspapers, 475 U.S. at 778. The Court acknowledged that this burden would leave some plaintiffs without a remedy and some defendants immune from liability as to defamatory speech that is "false, but unprovably so." Id. (emphasis added).

276. Id. (emphasis added). Clearly, the Court was analyzing the truth-falsity of the underlying charges, not merely the defendant's accurate reportage of them.

277. Id. The Court noted that a jury would more probably accept plaintiff's argument of fault if persuaded that the defamatory statements were also false. Id.

278. Id. at 780-81 (Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., dissenting).

279. Id. at 787. The majority's error lay in its underlying assumption that any questions relating to the truth of a defamatory statement would be resolved favorably to free expression and against the plaintiff-private person's reputation. Id. As to private individuals, the Court "trades on the[ir] . . . good names with little First Amendment coin to show for it." Id. at 790.

280. Id. at 780-82 (Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., dissenting).

281. Id. at 782-83 (Stevens, J., dissenting).

282. Id. at 783 n.4 (Stevens, J., dissenting).

283. Id. at 783 (Stevens, J., dissenting).

284. Id. at 784-85 (Stevens, J., dissenting) (quoting Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976)). For a discussion of the Court's analysis of the reputational interest, see infra text accompanying notes 463-469.


286. Id. at 784 n.5 (Stevens, J., dissenting). The dissenters concluded there was no inconsistency between a plaintiff's burden on fault and a defendant's burden on falsity, quoting the Supreme Court of Pennsylvania's analysis. Id. See supra note 263.
both common law and constitutional malice but not falsity. The plaintiff would be remediless where the defendant defamed the plaintiff by means or methods that could not be disproved. In other words, a "character assassin has a constitutional license to defame" when he or she deliberately chooses unprovable imputations. The very case before the Court aptly illustrated that such a concern was real. The parties stipulated that the gist of the charge plaintiffs had to disprove was their linkage by the defendant to organized crime and underworld personalities. This scenario provided an "obvious blueprint for character assassination . . . [and] wholly unwarranted protection for malicious gossip."

A year after imposing the Sullivan standard on a public person suing for the tort of intentional infliction/outrage in Hustler Magazine v. Falwell, the Court extensively analyzed the constitutional malice
standard in *Harte-Hanks Communications v. Connnaughton*. The court in *Harte-Hanks* involved the defendant’s accurate republication of a questionable source’s charges of campaign “dirty tricks” and plaintiff/judicial candidate’s responses thereto. While unanimously rejecting either deviation from professional standards or the defendant’s suspect motives as sufficient, the Court found both to be supportive evidence on the controlling issue of whether the defendant, in republishing the source’s charges, acted with knowing or reckless disregard of their underlying falsity.

Analyzing the evidence, the Court found inexplicable the defendant’s decision not to interview a pivotal corroborating witness who was present at the contested interview between the plaintiff and the source or to listen to the taped interview which the plaintiffs had supplied to the defendants. However, if the defendants had already decided to issue the story, it made sense not to pursue either of the above opportunities: the story would die on the proverbial vine. The Court accepted the jury’s rejection of the defendant’s proffered justification for nonfeasance. In doing so, the Court held as an insufficient substitute the intentional infliction tort’s intent or reckless/severe emotional distress and “extreme and outrageous” conduct standards despite admitting that the parody was “doubtless gross and repugnant” to most. Later, the Court cited *Falwell* as part of its *Greenbelt Publishing-Letter Carriers-Falwell* trio of “imaginative expression”-“rhetorical hyperbole” cases.

295. *Harte-Hanks*, 491 U.S. 657 (1989). The Court took no position on the issue of the quantum of evidence required in public person-public concern cases. *Id.* at 661 (noting “some debate” on the issue and citing the cases on both sides). The author has suggested this is a curious anomaly. *ELDER, DEFAMATION*, supra note 51, § 7:5, at 7-81 to 7-82.

296. *Id.* at 660, 680-81. The source for defendant’s article was a witness before the grand jury investigating the incumbent’s director of court services, who had resigned and been indicted for bribery. *Id.* at 660. At minimum, the Court’s analysis would seem to bar any suggestion that neutral reportage would apply in the “irresponsible,” non-prominent source line of cases supporting the broadest interpretation of neutral reportage. See *infra* Part V.C.

297. *Harte-Hanks*, 491 U.S. at 666-68 (noting that the *Gertz* decision had unanimously adopted the knowing or reckless disregard and not Justice Harlan’s “highly unreasonable conduct” standard in *Butts*). For a discussion of the latter, see supra notes 73-74, 76 and accompanying text. See also its perversion under New York law into a version of absolutist neutral reportage, *infra* Part IX.


299. *Id.* at 666-69.

300. *Id.*

301. *Id.* at 682-84.

302. *Id.* at 683, 692.

303. *Id.* at 682-84.

304. *Id.* at 692. The Court noted that defendant had expended major investigative resources on the story and that by the time of publication six witnesses had “consistently and categorically” denied the source’s allegations. *Id.* Yet, defendant chose not to interview
that the evidence supported a conclusion not merely of a failure to investigate the underlying falsity of the source’s charges, but also of “a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source’s republished] charges.” This demonstrated “purposeful avoidance of the truth.” The Court relied upon the “remarkably similar” unreliable and incredible informant involved in the Curtis Publishing case.

In the following year, the Court decided Milkovich v. Lorain Journal. This opinion was a strong effort, that proved only modestly successful, to brake the burgeoning development of the “pure opinion” rule and “hold[] the balance true” between reputational and free expression interests. Milkovich involved a sports editorial column in which the columnist portrayed the plaintiff, a wrestling coach, and the superintendent of schools as having “lied at the [judicial] hearing after each having given his solemn oath to tell the truth.” The Supreme Court of Ohio had found the statement to be defamatory. The one person both plaintiff and the source said could corroborate their different accounts of the events at issue. Id. at 682-83.

Id.

Id.

Id. at 692-93 nn.38-40 (This met both Justice Harlan’s “extreme departure from publishing standards” criterion and Chief Justice Warren’s “more demanding” Sullivan standard). See also supra note 76.

Harte-Hanks, 491 U.S. at 692. See discussion of Curtis Publishing, supra Part I.B. 497 U.S. 1 (1990). This had been foreshadowed by a two party dissent from denial of certiorari in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, 1128-30 (1985) (Rehnquist, J., with Burger, C.J., dissenting) (viewing the appellate majority below—that plaintiff/academic had “no status” and was a “pure and simple activist”—as “nothing less than extraordinary” and using the “opinion” rule “meat axe” on “a very subtle and difficult question, totally oblivious ‘of the rich and complex history of the common law to deal with this problem’”).

See the recent analysis of Milkovich’s tepid impact in Fifteen Years Later: “Sting” of “Milkovich” Loses Force, 33 MEDIA L. REP. 5 (BNA) (Feb. 1, 2005), available at http://ipcenter.bna.com/pic2/up.ns?id=BNAF-693JW?OpenDocument&PrintVersion=Yes (noting that the commentators at an ABA program collectively viewed Milkovich as having been “generally . . . disregarded” or “largely ignored”). This evisceration of Milkovich’s attempt to remedy the disequilibrium persuasively reflects the general inequality of resources available to plaintiffs and defendants in libel litigation and the ability of defendants in cases seemed pivotal to mobilize the national media and their influential lawyers and marshal their resources to protect common interests. Id. Witness the ability of defendants in Norton v. Glenn, to do just that in support of neutral reportage. See infra note 571.

Milkovich, 497 U.S. at 23.

Id.

The entire article is found in Milkovich, 497 U.S. at 5-7 n.2. The article was based on the author’s observations at a wrestling match at which a melee took place and a state high school athletic association hearing on the issue. Id. at 1. Ineligibility sanctions
be privileged under an open-ended “totality of the circumstances” test.314 Specifically, the court found that the language used and the verifiability factors supporting the charge’s factuality were trumped by the “general context” (the caption) and the “broader context” (the sports page).315

On review, the Supreme Court delineated the extraordinary panoply of protections316 it had accorded to the “vital guarantee”317 of free expression and found that guarantee appropriately protected by existing doctrine.318 The Court rejected any “artificial dichotomy”319 between fact and opinion and held that the plaintiff’s burden of falsity in public concern-media defendant cases320 under Philadelphia Newspapers required that the particular statement be provable as
factually false. Accordingly, where a statement reasonably implied defamatory false facts, a public plaintiff had to show publication with either “knowledge of their false implications or with reckless disregard of their truth.” By contrast, a private plaintiff had only to demonstrate that “false connotations were made with some level of fault.” The Court gave a specific example of how this approach operated by demonstrating that actionability related to implied substratal falsity. Thus, where defendant boldly stated “I think Jones lied,” falsity meant that in fact Jones had not prevaricated. Even where a statement opinionative in form provided underlying facts, it could still imply a false statement of fact if the underlying facts were “either incorrect or incomplete, or if his assessment of them is erroneous.”

In its most recent libel decision, Masson v. New Yorker Magazine, the Court definitively and powerfully analyzed the classical approach to falsity in the context of attributing to the plaintiff words that he did not say. The Court specifically rejected the suggestion

321. Id. at 19-20 (majority opinion). See discussion of Phila. Newspapers, supra text accompanying notes 254-293.
323. Id. at 20-21.
324. Id. at 20 n.7. Even where a speaker prefaces a sentiment with, “[i]n my opinion [plaintiff] is a liar,” he implies a knowledge of facts which lead [sic] to the conclusion that [plaintiff] told an untruth.” Id. at 18-19. This can “cause as much damage to reputation as the statement (plaintiff) is a liar.” Id. The Court then analyzed how verifiability of the false charge could be shown, i.e., by comparing plaintiff’s testimony at the administrative and judicial proceedings. Id. It seems unarguable that the Milkovich Court would not have treated the case any differently if defendant had accurately reported that “X [e.g., a public official] thinks Jones lied” without supporting underlying facts or omitting or misstating major qualifying aspects. Id. Note Judge Kosinski’s recent rejection of opinion protection for republishing another’s statement:

A speaker can’t immunize a statement that implies false facts simply by couching it as an opinion based on those facts. See Milkovich . . . Likewise, a defamatory statement isn’t rendered nondefamatory merely because it relies on another defamatory statement. In this case, the truth of the news reports on which defendants’ claim to have relied is disputed.

Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir. 2002) (citation omitted). Consequently, if there was “some clear warning sign,” they could not republish the news reports and claim opinion status. Id.


327. 501 U.S. 496 (1991). A case involving injunctive relief, Troy v. Cochran, 544 U.S. 734 (2005), was rendered after Johnny Cochran’s death while the appeal by defendant was pending. The case was an extremely strong and sympathetic one for injunctive relief, as the California courts had found, concluding that claims by defendant that Cochran owed
that each and every alteration over and above those involving grammatical and syntax corrections sufficed for constitutional malice.\textsuperscript{328} This suggested “narrow” approach would be a “radical change” at odds with the Court’s jurisprudence.\textsuperscript{329} It would also be an “unnecessary departure from First Amendment principles of general applicability” and “essential principles” of the common law as they had evolved since the late sixteenth century.\textsuperscript{330} Instead, the Court explicitly adopted this historical meaning, which, whatever the form of the defamation, “overlooks minor inaccuracies and concentrates upon substantial truth.”\textsuperscript{331} The Court held that its constitutional malice doctrine relied on and incorporated this historical meaning.\textsuperscript{332} Consequently, no knowing or reckless disregard would be actionable

\textsuperscript{328} Masson, 501 U.S. at 513-18.  
\textsuperscript{329} Id. at 514.  
\textsuperscript{330} Id. at 514-16. The Court has commonly looked at common law precedent and heritage in analyzing its First Amendment jurisprudence. See, e.g., its Petition Clause analysis infra note 514, its rejection of immunity for the editorial process in \textit{Herbert v. Lando}, 441 U.S. 153, 163-66 (1979) (relying in part on the common law traditional admission of indirect and direct “state of mind” evidence on qualified privilege and punitive damages issues) (on \textit{Herbert}, see infra text accompanying notes 485-493), its recognition and reaffirmation of the common law’s provision of a defamation remedy since the latter part of the 16th century, \textit{Milkovich}, 497 U.S. at 11-12, its discussion of common law “fair comment,” id. at 13-14, its retention of presumed and punitive damages under state law standards in the purely private concern arena, see supra text accompanying notes 244-253, and its partial reliance on “general principles” of defamation in rejecting a “rational interpretation” rule for use of quotations, see infra note 1611.  
\textsuperscript{331} Masson, 501 U.S. at 516. In other words, basic principles of defamation could resolve inaccurate quotations without constructing a separate body of decisional law. \textit{Id}. The Court followed its example in \textit{Milkovich}, 497 U.S. at 18, where it had rejected “a wholesale exemption for anything that might be labeled ‘opinion.’” See supra text accompanying notes 309-326.  
\textsuperscript{332} Masson, 501 U.S. at 517; see also id. at 521-25. The Court cited \textit{RESTATEMENT (SECOND) OF TORTS} § 563, cmt. c (1977), and W. PAGE KEETON, ET AL., \textit{PROSSER AND KEETON ON THE LAW OF TORTS} § 776 (5th ed. 1984) [hereinafter \textit{PROSSER & KEETON}], then concluded “the common law of libel \textit{takes but one approach to the question of falsity, regardless of the form of the communication.” Masson, 501 U.S. at 516 (emphasis added).
“unless the alteration results in a material change in the meaning conveyed by the statement.”

Masson involved six defamatory statements. The Court analyzed each statement applying traditional material falsity analysis and found five of them potentially actionable. In so doing it unequivocally rejected three separate attempts to circumvent the classic traditions of defamation law and provide defendants de facto absolute privileges for materially false statements. First, the Court rejected any suggestion that the First Amendment imposes limitations on what is actionable libel under state law. Second, the Court repudiated the suggestion that the “incremental harm” doctrine is constitutionally based in unambiguous terms. Under this doctrine, a court is required to assess the incremental reputational injury of the alleged defamatory statements over and above that already caused by the nonactionable parts of the published matter. Although California could adopt “incremental harm” as a matter of state law, the Court definitively repulsed any suggestion that the doctrine is mandated by the First Amendment.

333. Masson, 501 U.S. at 517 (emphases added). Defendant’s attribution of quoted words in fact not said “bears in a most important way on that [constitutional malice] inquiry, but it is not dispositive in every case.” Id.

334. Id.

335. Id. at 522-24. For a brief discussion of the subsequent litigation see infra text accompanying notes 1632-1635.


337. The “intellectual gigolo” description attributed to Masson—whether attributed falsely to him or falsely portraying him as saying respected senior psychoanalysts so said—was materially different from the taped statement where he had said he deemed himself “much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him].” Masson, 501 U.S. at 522. The Court concluded that insofar as the court of appeals had relied on the First Amendment for its conclusion that the above statement was non-defamatory, it was in error—that would be purely a matter of state law. Id. at 523. See also the Court’s discussion of California’s broad statutory defamation of libel. Id. at 509-10. The Court’s analysis presents a major obstacle to those who claim that some forms of republication should not be viewed as defamatory. See infra Part VII.D.


339. Id. at 522-23.

340. Id. at 523. The Court seems to have followed Justice Scalia’s view (when he sat on the Court of Appeals for the District of Columbia) that this doctrine was “a fundamentally bad idea.” See Liberty Lobby, Inc. v. Anderson, 746 F.2d. 1563, 1569 (D.C. Cir. 1984). On remand the Ninth Circuit held that the “incremental harm” doctrine was not part of California law. Masson v. New Yorker Magazine, 960 F.2d 896, 898-99 (9th Cir. 1992) (adopting Judge Scalia’s “bad idea” analysis). See also Crane v. Ariz. Republic, 972 F.2d 1511, 1524 (9th Cir. 1992); Dorsey v. Nat’l Enquirer, Inc., 973 F.2d 1431, 1440 (9th Cir. 1992) (Pregerson, J., concurring in part and dissenting in part).
Third, the Masson Court found that the Ninth Circuit erred in
deciding overly broad protection to the use of quotations.\textsuperscript{341} The
Ninth Circuit had provided protection to “rational interpretation” of a
statement even if \textit{substantially inaccurate}.\textsuperscript{342} In the Court’s view,
neither the “general principles” of defamation nor the Court’s First
Amendment precedents accorded protection to “rational interpretation” in
the materially altered quotation context.\textsuperscript{343} The
Court seems to have narrowly construed \textit{Pape}\textsuperscript{344} to mean only that
\textit{Time} had not published “a falsification sufficient to sustain a finding
of actual malice.”\textsuperscript{345} In any event, according protection to a “rational
interpretation” fulfilled First Amendment values by giving a publisher
the “interpretive license . . . necessary when relying upon ambiguous
sources.”\textsuperscript{346} Where, however, the ordinary or reasonable reader would
view the quotation as purporting to be a verbatim rendition of the
speaker’s statement, use of quotation marks evidences that the writer is
“attempting to convey what the speaker said.”\textsuperscript{347} The writer is “not
involved in an interpretation of the speaker’s ambiguous
statement.”\textsuperscript{348}

In sum, the Masson Court concluded that quotation marks tell
the reader that he or she is reading the speaker’s own words, not the
author’s “rational interpretation of what [the speaker] has said or

\begin{itemize}
\item \textsuperscript{341} \textit{Masson}, 501 U.S. at 518. Despite use of “accuracy” here, it is clear that the
Court was focused on the underlying truth or falsity of the libelous connotation conveyed by
use of the quotations. \textit{Id.}
\item \textsuperscript{342} \textit{Id.} Vary the facts somewhat as to the “intellectual gigolo” libel discussed \textit{supra}
note 337. Assume that defendants had given a “rational interpretation” to a purported
quote from the respected senior psychoanalysts. They were likely both public figures and
“responsible, prominent” sources under \textit{Edwards}. \textit{See infra} text accompanying notes 795-
799. Defendants’ interpretation would meet \textit{Edwards}’ “reasonably and in good faith” belief
discussion in text accompanying note 833, which equates to “rational interpretation.” And,
of course, Masson was deemed a “public figure.” \textit{Masson}, 501 U.S. at 499. Most of the
requisites for neutral reportage would have been met. But there is \textit{no} indication the
Masson Court would have treated this parallel scenario differently and \textit{every} indication
that it would not have—the focus of quotation use was on “what the speaker said.” \textit{Masson},
501 U.S. at 519 (emphasis added). In other words, misuse of purported quotations, whether
by a third person or by the plaintiff to defame plaintiff would \textit{not} have been immune if
“rationally interpreted” or accurately reported if they conveyed a knowingly or recklessly
false implication.
\item \textsuperscript{343} \textit{Masson}, 501 U.S. at 518.
\item \textsuperscript{344} \textit{See supra} Part I.B.
\item \textsuperscript{345} \textit{Masson}, 501 U.S. at 519 (noting that this was a “fair reading of our opinion”).
\item \textsuperscript{346} \textit{Id.} The classic use of a quotation is “the quintessential ‘direct account of events
that speak for themselves’ . . . More accurately, the quotations allow the subject to speak
\item \textsuperscript{347} \textit{Masson}, 501 U.S. at 519.
\item \textsuperscript{348} \textit{Id.}
\end{itemize}
Any other result would allow authors to defame subjects through their own voices with impunity, possibly inducing newsworthy persons to be exceedingly cautious with journalists, “knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded.” The Court declined to apply “near absolute, constitutional protection” for such a practice as it would “ill serve the values of the First Amendment.”

Given the Court’s extensive libel jurisprudence and Edwards’ pedigree, it is perhaps surprising that the Court has given no clear intimation as to its position on neutral reportage. The Court did briefly encounter neutral reportage in Harte-Hanks, and in that case, the Court noted but did not resolve the issue of whether neutral reportage was constitutionally required. The district court had rejected the neutral reportage argument on the ground that the source was not a “responsible” person on par with the National Audubon Society, the responsible source in Edwards. Petitioner’s decision not to rely on the neutral reportage argument before the Supreme Court was eminently logical: as the lower court decisions demonstrated, the petitioner probably could not have met its requirements.

Curiously, in dicta Justice Blackmun chastised the petitioners’ decision to “eschew[ ] any reliance” on neutral reportage as apparently “unwise” under the facts, which “arguably might fit within” the doctrine. Justice Blackmun very broadly characterized neutral reportage as protecting “accurately reported,” “newsworthy
allegations,” such as “information that had become central to the political campaign” about a public figure-candidate. This admonition should not be surprising: Justice Blackmun had been a member of the badly fractionated Rosenbloom coalition and only reluctantly joined the Gertz majority because of that fragmentation. Thus, Justice Blackmun’s concurrence in Harte-Hanks was likely an attempt to resuscitate and possibly enhance his strong pro-media position in Rosenbloom.


358. See supra note 149.

359. See supra text accompanying notes 158-160.

360. Recent comments by Lee Levine, who argued Harte-Hanks before the Court, indicate that Justice Blackmun’s questions from the bench strongly supported neutral reportage: “I think what Justice Blackmun was going for was actual malice doesn’t fit this situation; isn’t there a way that the First Amendment protects this, separate and apart from actual malice? It may be neutral reportage, it may be constitutionalization of at least part of the ‘defamatory meaning’ inquiry [see infra Part VII.D], but there’s got to be some way that the First Amendment protects it. . . .” Kimberly, Stuck in Neutral, NEWS MEDIA & L., Jan. 1, 2005, available at 2005 WLNR 4888659. Other indicia in Justice Blackmun’s opinion support this interpretation. Justice Blackmun also criticized petitioners’ abandonment of the truth defense, leaving the case in an “odd posture.” Harte-Hanks Comm’ns, 491 U.S. at 694 (Blackmun, J., concurring). Later, Justice Blackmun mischaracterized Greenbelt Publishing Association v. Bresler in a way that suggested it provided an absolute privilege for fair report—“truthful and accurate reporting of what was said at [a] public meeting on issues of public importance [was] not actionable. . . .” Id. at 695 (Blackmun, J., concurring). This is clearly wrong. See supra text accompanying notes 86-100. In his analysis of constitutional malice, Justice Blackmun also viewed the case before the Court as “markedly different” from Curtis Publishing Co. v. Butts, see Harte-Hanks Comm’ns, 491 U.S. at 695; supra text accompanying notes 71-76, a case relied on by the Court, where defendant’s depiction of the events was that they were true, not “contested allegations.” In Harte-Hanks Communications, Justice Blackmun found “significant” the fact the petitioners had “accurately reported [the sources’] allegations as allegations” and printed plaintiff’s denial. 491 U.S. at 695 (Blackmun, J., concurring) (emphasis added). This was relevant to reckless disregard to the truth—a portrayal as “established fact would have shown markedly less regard for their possible falsity.” Id. (emphasis added). He was also concerned by the Court’s exclusive reliance on evidence “extrinsic to the story itself” and the absence of any discussion of Time, Inc. v. Pope, see supra text accompanying notes 113-148, and Greenbelt Publishing, an absence which he feared might be construed as suggesting that the form of the presentation—i.e., presentation as allegation—might be deemed wholly unrelated to the constitutional malice issue. Harte-Hanks Comm’ns, 491 U.S. at 695-96 (Blackmun, J., concurring). Indeed, Justice Blackmun comes very close to concluding that form controls—i.e., presentation as allegation negates constitutional malice. This parallels the Medina v. Time, Inc. line of case that Edwards v. Nat’l Audubon Soc’y relied on in significant part in creating neutral reportage—a line of cases that is constitutionally disreputable. See discussion infra Part IV. On the possible impact of Blackmun’s replacement by Justice Breyer, see supra note 327, infra note 643.
This extended analysis of the Supreme Court’s jurisprudence demonstrates how little justification is found for a doctrine of neutral reportage or its related circumvention devices. Starting with *Sullivan*’s dramatic pronouncements, the Court has repeatedly affirmed that knowing or reckless disregard is both *required* by the First Amendment and provides *sufficient protection* for media\(^\text{361}\) and non-media defamers\(^\text{362}\) in cases involving public persons\(^\text{363}\) on issues of public concern\(^\text{364}\). This is true for both civil\(^\text{365}\) and criminal defamation sanctions\(^\text{366}\), as well as for false light purveyors\(^\text{367}\). The Court has repeatedly shown that bad faith animus focusing on defendants’ attitude toward plaintiffs, rather than defendants’ attitude toward falsity\(^\text{368}\), is not sufficient. Even a plaintiff’s proof of falsity plus ill will does not suffice\(^\text{369}\). In addition, the Court has repeatedly reaffirmed that protection of substantial truth is mandated by\(^\text{370}\), but not sufficient for,\(^\text{371}\) free expression on all matters of public concern\(^\text{372}\) regardless of status.\(^\text{373}\) Indeed, the Court has affirmed that all plaintiffs have the burden of proving material falsity in cases involving matters of public concern.\(^\text{374}\)

As logical corollaries of the above, imaginative expression\(^\text{375}\) and other defamatory\(^\text{376}\) or tortious matter\(^\text{377}\) not provable as factually false are not actionable. Moreover, the threshold barrier to proof of

\(^{361}\) See *supra* Part I.A-C.

\(^{362}\) See *supra* text accompanying notes 39, 54-55, 78-79, 271.

\(^{363}\) See *supra* Part I.A-C.

\(^{364}\) See *supra* Part I.A-C.

\(^{365}\) See *supra* Part I.A-C.

\(^{366}\) See *supra* text accompanying notes 54-62.

\(^{367}\) See *supra* text accompanying notes 64-70, 179-186.

\(^{368}\) See *supra* text accompanying notes 88-93, 174-178, 294, 318.

\(^{369}\) See *supra* text accompanying notes 88-93, 174-178, 294, 318.

\(^{370}\) See *supra* text accompanying notes 64-70, 179-186, 294.
constitutionally mandated fault is material falsity. In determining such falsity, the Court has reaffirmed the classical notion of underlying substantial truth and its corollary, the plaintiff-mandated burden of proving material falsity.

With rare exceptions, the Court’s fault regarding falsity focus has been on substratal or underlying falsity, not on facial accuracy. An important example of this focus, Monitor Patriot, involved the defendants’ republishing of a syndicated column. The Court’s focus was on whether Sullivan had been correctly applied to the issue of truth or falsity of the underlying charge of criminality. As a corollary of this general focus on substratal falsity, the Court has absolved defendants who relied, even negligently, on reputable sources in litigation brought under the Sullivan standard. In these cases, the Court implemented its self-imposed duty of independent examination of the record to avoid forbidden intrusions on free expression.

Several of the Court’s decisions have involved reports of official actions or public proceedings. One such case, Cox Broadcasting, involved accurately reported, true matter of public record in the context of public disclosure-privacy litigation. Cryptic and not altogether unambiguous dicta in Firestone suggests that the Court might accord an absolute privilege to accurately reported false and defamatory matter contained in a public record. On the other hand, Rosenbloom cited a common law fair report privilege defeasible on grounds other than unfairness or inaccuracy. Where fair report was abused by noncompliance with fairness and accuracy mandates, the Court linked fault liability to the plaintiff’s public or private status and then took a commonsense approach dependant on the nature of the abuse in determining whether to link the fault issue to facial inaccuracy or substratal falsity. Where the media defendant engaged in a misidentification, the Court focused on how the

379. See supra text accompanying notes 328-333.
381. See supra text accompanying notes 101-107.
382. See supra Part I.B-C.
383. See supra text accompanying notes 152.
385. See supra text accompanying notes 225-227. See also the cryptic reference by Justice Harlan in his plurality opinion in Curtis Publishing v. Butts, supra note 152.
386. See supra note 152.
387. See supra text accompanying notes 101-157.
388. See supra text accompanying notes 209-227.
defendant made the transposition, not on whether the defendant recklessly disregarded the underlying falsity of the charge that the plaintiff was a perjurer.\textsuperscript{389} Similarly, in a private figure case, the Court focused on the defendant’s erroneous interpretation of the “four corners” of the ambiguous divorce decree, not on negligence as to the substantive falsity of the depiction of the plaintiff as an adulteress.\textsuperscript{390} Where, however, the media’s embellishments and omissions resulted in an explicit or implicit endorsement of the underlying charges, the Court focused on whether the defendant acted non-recklessly in relying on responsible sources.\textsuperscript{391}

In a triad of cases, the Court delved into the “rational interpretation”-“bristled with ambiguities” rule generated by \textit{Time v. Pape}.\textsuperscript{392} Time’s report in that case was so extraordinarily ambiguous that it was difficult to discern with any certitude what the official report itself intended to convey. Indeed, the true narrow holding seems to be that Time did not publish a material falsity\textsuperscript{393} when viewed in the context of the report’s “four corners,” a view replicated in \textit{Masson}, the Court’s most recent libel decision.\textsuperscript{394} A second “rational interpretation” decision, \textit{Bose}, should justifiably be viewed in the same way: the “about” versus “across” contretemps did not constitute a material falsity.\textsuperscript{395}

Three of the Court’s fault regarding falsity analyses should give any court looking for support for neutral reportage, or a perverted redefinition of “truth,” particular reason to pause. In \textit{Philadelphia Newspapers}, the majority only narrowly defeated (5-4) the retention of an affirmative burden of proof of truth on the defendant, finding that a plaintiff’s burden was enhanced “only marginally” by a burden of proving falsity.\textsuperscript{396} It is difficult to imagine that a Court so divided as to proof of underlying falsity would give a defendant who knows of the underlying falsity of the matters published the right to publish such with absolute impunity under some version of neutral reportage or reformulated accuracy-pseudo-truth.

\textsuperscript{389} See supra text accompanying notes 101-107.  
\textsuperscript{390} See supra text accompanying notes 208-212, 221-224.  
\textsuperscript{391} See supra text accompanying notes 149-157.  
\textsuperscript{392} See supra text accompanying notes 145-147. In its fourth analysis the Court limited the “rational interpretation” rule to public person plaintiff cases. See supra notes 213-215.  
\textsuperscript{393} See supra Part I.B-C.  
\textsuperscript{394} See supra text accompanying notes 343-345.  
\textsuperscript{395} See supra text accompanying note 236.  
\textsuperscript{396} See supra text accompanying notes 254-293.
Next, in Milkovich, the Court rejected as wholly artificial a fact-opinion dichotomy and allowed opinionative statements to be actionable if they imply underlying facts, either through absence of supporting facts or distortion or wrongful assessment thereof, provided the appropriate fault is shown. Would a Court so explicitly and staunchly intent on holding “the balance true” countenance an absolute privilege for demonstrable, defamatorily false statements under the guise of neutral reportage (or reconstituted accuracy—pseudo-truth) after rejecting opinion protection for the same where a knowingly or recklessly false statement of and concerning a public person is implied? That is highly doubtful.

Lastly, Masson reaffirmed classical defamation law’s historic contours and rejected three separate media-centric attempts to circumvent media liability where the plaintiff could otherwise prove constitutional malice; infusion of First Amendment values into what is defamatory under state law; the “incremental harm” version of the “libel-proof” plaintiff doctrine; and “rational interpretation” for attributed quotations. None of these conclusions registered a single dissent. It is difficult to imagine a Court rejecting the latter of the three as a “near absolute,” “ill serv[ing] the values of the First Amendment” as ever approving neutral reportage. But, of course, hope springs eternal for the media and media lawyers.


This discussion of truth versus falsity demonstrates that the Court’s jurisprudence offers little solace to purveyors of neutral reportage or accurate-republication as pseudo-truth. However, the media Jabberwock, exemplified by the media defendants in Norton v. Glenn and Troy Publishing v. Norton, has found a miraculous new “source” of supporting “authority:” the Court’s three decades of Cox Broadcasting privacy-generated jurisprudence. Through curious
logic, the media has looked to the Court’s strong protection of true matter lawfully obtained, as support for neutral reportage. Indeed, Dean Rodney Smolla found “obvious parallels” between Bartnicki’s First Amendment-based passive receipt and subsequent reportage of true, legitimately newsworthy information about public figures and neutral reportage of calculated falsehood. In Dean Smolla’s view, both perform a “public forum function, operating as a platform for the exchange of views.”

Consider the indefensible and radical “public fora” proposition that is being suggested in the context of the following hypothetical: A media defendant’s editor, Q, receives from a known, responsible source, C, an incumbent candidate of high repute rated as third in the

407. See infra text accompanying notes 415-444.
408. 532 U.S. 514 (2001); Rodney A. Smolla, Information As Contraband: The First Amendment And Liability For Trafficking in Speech, 96 NW. U. L. REV. 1099, 1152 (2002) [hereinafter Smolla, Contraband] (interpreting Bartnicki as having five justices arguably reinvigorating the public disclosure tort and approving “a content sensitive test” to distinguish what is legitimately newsworthy and protected from what is not).
409. See Smolla, Contraband, supra note 408, at 1113-14, 1116-17, 1141-56; see also Bartnicki, 532 U.S. at 524-35; id. at 535-40 (Breyer, J., with O’Connor, J., concurring). While Justice Stevens in his opinion for the Court repeatedly referred to a “public issues”-“public concern”-“public importance” test for true information lawfully obtained, id. at 529-29, 533-35, Justice Breyer more carefully circumscribed the case to a “narrow holding limited to the special circumstances therein,” i.e., “a matter of unusual public concern,” “a threat of physical harm,” id. at 533-36, a matter of “little or no legitimate interest” in privacy, id. at 539, and where plaintiffs, a teacher’s union president and the union’s chief labor negotiator, were limited purpose public figures, who had “subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy . . .” Id. Justice Breyer specifically rejected any suggestion that the case involved a “public interest” exception that swallow(ed) up the . . . privacy-protecting general rule” in the electronic surveillance statutes before it. Id. at 540. He emphasized the “particular circumstances” of the case, i.e., where the plaintiffs’ “legitimate privacy expectations [were] unusually low, and the public interest in defeating those expectations is unusually high.” Id. Clearly, Justice Breyer would not have immunized even this passive receipt absent these rather eccentric circumstances. Three dissenters would have upheld the statutes and not immunized republication with scienter of passively received information illegally obtained by the source. Id. at 541-56 (Rehnquist, C.J., with Scalia, J., and Thomas, J., dissenting). They disparaged Justice Stevens’ “public concern/newsworthiness criterion, as an “amorphous concept” he did “not even try to define.” Id. Clearly the two concururs and three dissenters formed a majority for a much more circumscribed view going no further than Justice Breyer’s opinion. In sum, the views of five members of the Court throw cold water on the idea of a broad First Amendment-based “public concern/newsworthiness exception for passive receipt and/or publication of any embarrassing true matter. In light of Chief Justice Rehnquist’s death and the retirement of Justice O’Connor, the views of Chief Justice Roberts and Justice Alito will hold pivotal sway on this issue.
410. See infra Parts III-VII, IX.
411. Smolla, Contraband, supra note 408, at 1160 (describing the neutral reportage doctrine as found in “some innovative judicial decisions”). See also infra note 904 and accompanying text.
polls, a copy of a dated criminal record. The criminal record shows that one opponent, A, who is neck and neck for the lead, has an expunged juvenile record for sexual assault on a minor. Q checks the newspaper morgue files and finds verification.\footnote{Even where expunged under first offender, youthful offender statutes, the substantial truth doctrine has been held to bar defamation liability. See ELDERS, FAIR REPORT, supra note 88, \S 1:23.} The same day, Q also receives from C a copy of a purported contempt citation against his other opponent, B. Q examines the citation and notes that C has confused B with another lawyer of the same first and last names but a different middle initial and location.\footnote{Those two variances were held to forfeit fair report in Young v. Morning Journal, 669 N.E.2d 1136 (Ohio 1996), a case which also rejected neutral reportage on the same facts. On the latter see infra text accompanying notes 1022-1029.} (Alternatively, Q notes that C has whited-out the distinguishing initial and differing home city). Q decides to report the information as presented to him by C, after according B an opportunity to deny the information (which B does). A, the convicted juvenile felon, comes in last, which is probably an appropriate result.\footnote{Criminality, however dated, is per se relevant to fitness for public office. See discussion supra Part I.B.} B spirals downward into a distant second. C wins. Whether Q thought C was acting in inadvertent error or knew C had manufactured a lie, Q knew what C provided and Q’s employer accurately reported was false. Q knew that the report would have a devastating impact on B’s candidacy and resuscitate C’s. This is where equating truth with accuracy leaves us, all in the name of a “public forum” for the “exchange of views.” This is the result when the Jabberwock cavalierly equates or conflates apples and oranges—or should I say apples and elephants.

Is this perhaps too harsh? After all, the Court has repeatedly reaffirmed\footnote{Cohen v. Cowles Media Co., 501 U.S. 663, 668-72 (1991) (calling the rule “unexceptionable” but not binding in cases of “generally applicable laws” involving illegally acquired information); Butterworth v. Smith, 494 U.S. 624, 632 (1989); Fla. Star v. B.J.F., 491 U.S. 533, 541 (1989); see also Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001); id. at 545-48 (Rehnquist, C.J., with Scalia, J., and Thomas, J., dissenting, but finding the precedent inapposite).} the Smith v. Daily Mail “rule”\footnote{Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 103 (1979) (synthesizing its cases in what was clearly dicta, the Court said: “[A]ll suggest strongly that if a newspaper lawfully obtains truthful information about a matter at public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”) (emphasis added).} and indicated that publication of truth can rarely, if ever, be punished under the First Amendment.\footnote{Bartnicki, 532 U.S. at 527; Daily Mail, 443 U.S. at 102.} But that simply resurrects the issue dealt with in detail above: what is meant by “truth”? The Court itself is largely to
blame for this intellectual snafu, having used *truth* (substratal) and *accuracy* (facial) interchangeably and indiscriminately. However, an analysis of the Court’s opinions suggests they fall into two discrete lines: those involving clearly true speech, where the plaintiff was challenging the defendant’s right to publish embarrassing true matter and those where the matter may well have been false, but the Court conflated publication of truth with accurate reportage.

418. See supra text accompanying notes 189-194, 222-223; infra text accompanying notes 430, 444. For an example of a noted media lawyer who participated in several of the truth-equals-accuracy cases, and strongly espouses the conflation of truth and accuracy, see FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT 62-92 (2005).

419. See Cox Broad. Co. v. Cohn, 420 U.S. 469 (1975); supra notes 187-207. See also Bartnicki, 532 U.S. at 518 (privacy was an interest of “highest order”); id. at 532 (“Privacy of communication is an important interest”); id. at 533 (citing “the fear of public disclosure of private conservations” as potentially having “a chilling effect on private speech”); id. at 534 (citing the “public or general interest” exception to common law privacy protection found in the “classic” article, Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 214 (1890)); id. at 539 (Breyer, J., with O’Connor, J., concurring) (citing the “personal privacy” interests protected by statutory civil liability for wiretaps); id. at 537-38 (analogizing privacy in telephone conversations to privacy within the home protected by the trespass to land tort and the publicity given to information theft from a person’s bedroom, citing RESTATEMENT (SECOND) OF TORTS § 652D (1977), and Warren & Brandeis, supra); id. at 539 (referencing RESTATEMENT (SECOND) OF TORTS § 652G (1977), applying common defamation privileges to privacy claims); id. at 539-40 (as vortex public figures, see supra note 228, plaintiffs had “a lesser interest in privacy than an individual engaged in purely private affairs” and citing precedent where the media could be liable in publicizing “truly private matters”); id. at 541 (emphasizing the need to allow legislative bodies to deal creatively with “the challenges future technology may pose to the individual’s interest in basic personal privacy”) (applying libel precedent by analogy); id. at 541-44, 549-53 (Rehnquist C.J., with Scalia, J., and Thomas, J., dissenting) (discussing at length the “significant privacy concerns” raised by a “vast system” of electronic networks and the legislative response as well as the justification for “dry-up-the-market” liability of republishers for matter illegally acquired by third parties, and quoting from privacy precedent, including Warren & Brandeis, supra, in support of the statute’s protection of this “venerable right of privacy”); Cohen, 501 U.S. at 668-72 (the Court analyzed media liability for embarrassing true information—plaintiff as source of information about an opposition party candidate for Lieutenant Governor—in the context of illegal acquisition via breach of a source anonymity agreement). *Fla. Star*, 491 U.S. at 530 (noting the “tension” between the First Amendment and state statutory and common law protection of “personal privacy against the publication of truthful information”); id. at 530 (“state-protected privacy interests”); id. at 533 (quoting Cox Broadcasting’s description of privacy as “plainly rooted in the traditions and significant concerns of our society”); id. at 539 (distinguishing a privacy tort based on the Florida statute from RESTATEMENT (SECOND) OF TORTS § 652D (1977), the latter involving true matter—see supra text accompanying notes 187-189, 193); id. at 542 (Scalia, J., concurring in part and concurring in the judgment) (referencing a probable gap in Florida’s “general privacy law”); id. at 550-53 (White, J., with Rehnquist, C.J., and O’Connor, J., dissenting) (excoriating the Court’s acceptance of the media’s “invitation . . . to obliterate one of the most noteworthy inventions of the 20th century”). See also *Boettger v. Loverro*, 587 A.2d 712, 713-21 (Pa. 1991), on remand after the Supreme Court vacated its earlier decision, 555 A.2d 1234 (Pa. 1989), in light of *Florida Star*, 493 U.S. 885 (1989). *Boettger* involved a transcript of a wiretapped conversation inadvertently included by the prosecutor in an open court file
which a reporter reviewed and later used in a newspaper account. *Id.* at 713-21. Plaintiff brought a claim based on the damage provision in the statute. *Id.* at 714. Clearly, the claim paralleled an intrusion claim, see ELMER, PRIVACY, supra note 65, § 2:17, at 2-160 n.5, § 2:18, at 2-165-2-166, 2-178-2-189, § 2:19, § 3:19, at 3-233 to 3-243, and involved *true* matter—plaintiff’s involvement in illegal gambling on college football games—later published by defendant. Boettiger, 555 A.2d at 713-14. Thus, this case was on all fours with Cox Broadcasting, involving *true* matter in a *public* record and there was no claim to *inaccurate* reportage in either opinion. *Id.* Note that Cox Broadcasting applied the same analysis to both public disclosure of private facts and intrusion claims where the matter was lawfully acquired. See supra note 193.

420. Butterworth v. Smith, 494 U.S. 624, 626 (1989) (the matters the grand juror/reporter wished to write about were alleged improprieties and misconduct within the county attorney’s office and sheriff’s department); Landmark Comms’n, Inc. v. Virginia, 435 U.S. 829, 830-31 (1978) (the criminal sanction involved a newspaper’s “accurate” reportage of a non-final investigation involving a sitting judge); Okla. Pub’g Co. v. District Court, 430 U.S. 309, 310-12 (1977) (the injunction covered use of identifying information about a young boy during a juvenile detention hearing on second-degree murder charges and a picture taken in the hallway outside). Note that the newspaper article at issue in Landmark Communications, which mentioned the judge by name, expressly stated that “[n]o formal complaint” had been issued, “indicating either that the five-man panel found *insufficient* cause for action or that the case is still under review.” Steve Golibert, Hearing Held About Judge, VA. PILOT, Oct. 4, 1975, at B1, B4 (emphasis added). Either alternative should have given a newspaper concerned about liability under Sullivan and St. Amant reason to pause. Note that the state’s interests for a total and indefinite ban in Butterworth were unrelated to protecting the reputation of the exonerated innocent—openness to influence, subornation and retribution, and the fear of a suspect fleeing. Butterworth, 494 U.S. at 630-34. The *Daily Mail* case is itself difficult to characterize. *Daily Mail*, 443 U.S. 97. Although the Court is careful to use terms such as “alleged assailant” in characterizing the defendant identified as charged with the killing, *id.* at 99, the accurately reported charge may well have been *true*, thus making it more like Cox Broadcasting. See supra note 419 and accompanying text. Indeed, the Court noted that plaintiff was identified by “seven different eyewitnesses” and arrested shortly after the incident. *Daily Mail*, 443 U.S. at 99 (emphasis added). Before his arrest the juvenile had made what was tantamount to an admission of guilt in the shooting: during the search, he wrote a message in the snow, “[t]ell Smith [the victim, who had died] I’m sorry.” See ABRAMS, supra note 418, at 81. The Court’s analysis of the state’s “rehabilitation” rationale for juvenile offender anonymity, *Daily Mail*, 443 U.S. at 104, suggests that both the state and the Court treated him as likely, if not indisputably, guilty for the purpose of evaluating this rationale. Justice Rehnquist’s opinion discusses the “rehabilitation” rationale in even greater detail. *Id.* at 107-10 (“[A]nonymity is] designed to protect the young person from the stigma of his misconduct . . . rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State”—“disclosure of the name may seriously impair rehabilitative goals. . . .”). Rehnquist makes repeated reference to the class of “youthful offenders,” while making only a single reference to the “alleged assailant.” *Id.* (emphasis added). In any event, neither the Court nor the concurrence seems to view underlying guilt or innocence as particularly relevant to the anonymity rationale in juvenile offender cases. However, such guilt or innocence is supremely important to defamation litigation. Under classical law a republisher of an allegation is held to the truth of the *underlying* charge. See discussion infra Part VII. Accordingly, if the juvenile was indeed guilty, a First Amendment-mandated truth defense would apply, as reportage would involve a matter of public concern. See supra text accompanying notes 372-374. In fact, under the Court’s jurisprudence plaintiff would have a burden of proving falsity as to the *underlying* charge. See supra text accompanying notes 254-293. If, however, the matter was shown to be false—the juvenile was *not* in fact guilty—defendant’s reportage would
A close analysis of the cases where the Court conflates truth and accuracy provides little support for a conclusion that accurately reported information connotes truth, thereby circumventing Sullivan. The cases are compellingly distinguishable on other, more limited grounds. All emphasized that the Court had narrowly framed and resolved the issue before the Court. All involved the Court’s response to use of extraordinary remedies, criminal sanctions or injunctive relief (and not compensatory damages) to punish the

only be privileged if it fell within the panoply of coverage of fair report. The latter may well not apply under the Daily Mail facts. Daily Mail, 434 U.S. at 99. Defendants heard of the incident by monitoring the police radio frequency and discovered the juvenile’s identity from “simply asking various witnesses, the police, and an assistant prosecuting attorney” at the shooting site. Id. at 99. Clearly, neither the witness’s statements nor the informal unofficial statements of police and a prosecutor were covered by the strong majoritarian view of fair report. See infra Part VII.C. Accordingly, it was in the defendant’s undoubted interest to envelop accurate reportage (if that’s all it was) in the loose mantle of “truth.”

421. Bartnicki, 532 U.S. at 529 (quoting Florida Star); id. at 535-36 (“narrow holding”); Fla. Star, 491 U.S. at 533 (following the tradition of deciding cases as they arose in “a discrete factual context” and concluding that the juxtaposed interests “counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”); Daily Mail, 443 U.S. at 105 (“narrow holding”); Butterworth, 484 U.S. at 637 (Scalia, J., concurring) (“narrow question”); Landmark Commc’ns, 455 U.S. at 897 (“narrow and limited question”).

422. Butterworth, 494 U.S. at 628-36 (agreeing with the Eleventh Circuit that the state’s interests were “not sufficiently compelling” to justify criminal penalties); Daily Mail, 443 U.S. at 101-06 (repeatedly emphasizing that a criminal sanction was being imposed and concluding “[t]he asserted state interest cannot justify the statute’s imposition of criminal sanctions on this type of publication”) (emphasis added); Landmark Commc’ns, 435 U.S. at 830, 836-38, 841, 843 (citing the “question presented” as one involving “criminal sanctions,” repeatedly referring to the latter throughout its opinion, and characterizing the “narrow and limited question” as one of “whether the First Amendment permits the criminal punishment” of strangers to the judicial inquiry who published “truthful information” about the commission’s confidential proceedings) (emphasis added).

423. Daily Mail, 443 U.S. at 101, 103 (distinguishing the case before the Court and terming Oklahoma Publishing a “classic prior restraint case”); Okla. Publ’g, 430 U.S. at 309-12. Daily Mail was resolved on other grounds, see supra note 422, infra notes 424-428, and did not reach the prior restraint issue, which involved a prior approval by the juvenile judge that defendants had ignored. This was the basis of the invalidation of the statute by the state supreme court of appeals. Daily Mail Publ’g Co. v. Smith, 248 S.E.2d 269, 270-72 (W. Va. 1978); see Daily Mail, 443 U.S. at 100-01. The prior restraint issue was one of the “twin arguments” relied on by counsel for Daily Mail. See ABRAMS, supra note 418, at 83-90. Of course, injunctions are subject to the awesome powers of punishment by contempt. See DAN B. DOBBS, 1 REMEDIES: EQUITY, RESTITUTION 6-7, 16-17 (2d ed. 1993) (terming the power of contempt “dangerous but often effective and efficient”).

press under circumstances where less restrictive and intrusive alternatives were widely available and generally followed. These cases all involved huge questions about the efficacy and necessity of the extraordinary measures taken by the governmental actors. In addition, the factual and jurisprudential settings of the cases greatly limit their significance as precedent. Daily Mail and Oklahoma Publishing involved issues of privacy, confidentiality and anonymity in the juvenile justice system where the traditional “benchmark” has been the state’s parens patriae interest in protecting the immature or not fully competent juvenile.

this important retrenchment, citing the “long held” views to contrary. Id. at 676 n.4 (Blackman, J., with Marshall, J., and Souter, J., dissenting).

425. Butterworth, 494 U.S. at 629, 631-32 (noting that forty states and the Federal Rules of Criminal Procedure did not criminalize disclosures of a grand jury witness’s own testimony); Daily Mail, 443 U.S. at 105 (noting that only five of fifty jurisdictions used criminal sanctions to enforce anonymity in juvenile proceedings); Landmark Commc’ns, 435 U.S. at 834, 836-37, 841, 843 (finding that, although confidentiality restrictions existed in forty-seven jurisdictions, criminal sanctions were “not a common characteristic”—only Virginia and Hawaii imposed such.).

426. Butterworth, 494 U.S. at 631-32 (The state “offered little more than assertion and conjecture” regarding the necessity of criminal sanctions) (quoting Landmark Communications, 435 U.S. at 841); Daily Mail, 443 U.S. at 105; Landmark Commc’ns, 435 U.S. at 841 (noting that the commission had “offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined.”); id. at 845 (In replying to the alleged “clear and present danger” to the administration of justice, the Court found the publication in question “falls far short” and that any risk of such could be resolved via more carefully constructed and implemented internal confidentiality procedures). Although the Court did not specifically reach the equal protection issue in Daily Mail, 443 U.S. at 106 n.4, it did conclude that criminal penalties for an asserted juvenile anonymity issue could not be justified where the statutory classification—applicable to newspapers but excluding electronic entities such as the three radio stations who disseminated the information before defendant—failed to accomplish the alleged anonymity interest. Id. at 105. Indeed, a narrow but wholly legitimate reading of Daily Mail’s holding is that the statute failed on First Amendment grounds because it was useless (if not laughable) as a means of implementing the purported anonymity interests. Id. at 110 (Rehnquist, J., concurring) (concluding it was “difficult to take very seriously” the state’s interest in anonymity under such circumstances). Note that a later decision relied on Justice Rehnquist’s reading of Daily Mail in imposing an “evenhandedness” requirement on the legislature as to the mass media and “small time distributor.” Fla. Star, 491 U.S. at 540-41. The latter was one of three defects in the statutory scheme. Id. at 538-41. Justice Scalia found the latter alone sufficient. Id. at 541-42 (Scalia, J., concurring).

427. Daily Mail, 443 U.S. at 102-06 (invoking reportage of the name of a youthful offender without juvenile court permission); Okla. Publ’g Co. v. District Court, 430 U.S. 309 (1977) (invoking detention hearing involving second-degree murder charges against an eleven year-old).

428. Daily Mail, 443 U.S. at 107 (Rehnquist, J., concurring) (stating that the “benchmark” of the juvenile offender system was that it was “conducted outside of the public’s full gaze” from a “tender concern” to protect offenders from the stigmatization of youthful indiscretions). In such situations truth or falsity may be a minor consideration. See supra note 420. See also In Re Gault, 387 U.S. 1, 25 (1967) (finding “no reason why,
Publishing involved information already disclosed to the media in court (and thus public information429), making it a close parallel to fair report, with facial accuracy rather than substratal truth as the sole focus.430 Landmark Communications involved a non-final, confidential judicial inquiry proceeding where the judge’s interest in reputation was inextricably commingled with a state’s policy of protecting judges as a class and the “institutional integrity” 431 of the judiciary as a whole from premature disclosure,432 with largely incidental protection of the particular individual involved. In significant part, this scenario bears a striking resemblance to libel on government, where the Court would likely accord absolute protection for defamation under the First Amendment.433

Most importantly and compellingly, the Court itself has repeatedly juxtaposed and affirmed the continuing viability of Sullivan and Garrison434 while simultaneously applying the Daily

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429. Daily Mail, 443 U.S. at 102 (interpreting Oklahoma Publishing, stating that “once the truthful information was ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination”); Oklahoma Publ’g, 430 U.S. at 310 (the Court found “compelled” the conclusion that the state court could not “prohibit the publication of widely disseminated information obtained at court proceedings in fact open to the public”).

430. See supra text accompanying notes 225-227. Note, however, that the Cox Broadcasting-Oklahoma Publishing protection for judicial proceedings open to journalists was distinguished in Florida Star, where Cox Broadcasting’s emphasis on the “important role the press plays in subjecting trials to public scrutiny” was found not undermined as to information in a police report involving no adversarial criminal process or identifiable suspect. Fla. Star, 491 U.S. at 531-32. See also id. at 544 (White, J., with Rehnquist, C.J., and O’Connor, J., dissenting) (describing these factors as “critical” in Cox Broadcasting). See also Landmark Commcs’n, 435 U.S. at 840 (Cox Broadcasting “explicitly reserved” the issue of “truthful information withheld by law from the public domain”).

431. Landmark Commcs’n, 435 U.S. at 841. Interestingly, the pages cited from Sullivan deal with the Court’s good faith/constitutional malice analysis, not its libel of government analysis. This may reflect the Court’s ambiguity in according absolute protection even in libel of government scenarios. See infra note 532.

432. Landmark Commcs’n, 435 U.S. at 836, 839-41. Until the bona fide claims were segregated from frivolous charges, confidentiality protected judges from injury. Id. The Court noted that the commission had “an interest in protecting the good repute of its judges, like that of all other public officials.” Id. (emphases added).

433. See supra note 43. But see Justice Blackmun’s support for neutral reportage in dicta discussed supra in text accompanying notes 356-359.

434. Bartnicki v. Vopper, 532 U.S. 514, 525 n.8, 534-35 (2001); Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (In discussing the First Amendment issues posed by a promissory estoppel claim, the Court noted plaintiff was not trying to circumvent the “strict requirements” of a defamation claim); id. at 676 n.4 (Blackmun, J., with Marshall, J., and Souter, J., dissenting) (citing the Sullivan-Gertz line of libel cases for the
Mail principle. For example, in *Landmark Communications*, the Court found mere injury to reputation “insufficient reason for repressing speech that would otherwise be free” under *Sullivan* and *Garrison*.435 Most recently, in *Bartnicki*, the Court unequivocally validated *Sullivan*’s “profound national commitment” to freedom of expression in distinguishing passive receipt of and later publication by strangers of true information legally acquired by a source.436 The Court cited as “parallel reasoning” its *Sullivan* libel jurisprudence,437 which had rejected the argument that factual error or defamatory content, or a combination of the two, “sufficed to remove the First Amendment shield from criticism of official conduct.”438

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435. *Landmark Commc’ns*, 435 U.S. at 841-42. See also Butterworth v. Smith, 494 U.S. 624, 634 (1990) (“[A]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech”). Indeed, in *Butterworth*, the court acknowledged that protecting the exonerated accused from public disparagement was a "substantial state interest" and the ban on grand jury witness testimony disclosure implemented this interest to “some extent.” *Id.* at 634. However, the Court also concluded the ban had a contrary impact as to a witness/target desirous of disseminating the fact of his or her exoneration. *Id.* In other words, at least some of the speech frustrated by the total and indefinite ban on a witness recounting her or his testimony was reputation-absolving true speech.


437. *Id.*

438. *Id.* at 535.
Although the Court seems at times semantically confused, Sullivan and its progeny cannot be viewed as having been implicitly disavowed by the “somewhat uncharted” precedent constituting the nebulous Daily Mail doctrine. Sullivan jurisprudence is modernly described as a set of “well-mapped,” “relatively detailed legal standards” in cases of “defamatory falsehood” filed by “individuals aggrieved by damaging untruths.” When read together, these two
lines of precedent cannot be viewed as supporting absolute protection for any and all information about public affairs that media defendants decide to accurately report, even if the information is known or suspected to be false. This suggestion would entail ignoring the Court’s repeated affirmation of *Sullivan* in these cases and its unequivocal adoption of the “historical understanding” of truth. Further, it would impute to the Court a type of jurisprudential schizophrenia: with calculated falsehood enveloped in the subterfuge of accuracy-pseudo-truth backdoored as the absolute protection the Court has uniformly disavowed through the front door. This is a tough position for the media and its allies to propose and defend. Doubtless, it is an argument they will make with considerable vigor and aplomb.

II. THE SUPREME COURT AND CALCULATED FALSEHOOD: AN UNEQUIVOCAL REJECTION OF MEDIA ABSOLUTISM

In *New York Times v. Sullivan*, and for a decade afterwards, a vociferous minority of the Court espoused absolute immunity for false defamatory expression and disparaged the qualified privilege adopted in public person-public import cases as largely illusory protection insufficient to protect against the

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443. See supra text accompanying notes 434-442.
444. See supra text accompanying notes 329-333.
446. Justice Douglas’s opinion in *Cox Broadcasting* was the last. See infra note 447. But see supra text accompanying notes 356-359 (discussing Justice Blackmun’s dicta support for neutral reportage).
448. *Sullivan*, 376 U.S. at 293 (Black, J., with Douglas, J., concurring) (calling such privilege “an elusive, abstract concept, hard to prove and hard to disprove . . . at best an evanescent protection”).
powerful inducement to self-censorship that *Sullivan*’s limited privilege supplied. However, that view never commanded more than three votes and has not been anointed by a single member of the Court in over three decades.\(^{449}\) Even Justice Brennan, the most consistent media-protective non-absolutist, viewed the *Sullivan* standard as “exceedingly generous.”\(^{450}\) The Court has generally viewed this standard as an “extremely powerful antidote” to self-censorship\(^{451}\) that is “widely perceived as essentially protective of press freedoms.”\(^{452}\)

Further, the Court has repeatedly reiterated this standard as the appropriate level of First Amendment protection in public person cases.\(^{453}\) Indeed, the Court has repeatedly affirmed that any proponent of an expanded sphere of application of *Sullivan*,\(^{454}\) or an

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\(^{449}\) See supra notes 446-447 and accompanying text. The last two absolutists, Justices Black and Douglas, retired from the Court on September 17, 1971, and November 12, 1975, respectively. KERMIT L. HALL, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1133 (2005). Justice Blackmun, who supported a broad version of neutral reportage in dicta, see supra text accompanying notes 356-359, finished his term August 3, 1994. HALL, supra at 1134.


\(^{451}\) Gertz, 418 U.S. at 342. Note that it is widely agreed that objectively viewed, “[i]n the aggregate . . . libel is not a significant financial burden on media.” MARC FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS (7th ed. 2005) (noting that the total of final libel judgment for a twenty-four year period, 1980-2003, was 0.0004 percent of combined media revenues of a single year ($200 billion) in fiscal year 2001 and that insurance is readily available and cheap compared to other types of insurance).

\(^{452}\) Herbert, 441 U.S. at 169.


\(^{454}\) Firestone, 424 U.S. at 456-57 (“Presumptively erecting the [Sullivan] barrier” as to all plaintiffs defamed in reporting legal proceedings would result in “substantial depreciation of the individual’s interest in protecting (the individual’s reputation from) harm, without any convincing assurance that such a sacrifice is required under the First Amendment”) (emphases added); Gertz, 418 U.S. at 341 (the Court indicated that it “would not lightly require the State to abandon this purpose,” “the ‘legitimate interest’ in compensating for defamation” (emphasis added); id. at 352 (the Court would not “lightly
enhanced burden in fulfilling its stringent standards,\textsuperscript{455} has a heavy
burden of justification.\textsuperscript{456}

The Court has acknowledged that the \textit{Sullivan} standard is
“exceedingly difficult”\textsuperscript{457} to meet and often requires long and expensive
litigation.\textsuperscript{458} As a corollary, the Court has anticipated that in the end
many deserving plaintiffs will fall\textsuperscript{459} before the negligence-is-never-

assumed” plaintiff’s professional and civic affairs made him an “all purpose[ ] public figure:
“\textit{Absent clear evidence of general fame or notoriety in the community, and pervasive
involvement in the affairs of society, an individual should not be deemed a public
personality for all aspects of his life.”\textsuperscript{457}(emphases added).

\begin{footnotesize}
\textsuperscript{455}. \textit{Herbert}, 441 U.S. at 165-76. In rejecting First Amendment-based limitations on
discovery inquiries into the editorial process, the Court concluded that the argument for
putting areas of direct evidence beyond the discovery of a public person trying to meet the
critical element of reckless disregard of falsity was “by no means clear and convincing, and
we decline to accept it.” \textit{Id.} at 169-70 (emphasis added). For further analysis of \textit{Herbert}, see \textit{infra}
text accompanying notes 485-493.

\textsuperscript{456}. See supra notes 454, 455. See also James E. Stewart & Laurie J. Michelson,
\textit{Reining in the Neutral Reportage Privilege}, 17 COMM. L. 13 (1999). See also David A. Elder,
Neville L. Johnson, \& Brian A. Rischwain, \textit{Establishing Constitutional Malice For
Defamation and Privacy/False Light Claims When Hidden Cameras and Deception Are
Elder, Johnson \& Rischwain]. See also the Court’s eloquent defense of its extensive
panoply of protections for the First Amendment’s “vital guarantee of free and uninhibited
discussion of public issues,” where it rejected an “opinion”/“fact” dichotomy in “holding the
balance true” between expression and reputation: “\textit{We are not persuaded that . . . an
additional separate constitutional privilege for ‘opinion’ is required . . .}” \textit{Milkovich}, 497 U.S.
at 21-23 (emphasis added). The Court expressly held that “the ‘breathing space’ which
‘[f]reedoms of expression require in order to survive’ is adequately secured by existing
constitutional doctrine without the creation of [this] artificial dichotomy . . .” \textit{Id.} at 19
(emphases added) (citations omitted). This express rejection the year following Judge
Blackmun’s proffer of neutral reportage, see supra text accompanying notes 356-359, may
be a telling contraindication as to the Court’s posture on neutral reportage.

\textsuperscript{457}. \textit{Herbert}, 441 U.S. at 192 (calling the \textit{Sullivan} standards “exceedingly
generous”); \textit{id.} at 157-58 (“already heavy burden of proof”); \textit{id.} at 169 (the \textit{Sullivan}
standard was “widely perceived as essentially protective of press freedoms”).

\textsuperscript{458}. \textit{Id.} at 157-58, 176 (the Court conceded the unsurprising use of enhanced
discovery in light of a libel plaintiff’s burdens and the fact that litigation and other costs
“would escalate and become much more troublesome for” both sides); \textit{id.} at 204-05
(Marshall, J., dissenting) (noting “many self-perceived victims . . . are animated by
something more than a rational calculus of their chances of recovery”); Elder, Johnson \&
Rischwain, supra note 456, at 363 (“As any libel plaintiff or lawyer knows, media lawyers
engage in Shermanesque attrition tactics that make the march across Georgia look like
kindergarten play banter. Cases are rarely settled and are invariably appealed to the court
of last resort and tactical maneuvers are used to financially, emotionally and
psychologically exhaust the plaintiff and plaintiff’s counsel—all under the purported
panoply of the First Amendment”).

\textsuperscript{459}. \textit{Gertz}, 418 U.S. at 342-43 (“Plainly, many deserving plaintiffs, including some
intentionally subjected to injury will be unable to surmount the barrier of the \textit{[Sullivan]}
test”). See also \textit{Laurence H. Eldredge, THE LAW OF DEFAMATION 7-8} (1978) (noting that
it is a “rare case, indeed, in which an unjustly and cruelly defamed public official” could
meet \textit{Sullivan}); \textit{Russell L. Weaver et al., THE RIGHT TO SPEAK ILL: DEFAMATION,
REPUTATION, AND FREE SPEECH} (2006) (\textit{Sullivan} has “effectively ended” civil defamation
enough barrier despite having suffered deliberate and incalculable harm to their personal and professional reputations. This is the “correspondingly high price” of Sullivan. But, the Court has also reaffirmed “society’s ‘pervasive strong interest’” in redressing reputational injury as reflecting the “basic concept of the essential litigation by public officials); id. at 188 (based on extensive interviews, the authors concluded that defamation liability’s impact on reporting was “minimal”); id. at 195 (potential liability “rarely inhibits” media reportage); id. at 199-200, 251 (unlike in England and Australia, the authors noted that a defamation plaintiff’s bar is absent in America—the media defamation specialists largely represent media entities); id. at 246 (Sullivan has “changed the culture” of defamation suits and “effectively stifled” such by public persons and most private persons, providing “little protection for reputation” and “a remarkable platform” for freedom of expression); id. at 250 (Sullivan “appears to significantly deter almost all defamation litigation”); Anderson, supra note 143, at 488 (Sullivan and its progeny make the libel remedy “largely illusory” with “the likelihood of success . . . miniscule”); id. at 525-26 (the constitutional malice rule “leaves vast numbers of people—perhaps most of the victims of media defamation—with no legal remedy for damage to reputation”—the author noted “no major legal system in the world provides as little protection for reputation as the United States now provides”) (emphasis added); id. at 545 (“(M)edia defendants, as a class, have the means and the incentive to spend what it takes to make sure libel does not become an effective remedy”); Gerald G. Ashdown, Journalism Police, 89 Marq. L. Rev. 739, 750-51 (2006) (noting that Sullivan and its progeny have “effectively eliminated” defamation and privacy liability as a form of media control by the “virtual impossibility” of a plaintiff recovery); David A. Logan, Libel Law in the Trenches: Reflections on Current Data on Libel Litigation, 87 Va. L. Rev. 503, 519-20 (2001) (under Sullivan and Gertz the media has “something approaching an absolute privilege to defame; a reasonable publisher should worry about having to pay substantial libel damages as much as she worries about being struck by lightning”).

The Court has repeatedly reaffirmed that mere negligence is never enough in publishing defamatory falsity under Sullivan. Masson v. New Yorker Magazine, 501 U.S. 496, 510 (1990); Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 658, 692 (1989) (“[F]ailure to investigate before publishing, even where a reasonably prudent person would have done so, is not sufficient to establish reckless disregard”); id. at 665-68 (however, the Court noted that evidence of motive and “departure from accepted standards” were probative evidence on the constitutional malice issue); Gertz, 418 U.S. at 342-52; Time Inc. v. Pape, 401 U.S. 279, 291 (1971) (Sullivan “added to the tort law of the individual states a constitutional zone of protection for errors of fact caused by negligence”); Time, Inc. v. Hill, 385 U.S. 374, 394-96 (1967); St. Amant v. Thompson, 390 U.S. 727, 731-33 (1968); Rosenblatt v. Baer, 383 U.S. 75, 83-84 (1966); Garrison v. Louisiana, 379 U.S. 64, 79 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Note that one member of the Court, Justice Scalia, opined in a recent off-the-record interview that Sullivan was wrongfully decided and was quoted as saying “(t)he press is the only business that is not held responsible for its negligence.” John W. Dean, Justice Scalia’s Thoughts, And A Few Of My Own on New York Times v. Sullivan, FindLaw, Dec. 2, 2005, http://writ.news.findlaw.com/dean/20051202.html.

Of course, this demanding standard “obviously deters participation in public life.” Anderson, supra note 143, at 531-33.

Of course, this demanding standard “obviously deters participation in public life.” Anderson, supra note 143, at 531-33.
dignity and worth"464 of all persons. In addition, the Court has repeatedly affirmed the vindicatory,465 compensatory,466 and deterrent467 functions of compensatory damages even in public person cases, while acknowledging the inadequacy of counter-speech to redress reputational damage.468

In sum, the Court has unequivocally declined to accord media (and other) defendants an “unconditional and indefeasible immunity,” as this would necessitate a “total sacrifice”469 of the countervailing values underlying the common law of defamation. In addition, the Court has specifically recognized the authority of the states to mitigate the “pollut[ing]” of public discourse through speech that qualifies as calculated falsehood under Sullivan and Garrison470 while constitutional system”); id. at 92 (Stewart, J., concurring). See also Herbert v. Lando, 441 U.S. 153, 169 (1979) (“basic concern”). In Time, Inc. v. Firestone, 424 U.S. 448, 466 (1976), the Court took great pains to equate reputation and an uninhibited media as “equally compelling need[s].” See also Phila. Newspapers, Inc., 475 U.S. at 773-74; id. at 784-85 (Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., dissenting).

464. Rosenblatt, 383 U.S. at 92 (Stewart, J., concurring opinion). This language has been quoted regularly by the Court. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990); Gertz, 418 U.S. at 341-42. See also Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966) (“[A] State’s concern with redressing malicious libel is so deeply rooted in local feeling and responsibility” as to be outside the preemption of federal labor law in cases of “malicious libel”).


466. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 515-16 (1991); Milkovich, 497 U.S. at 22-23; Calder v. Jones, 465 U.S. 783, 786-90 (1984) (the Court approved long-arm jurisdiction under the Due Process Clause bringing into California the writer and editor of a national publication having a “potentially devastating impact” on plaintiff/actress in her home state); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 780 (1984) (the Court noted the state’s “significant interest” in redressing intrastate injuries in rejecting a Due Process Clause challenge to long-arm jurisdiction asserted in the case of a forum-shopping nonresident public figure plaintiff asserting otherwise time-barred damages under the “single publication” rule and New Hampshire’s exceptionally long statute of limitation); Gertz, 418 U.S. at 341; Herbert, 441 U.S. at 172; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 64 (1971) (Harlan, J., dissenting); Rosenblatt, 383 U.S. at 93 (Stewart, J., concurring); Linn, 383 U.S. at 63-64.

467. Keeton, 465 U.S. at 776-77; Herbert, 441 U.S. at 171-76. The Court has noted that the absence of a remedy to redress false libels “creates disrespect for the law” and “encourages the victim to take matters into his own hands.” Linn, 383 U.S. at 63-64 n.6. See also Rosenblatt, 383 U.S. at 93 n.4 (Stewart, J., concurring) (noting defamation arose as a substitute for self-help through murder and duels).

468. Gertz, 418 U.S. at 344 n.9 (in discussing its rationale for distinguishing public and private persons, the Court noted that the insufficiency of rebuttal to repair the damage did not render rebuttal irrelevant).

469. Id. at 341.

470. Dun & Bradstreet, 472 U.S. at 769 (White, J., concurring in judgment).
simultaneously providing “strategic protection” under the First Amendment for negligently disseminated falsity about public persons related to public issues.⁴⁷¹ In other words, this valid state interest in sanctioning and deterring pollution of public discourse⁴⁷² justifies using state defamation law as a legitimate, prophylactic public policy tool to protect the citizenry from deliberate falsehood and deception.⁴⁷³ As the Court has suggested, the American experience with McCarthyism in the 1950’s indicates that “the poisonous atmosphere of the easy lie can infect and degrade a whole society.”⁴⁷⁴

The Court provided a compelling and eloquent defense of a state’s authority to sanction this pollution of public discourse in Garrison v. Louisiana.⁴⁷⁵ In that case, the Court extended Sullivan protection to a public official who was charged and convicted of defaming other public officials.⁴⁷⁶ Although a good faith statement, even if false, might enhance freedom of expression,⁴⁷⁷ no protection was intended by the Founders or is currently needed for “the lie,

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⁴⁷¹ Id.
⁴⁷² Keeton, 465 U.S. at 776-77 n.6 (citing the criminal defamation statute).
⁴⁷³ Id. See also Illinois v. Telemarketing Ass’n, 538 U.S. 600, 612 (2003) (the Court unanimously upheld the right of the state to go after knowing affirmative misrepresentations in fund-raising, broadly stating that “the First Amendment does not shield fraud”—the Court relied in substantial part on its libel jurisprudence); Curtis Pub’l v. Butts, 388 U.S. 130, 150 (1967) (the opinion rejected absolute immunity for free expression and noted that newspapers had “no special immunity from the application of general laws. . . . Federal Securities regulation, mail fraud statutes, and common law actions for deceit and misrepresentation are only some examples” of those laws) (citations omitted). See also the Federal Communications Commission’s “news distortion” policy, where intentional distortion can affect licensure. Serafyn v. F.C.C., 149 F.3d 1213, 1223-24 (D.C. Cir. 1998) (the F.C.C. erred in not setting a new station license for a hearing where extrinsic evidence was produced of applicant’s intent to distort in a program on the modern Ukraine; the court cited as an example the applicant’s deliberate translation substitution of “Kike” for “Jew” as an example of an “obvious and egregious” inaccuracy which gave rise to an inference of intent to distort). A Florida court found the “news distortion” policy, which had been adopted through the adjudicative process, not to be a “law” for purposes of suit under a whistleblower statute. New World Communications of Tampa v. Akre, 866 So.2d 1231, 1233-34 (Fla. Dist. Ct. App. 2003).
⁴⁷⁵ 379 U.S. 64 (1964).
⁴⁷⁶ Id. at 74-79. The Sullivan standard applied “with no less force merely because the remedy is criminal.” Id. at 74-75. The public officials maligned were the entire criminal bench of the district court of a particular parish. For a detailed analysis of this case, which involved a collectively disparaged group under the “small group” defamation rule, see Elder, Small Town, supra note 43, at 892-90, 906, 932.
⁴⁷⁷ Garrison, 379 U.S. at 73.
knowingly and deliberately published about a public official.” 478 Then, as now, some people are “unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration.” 479

Accordingly, use of the lie for political purposes does not require constitutional protection, for “the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected.” 480 In Garrison, the Court boldly held that such “[c]alculated falsehood,” a knowingly or recklessly false statement, “do[es] not enjoy constitutional protection.” 481 In fact, the Court has repeatedly

478. Id. at 75. The Court emphasized that the First Amendment’s “great principles” “preclude attaching adverse consequences to any except the knowing or reckless falsehood.” Id. at 73 (emphasis added). However, falsity plus “intent merely to inflict harm” “did not suffice.” Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.” Id. (emphasis added). Under the deficient rule in Louisiana, allowing liability for “intent merely to inflict harm,” “it becomes a hazardous matter to speak out against a popular politician, with the result that the honest and incompetent will be shielded.” Id. at 73-74 (quoting Dix W. Noel, Defamation of Public Officers and Candidates, 49 COLUM. L. REV. 875, 893 (1949)). Indeed, absence of such motivation would be impossible to disprove. Id. at 74.

479. Id. at 74. The Court cited David Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 COLUM. L. REV. 1085, 1088-1111 (1942). In analyzing German libel law during the Nazi period, Professor Riesman said:

Thus defamation, like political assassination, served both to remove from the arena certain key enemies and to plunge the country into turmoil, and in the judicial sequel to demonstrate the power and justice of the rightist cause and the weakness of the Republic. For if one can, with impunity and even with the blessing of the courts, call the authorities names and defame them, one removes whatever magic they possess as authorities . . . abuse of officials who are selected by the democratic process can easily serve anti-democratic ends.

Id. at 1098-99.

480. Garrison, 379 U.S. at 75. This and the other language in the text or parts thereof are oft-quoted. Hart-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 687, n.34 (1991); McDonald v. Smith, 472 U.S. 479, 487 (1985) (Brennan, J., with Marshall, J., and Blackmun, J., concurring); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (Harlan, J.); Linn v. Plant Guard Workers, 383 U.S. 53, 66-67 (1966) (the Court found that the “known lie” could result in an actionable libel by an injured person consistent with national labor policy; the Court noted that this was a remedy separate from and not inconsistent with the NLRB's right to set aside elections tainted by such lies as unfair labor practices). See also Turner v. KTRK Television, Inc., 38 S.W.3d 103, 137 (Tex. 2000) (“[A] calculated falsehood, inserted into the midst of a heated political campaign, can unalterably distort the process of self-determination.”) (Baker, J., with Enoch, J., and Hankinson, J., concurring in part and dissenting in part). See also the discussion in the leading New York case rejecting neutral reportage, infra text accompanying note 1002. See also the Court’s use of the Sullivan standard in analyzing intervention in tainted elections, infra note 496.

481. Garrison, 379 U.S. at 75. See also Curtis Publ'y, 388 U.S. at 170 (Warren, C.J., concurring in the result) (applying Sullivan and Garrison, the Chief Justice said: “Freedom
affirmed the viability of state criminal defamation law. The Court has likewise repeatedly sanctioned the awarding of punitive damages in public concern cases if the Sullivan standard is met.

In Herbert v. Lando, the Court took significant measures to ameliorate a public person's burden under Sullivan. The Court granted discovery access to the evidentiary means needed to redress damaged reputation in a case involving the defendant's devastating portrayal of a military officer's "whistle blowing" charges about war crimes and senior officer cover-up. Not a single member of the Court supported the defendant's claim of absolute immunity from all of the press under the First Amendment does not include absolute license to destroy lives or careers") (emphasis added); Linn, 383 U.S. at 63 (applying Sullivan by analogy in the labor law context, the Court concluded "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context.") (emphasis added). A rarely admitted corollary of the media's non-liability for "calculated falsehood" is that media credibility and the public's willingness to credit what they say take major hits any time a media defendant wins under the constitutional malice standard. As one noted scholar sympathetic to media concerns has said, "[s]uch a win may not strike the public as a 'fair' win on the merits." Anderson, supra note 143, at 548. This is, of course, the typical situation, where a jury is trying to decide whether the media defendant is "a liar or merely incompetent." Id. at 523. See supra text accompanying notes 457-459. A victory under such circumstances is truly Pyrrhic.


484. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 n.8 (1990); Harte-Hanks Comm'n's, Inc. v. Connaughton, 491 U.S. 657, 661-62, 685-90 (1989) (upholding an award of $200,000, $195,000 of which was punitive damages); Herbert, 441 U.S. at 161-62 n.7, 168; Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974) (the Court authorized punitive damages, noting that they are "private fines levied . . . to punish reprehensible conduct and to deter its future occurrence"); id. at 354 (Blackmun, J., concurring); id. at 366 (Brennan, J., dissenting); id. at 370, 376, 395-98 (White, J., dissenting) (see supra text accompanying note 169); Rosenbloom, 403 U.S. at 73-77 (Harlan, J., dissenting); Curtis Publ'g, 388 U.S. at 138, 156-61 (Harlan, J.); id. at 165-70 (Warren, C.J., concurring in the result) (five members of the Court upheld an award for Butts for $460,000, $400,000 of which was punitive). Punitive damages are also available under federal labor law where Sullivan applies. Linn, 383 U.S. 53, 66 (1966); id at 69-70 (Fortas, J., with Warren, C.J., and Douglas, J., dissenting).


486. Id.

487. Id.
In reversing the Second Circuit, the Court rejected any First Amendment basis for barring inquiry into the editorial process by a plaintiff seeking to discover evidence of reckless disregard of falsity, “a critical element” of a public plaintiff’s burden of proof. If the resulting information led to compensatory damages and deterred defendants from publishing false and defamatory matter, “no undue self-censorship” resulted. These burdens could only be eliminated by absolute immunity, a proposition the Court had “regularly found to be an untenable constriction” of the First Amendment.

A trio of the Court’s cases have involved candidates for public office, a setting that justifies “the fullest and most urgent application”

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488. Some Court members would have imposed modest limitations. Id. at 180 (Powell, J., concurring) (the First Amendment did not require a “constitutional privilege” but must be “weighed carefully.”); id. at 181, 197-99 (Brennan, J., dissenting in part) (the First Amendment required that plaintiff demonstrate a prima facie case of “defamatory falsehood” before discovery could be had as to “predecisional communications among editors”); id. at 206, 209 (Marshall J., dissenting) (Justice Marshall would have mandated that courts “superintend pretrial disclosure . . . so as to protect the press from unnecessarily protracted or tangential inquiry” and would have “foreclose[d]” discovery as to “the substance of editorial conversation”). Only Justice Stewart came close to an editorial privilege, terming the “gravamen” of a Sullivan-based lawsuit “that which was in fact published”—“[w]hat was not published has nothing to do with the case.” Id. at 200 (Stewart, J., dissenting). That is, of course, ridiculous, as the Court demonstrated by its example of the two contradictory accounts, with defendant deciding to publish only the defamatory one. This decision was relevant to constitutional malice and discoverable in proving it. Id. at 173. Justice Stewart seemed more concerned about discovery of “motivation” evidence, which he deemed totally irrelevant. Id. at 200-02. He would have remanded for the trial court to analyze “strictly” the questions against the standards of the Court’s Sullivan jurisprudence. Id. at 202 (Stewart, J., dissenting).

489. Herbert v. Lando, 568 F.2d 974 (2nd Cir. 1977). The Court reversed Chief Judge Kaufman’s opinion slightly a year after his opinion in Edwards.

490. Id. at 160, 169-70.

491. Id. at 173 (“Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which [defendants] do not suggest, constitutional values will not be threatened.”) (emphasis added).

492. Id. at 169, 171-73; id. at 191-92 (Brennan, J., dissenting in part). The Court’s opinion reflected the views of Judge Meskill, the dissenter below, who opined that the discovery of information to meet Sullivan’s heightened standards was intended to deter and chill lies—the majority’s attempt to forestall that was “supportable in neither precedent nor logic.” Herbert v. Lando, 568 F.2d 974, 996-97 (2d Cir. 1977) (Meskill, J., dissenting). He rejected any suggestion the press as an institution was in a “preferred position” vis-à-vis the right of the individual to freedom of speech. Id at 997. He cited Saxbe v. Washington Post Co., 417 U.S. 843 (1974), where the Court had rejected special prison access rights to the media denied the general public. Herbert, 568 F.2d at 997. See also Pell v. Procunier, 417 U.S. 817 (1974).

493. Herbert, 443 U.S. at 176.
Yet, the Court has consistently extended only the Sullivan level of protection while adopting an extremely broad standard of what is relevant to fitness for public office. Interestingly, all three of these cases involved republications of information from third party sources. The first, *Monitor Patriot v. Roy*, addressed the liability of a newspaper alliance redistributor

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495. "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." *Id.* at 275. The Court left open the issue whether there might be "some exiguous area of defamation" to which the First Amendment would not apply. *Id.* at 276. The Court held that a thirty-seven year-old allegation of criminality during Prohibition was relevant to fitness. *Id.* at 268. Indeed, criminality in general could never be irrelevant. The Court extended the latter to a charge that a mayor/candidate for tax assessor had been indicted for perjury during civil rights litigation. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971). The Court built on its criminal defamation decision in *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964) (the Court included within Sullivan's coverage "anything which might touch on an official's fitness for office" even if also impacting private character).

496. 401 U.S. 265 (1971). Plaintiff was a primary candidate for U.S. Senator. *Id.* at 266. The *Monitor Patriot/Sullivan* line of cases was applied in a state overturning of a local election context in *Brown v. Hartlage*, 456 U.S. 45 (1982). Recognizing the "special vitality" of free expression in campaigns, "the heart of American constitutional democracy," the Court found that the factual error at issue—a candidate's (later withdrawn) promise to reduce his salary, which violated state law—failed to meet the compelling state interest test, *id.* at 53-55, for curtailing free expression. Although noting that the state's interest in protecting against distortions in the electoral process was "somewhat different," First Amendment principles "remain[ed] paramount." *Id.* at 61. The Court suggested that a candidate's blunder would probably receive a corrective from his opponent and the candidate (who had retracted the offer) had acted in good faith, *not* with constitutional malice as defined in *Sullivan Id.* Clearly, the implication was the Court would likely have upheld the overturning of the election had such "calculated falsehood" been shown. Assume the following scenario. An incumbent candidate of responsible reputation shortly before a tightly fought election offers a media defendant supporting his reelection a devastating charge against his fast-closing opponents—*e.g.*, that a charge had been made to the police (during a contested custody battle) fifteen years ago that his opponent had molested his daughter but that the police had investigated and found the charges unsubstantiated. The newspaper has no time to investigate, as the election is the day following the next edition. The editor tries in vain to contact the candidate, who is on the campaign trail. The newspaper accurately prints but does not endorse the charge, notes that it came from the opposition's campaign and that the accused could not be reached for comment despite its good faith efforts. The charges cause the wrongly accused opponent to drop several points in the polls overnight. He loses the election. He then does two things. He seeks to overturn the election and seeks to sue both his opponent and the newspaper for libel. What result? If the court were to adopt neutral reportage, plaintiff would be remediless against the media defendant. *See infra* text accompanying notes 655-658. This seems absurd. Luckily for plaintiff, the Pennsylvania Supreme Court provided a knock-out blow to such a result in *Norton v. Glenn*. *See infra* Part III. What about the election? Note that the Kentucky statute at issue in *Brown* allows for the voiding of an election where a violation has occurred by the contestee "or by others in his behalf with his knowledge." *Brown*, 456 U.S. at 49-50, n.4, (quoting KY. REV. STAT. ANN. § 120.015 (West 2004)). For a provocative analysis of *Brown v. Hartlage*, viewed in light of Sullivan-Garrison, see
and a daily newspaper publisher.\textsuperscript{497} A companion case, \textit{Ocala Star-Banner v. Damron}, involved a misidentification/abuse of fair report of a charge against the plaintiff’s brother.\textsuperscript{498} The third case, \textit{Harte-Hanks Communications v. Connaughton},\textsuperscript{499} analyzed a newspaper’s accurate publication,\textsuperscript{500} together with plaintiff’s contradictory version, of charges from a grand jury witness/suspect source.\textsuperscript{501} Although acknowledging that “[v]igorous reportage” of campaigns is required for “optimal functioning of democratic institutions and central to our history of individual liberty,”\textsuperscript{502} the Court specifically reaffirmed liability for calculated falsehood.\textsuperscript{503} The Court quoted at length from \textit{Garrison}\textsuperscript{504} and denied absolute immunity to media treatment of public figures or campaigns.\textsuperscript{505} Explicitly reaffirming republisher liability, the Court found that in “reporting . . . a third party’s allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”\textsuperscript{506}

Undoubtedly, one of the most difficult hurdles for neutral reportage enthusiasts is the Court’s libel Petition Clause case, \textit{McDonald v. Smith}.	extsuperscript{507} This case involved a defamation suit by a U.S. Attorney candidate based on a letter of opposition sent to President

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\textsuperscript{497}. The column was Drew Pearson’s “Merry-Go-Round.” \textit{Monitor Patriot}, 401 U.S. at 266-67 n.1. \textit{See also} Roy v. Monitor Patriot Co., 254 A.2d 832, 833 (N.H. 1969). The newspaper alliance distributed the column under contract with Pearson. \textit{Id}.

\textsuperscript{498}. \textit{401 U.S.} 295 (1971); \textit{see also supra} text accompanying notes 108-112.

\textsuperscript{499}. 491 U.S. 657 (1989).

\textsuperscript{500}. \textit{Id}. at 680-81. The district court had rejected neutral reportage because of the absence of a “responsible, prominent” source. \textit{Id}. at 660-61, n.1. The petitioner had not argued the issue in its writ nor argued it in oral argument. The Court did not review this issue. \textit{Id}. Justice Blackmun, concurring, thought that this “strategic decision appears to have been unwise.” \textit{Id}. at 694-95 (Blackmun, J., concurring) (dicta). \textit{See supra} text accompanying notes 352-360.

\textsuperscript{501}. \textit{Harte-Hanks Comme’ns}, 491 U.S. at 660, 668-93.

\textsuperscript{502}. \textit{Id}. at 687.

\textsuperscript{503}. \textit{Id}. at 687 n. 34, 688-93.

\textsuperscript{504}. \textit{Id}. at 687 n. 34.

\textsuperscript{505}. \textit{Id}. at 688.

\textsuperscript{506}. \textit{Id}. (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).

\textsuperscript{507}. 472 U.S. 479 (1985).
Reagan and a host of high ranking federal officials. Although it has been argued that the right to petition is preferred and necessary among First Amendment freedoms, all Court members participating rejected this position. The Court found the right to petition to be “an important aspect of self-government” but “cut from the same cloth” as other First Amendment guarantees and inspired by the “same ideals of liberty and democracy.” As the Court powerfully concluded, “[t]he right to petition is guaranteed; the right to commit libel with impunity is not.”

In *McDonald*, even the Court’s most stalwart free expression defenders rejected any suggestion that the First Amendment absolutely protects all defamatory statements made about public officials or candidates for appointed public office. They, like the Court, rejected the argument that the right to petition was “functionally different from and . . . entitled to greater protection” than speech or press criticism. The guarantees in the First Amendment were all “interrelated components of the public’s exercise of its sovereign authority.” In fact, there was an “essential unity” between the ad in *Sullivan* and the letter to President Reagan in *McDonald*. Justice Brennan closed with a compelling analysis that

508. *Id.* at 481 nn.1-2.

509. See the excellent concurrence of Justice Young in *J&J v. Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 735-45 (Mich. 2003) (Young, J., concurring), *cert. denied*, 540 U.S. 1142 (2004), where he felt bound by the Court’s decision in *McDonald*, but thought it at odds with “significant, persuasive historical evidence suggesting that the contemporary understanding” in *McDonald* was inconsistent with the Clause’s “original understanding,” 664 N.W.2d at 735, which “offers protections distinct from its sibling clauses under the First Amendment . . .” *Id.* at 745.


511. *Id.* at 483.

512. *Id.* at 479, 482.

513. *Id.* at 485.

514. *Id.* The Court relied in large part on its mid-nineteenth century decision in *White v. Nicholls*, 3 How. 266, 291 (1845), where the Court, after analyzing the common law, adopted an “express malice” limitation, defined as “falsehood and the absence of probable cause.” *McDonald*, 472 U.S. at 484. This was a type of negligence standard. Note that the standard applicable in private person-public concern-Petition Clause cases is not clear. See *Elder, Defamation*, supra note 51, § 4:6. Of course, states may adopt an absolute immunity, and a few have. *Id.*


516. *Id.*

517. *Id.* at 489.

518. *Id.*

519. *Id.* at 489 n.3. Such “communicated information, expressed opinion, recited grievances, [and] protested claimed abuses”—expression “essential to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.” *Id.* (quoting *Sullivan*, 376 U.S. at 266, 269).
should make any lawyer advocating or any court considering neutral reportage take a long, pregnant pause:

No persuasive reason [exists] for according greater or lesser protection on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in [Sullivan] . . . is not shielded by an absolute privilege.520

The McDonald concurrence’s juxtaposition of Sullivan and the case before it as reflecting an “essential unity” has powerful negative ramifications for the Court’s future adoption of neutral reportage.521 A close analysis of the facts and parties in Sullivan suggests it would have come within the parameters of neutral reportage.522 The controversy was quintessentially “raging.”523 The Court described it as expressing “grievance and protest on one of the major public issues of our time.”524 The text of the ad appeared above the names of sixty-four persons, “many widely known.” 525 Below these were the names of twenty individuals, including the four individual defendants.526 All but two were Southern clergyman. All would likely be deemed public figures, under Curtis Publishing and Gertz,527 as well as “responsible, prominent” individuals.528 The ad was printed verbatim.529 There was no endorsement of or concurrence therein by the Times.530 The

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520. McDonald, 472 U.S. at 490 (Brennan, J., with Marshall, J., and Blackmun, J., concurring). Indeed, expression protected by the Petition Clause will often be protected under one of the other listed First Amendment freedoms. Id. at 489, n.2, 490.

521. In comparing the ad in Sullivan to a commercial ad in another case which violated a local ordinance, the Court came pregnantly close to rejecting the underlying rationale for neutral reportage: “Assuming the requisite state of mind [constitutional malice], nothing in a newspaper’s editorial decision to accept an advertisement changes the character of the falsely defamatory statements. The newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own.” Pittsburgh Press Co. v. Human Rel. Comm’n, 413 U.S. 376, 386 (1973) (dicta) (emphasis added).


523. See supra text accompanying note 42, infra text accompanying notes 877-887.

524. Sullivan, 376 U.S. at 271; id. at 294 (Black, J., with Douglas, J., concurring) (“one of the acute and highly emotional issues in this country”).

525. Id. at 257. See also supra note 40.

526. Sullivan, 376 U.S. at 257, 286. The individual defendants were held jointly liable with the New York Times and the state supreme court affirmed. Id. at 256.


528. See supra note 40, infra text accompanying notes 795-798.

529. Sullivan, 376 U.S. at 740-41.

530. The Court analyzed the underlying facts, noting that the Times’ Secretary thought them correct in substance. Sullivan, 376 U.S. at 286. The Court agreed and
McDonald concurrence viewed the ad as indistinguishable from the Petition Clause case before it.\(^\text{531}\) And, of course, the Sullivan Court adopted only a qualified privilege as to an identifiable plaintiff.\(^\text{532}\) An absolute privilege has been ambiguously extended only to governmental entities or where an unidentifiable public official attempts to transform impersonal criticism of government generally into criticism of the official personally.\(^\text{533}\)

Examining the Court’s libel jurisprudence\(^\text{534}\) reveals that the Court has never even hinted at absolute protection for a publisher that limits itself to accurately republishing its source’s charges. Every intimation is to the contrary. All of the Court’s holdings in these cases focus exclusively on the application of the requirements of Sullivan and Gertz.

Indeed, in another important republication case, Hutchinson v. Proxmire,\(^\text{535}\) the Court denied absolute Speech and Debate Clause otherwise found his conclusion a reasonable one reached in good faith. Id. In discussing the Times’ failure to check the ad against its files, the Court cited the Times’ employees’ reliance on the scienter of the good repute of many of the listed sponsors and the accompanying letter from A. Phillip Randolph, “known to them as a responsible individual.” Id. at 287-88. See supra note 40.


532. On the issue of “of and concerning” a plaintiff based on membership in a small group of governmental employees, see the author’s detailed criticism of Dean v. Dearing, 561 S.E.2d 686, 687-90 (Va. 2002), and its holding that the consensus common law small group libel rule could not constitutionally be applied under Sullivan and its progeny to a small town police force. As the author concluded: “[n]o support exists in the jurisprudence of the Court, lower court precedent, fundamental fairness, public policy, or common sense for the potentially open-ended abuse of reputation envisioned by the Court’s decision in Dean”. Elder, Small Town, supra note 43, at 902-03, 907-08.

533. See Elder, Small Town, supra note 43, at 886-87 & n.35, 907 (noting the Court’s analysis is “not unambiguous”).

534. See Masson v. New Yorker Magazine, 501 U.S. 496, 525 (1991) (regarding a book publisher’s issuance of a book based on a reputable magazine’s articles); Wolston v. Reader’s Digest Ass’n, 443 U.S. 157, 159 & n.1 (1979) (regarding in part co-defendant book club and paperback publishers of an employee-authored book); St. Amant v. Thompson, 390 U.S. 727, 728-29, 733 (1968) (regarding a non-media defendant’s republication during a televised speech of questions to and answers from a union source with substantial indicia of reliability embroiled in an intra-union dispute); Herbert v. Lando, 596 F. Supp. 1178, 1184, 1230-31 (S.D.N.Y 1984), rev’d in part, 781 F.2d 298, 307-08 & n.7 (2d Cir. 1986), on remand from Herbert v. Lando, 441 U.S. 153 (1979) (regarding another reputable magazine’s republication of an article based on a “60 Minutes” broadcast written by the producer with its own preface or “streamer”); supra text accompanying notes 39-42 (a newspaper’s publication of a protest ad from responsible sources); supra text accompanying notes 101-107 (a newspaper alliance’s distribution of a syndicated column, a newspaper’s republication of that same column); infra text accompanying notes 518-532.

535. 443 U.S. 111 (1979). Under the Court’s “long-established rule,” id. at 128, such republications, however “[v]aluable and desirable” they might be in a broad sense to inform
protection to a U.S. Senator’s apparently accurate republication of information in newsletters originally published in a speech either given by him in Senate chambers or published in the Congressional Record. The Court refused to provide even Sullivan protection, finding the plaintiff to be a private person. This allowed the plaintiff to bring suit for defamation against the Senator/republisher under a Gertz-simple negligence standard.

III. NEUTRAL REPORTAGE AND THE PENNSYLVANIA SUPREME COURT

The Pennsylvania Supreme Court unanimously rejected the doctrine of neutral reportage in Norton v. Glenn. Norton involved a newspaper’s accurate reportage of the co-defendant/borough council member’s public activities, which were not within the absolute protection of the Speech and Debate Clause. Id. at 132-33.

536. Defendant sent out a newsletter republishing the essence of a Senate speech to 100,000 on his mailing list and also disseminated an advance press release to 275 members of the domestic and foreign media. Id. at 115-16.

537. Id. at 116 n.3.

538. Id. at 134-37. See the parallel scenario in Gertz v. Robert Welch, Inc. discussed supra note 168.

539. Hutchinson, 443 U.S. at 133-36. Although the Court did not specifically analyze the substratal falsity issue, its analysis of the decisions below, id. at 119-21, intimated strongly that this would be the focus on remand. On the Gertz standard see supra text accompanying notes 158-169. The Court did not make it entirely unclear whether fair report applies in a case such as Hutchinson. The Court referred to Justice Story’s COMMENTARIES supporting a fair report privilege for legislative activities but not for libelous republication of a legislator’s speech, refusing to deviate from the “long established” doctrine of English precedent in denying Speech and Debate Clause protection. Hutchinson, 443 U.S. at 128-29. The Court did not specifically reach the fair report issue. Compare the RESTATEMENT (SECOND) OF TORTS §611, cmt. c (1977) (“A person cannot confer this privilege on himself by making the original defamatory publication himself and then reporting to other people what he stated. This is true whether the original publication was privileged or not.”). For a detailed critique of the latter see ELDER, DEFAMATION, supra note 51, §3:15, at 3-50 to 3-51. Compare McGovern v. Martz, 182 F. Supp. 343, 346-49 (D.D.C. 1960), where the court adopted a qualified fair report privilege for republications by a Congressman of matter protected by the Speech or Debate Clause. The court cited KENT’S COMMENTARIES, which did not define “malice,” and also cited to RESTATEMENT OF TORTS §611 (1938). McGovern, 182 F. Supp. at 347. Note that the latter was defeasible by defendant’s publication “solely” for malicious reasons. See infra note 1416.

540. 860 A.2d 48 (Pa. 2004), cert. denied, 544 U.S. 956 (2005). The court noted but had no reason to decide whether Edwards’ neutral reportage analysis was mere dicta and not binding, as even a holding by a court inferior to the United States Supreme Court was not binding on it. Id. at 53 n.7. A lower appellate court had so construed Edwards. DiSalle v. P.G. PUBL’G CO., 544 A.2d 1345, 1355 (Pa. Super. Ct. 1988) (dictum), app. denied, 557 A.2d 724 (1989). This is an important point, as the court was not required to follow even Third Circuit opinions misinterpreting Pennsylvania law. See, e.g., the discussion of Medico v. Time, Inc., infra text accompanying notes 1353-1360, 1382-1445.
member’s charges that the plaintiffs, the borough council president and mayor, were homosexuals and had engaged in homosexual acts.\footnote{Norton, 860 A.2d at 50. Plaintiff Norton was also a high school teacher, making the charge particularly damaging to his professional reputation. Brief of Appellee Norton at 1, Norton v. Glenn, 860 A.2d 48 (Pa. 2004) (Nos. 18, 19 MAP 2003).}

The actionable statements had been made outside the borough council’s chambers following a special council meeting.\footnote{Norton, 860 A.2d at 50. The individual co-defendant claimed absolute immunity under the “high public official” doctrine adopted in Pennsylvania, see Elder, Defamation, supra note 51, §2:14, at 2-101 to 2-112, on the ground that his charges occurred during a period of “bitter political infighting” and that he was trying to inform the public about plaintiffs’ misconduct and the purported conspiracy against him. Wolfe v. Glenn, 51 D. & C. 4th 46, 55 (Pa. Ct. C.P. 2001). The court affirmed another judge’s conclusion the immunity did not apply because the comments were not “closely related” to official responsibilities. Id. at 55-56.}

The article, however, reported that the statements occurred both within and outside the council chamber.\footnote{Norton, 860 A.2d at 50. The reporter was on notice that there were substantial grounds for seriously doubting the veracity of the source,\footnote{See Brief in Opposition to Certiorari, supra note 544, at 4-5; Brief of Appellee Wolfe at 5-6, Norton, 860 A.2d 48 (Nos. 18, 19 MAP 2003); Brief of Appellee Norton, supra note 541, at 7.} including baseless suggestions of homosexuality directed at the reporter himself.\footnote{DiSalle v. P.G. Pub'l'g Co., 544 A.2d 1345, 1354-55 (Pa. Super. Ct. 1988) (dicta), app. denied, 557 A.2d 724 (1989).}

The newspaper did not disclose this information, which would have portrayed the source as an unmitigated liar—the jury’s ultimate determination.\footnote{Wolfe v. Glenn, 51 D. & C. 4th 46, 54 (Pa. Ct. C.P. 2001). The judge noted plaintiffs would be entitled to a new trial if neutral reportage were repudiated on appeal. Id.}

Based on dicta\footnote{DiSalle v. P.G. Pub'l'g Co., 544 A.2d 1345, 1354-55 (Pa. Super. Ct. 1988) (dicta), app. denied, 557 A.2d 724 (1989).} from a state appellate case, the trial court had denied the plaintiffs the opportunity to present evidence of knowing or reckless disregard of falsity because it was irrelevant under neutral reportage.\footnote{Wolfe v. Glenn, 51 D. & C. 4th 46, 54 (Pa. Ct. C.P. 2001). The judge noted plaintiffs would be entitled to a new trial if neutral reportage were repudiated on appeal. Id.}

The appellate court reversed and
remanded.\textsuperscript{549} In a powerful opinion, the Pennsylvania Supreme Court affirmed.\textsuperscript{550} Chief Justice Cappy rejected neutral reportage, stating that the doctrine was based on “the radical notion” that media defendants were immune from liability for republishing “newsworthy comments” regarding public officials even though the comments were made with constitutional malice.\textsuperscript{551}

Noting that the U.S. Supreme Court had not “squarely addressed” neutral reportage,\textsuperscript{552} the Pennsylvania Supreme Court analyzed \textit{Sullivan} and its progeny to determine whether neutral reportage was a “logical extension.”\textsuperscript{553} It found that it was not, emphasizing that the Court’s jurisprudence had clearly and regularly rejected any “blanket immunity”\textsuperscript{554} based on the press’s purported “special role”\textsuperscript{555} in American democracy. A primary rationale for rejecting this absolutism was the obliteration or abrogation\textsuperscript{556} of state

\textsuperscript{549} Norton v. Glenn, 797 A.2d 294 (Pa. Super. Ct. 2002). It was not bound by the dicta in \textit{DiSalle}. \textit{Id.} at 296 n.4, 298. It noted that \textit{DiSalle}’s dicta was double-tiered, as even it admitted \textit{Edwards}’ adoption of neutral reportage was dicta. \textit{Id.} at 297 n.5 (citing \textit{DiSalle}, 544 A.2d at 1354-55). The superior court cited \textit{Edwards}’ misconstruction of \textit{Time, Inc. v. Pape}, see supra text accompanying notes 113-148, and gave a powerful, indeed unanswerable, critique: the latter “did not carve out a privilege allowing ‘prominent’ organizations expanded rights, it did not alter the law of defamation depending on who is speaking, and it did not espouse a rule that disregarded the private views of the reporter regarding the validity of what is reported.” Norton, 797 A.2d at 297.


\textsuperscript{551} Norton, 860 A.2d at 53. Note that the court’s decision was consistent with earlier Pennsylvania precedent that had rejected an argument that a media re-broadcast after scienter of likely falsity was insufficient for constitutional malice. See Braig v. Field Commc’ns, 456 A.2d 1366, 1376-77 (Pa. Super. Ct. 1983). But see id. at 1377 (Popovich, J., concurring and dissenting) (stating that under the facts no constitutional malice could be demonstrated by defendants’ actions as “conduit”—“disseminator of information to the public”).

\textsuperscript{552} Norton, 860 A.2d at 53-54. See supra text accompanying notes 352-359.

\textsuperscript{553} Norton, 860 A.2d at 54.

\textsuperscript{554} Id. at 56-57.

\textsuperscript{555} Id. at 56 (“[T]he Court has not declared that a media defendant is owed even a scintilla more protection than a private citizen-defendant.”). See also the thoughtful article by Dennis J. Dobbels, Edwards v. National Audubon Society, Inc: A Constitutional Privilege to Republish Defamation Should Be Rejected, 33 HASTINGS L.J. 1203, 1220-25 (1982) [hereinafter Dobbels] (concluding that plaintiff’s status was only “incidentally important” in \textit{Edwards} and rejecting a “newsworthiness”-based interpretation as inconsistent with \textit{Gertz v. Robert Welch, Inc.} and its progeny and a plaintiff-status-based interpretation as “foreclosed” by \textit{St. Amant v. Thompson} and as “discount[ing] totally” the interest in reputation of the victim in “revolutionary” contravention of the Court’s jurisprudence).

\textsuperscript{556} Norton, 860 A.2d at 56-57.
defamation law that such a “sweeping privilege”\textsuperscript{557} would entail. Instead, the Court had adopted and repeatedly affirmed the \textit{Sullivan} qualified constitutional privilege imposing a burden, “albeit a minimal one,”\textsuperscript{558} of refraining from publishing a knowing falsehood or one in reckless disregard of truth.\textsuperscript{559} The Pennsylvania Supreme Court also rejected an argument based on the Pennsylvania Constitution, finding that First Amendment jurisprudence likewise represented the “outer boundaries”\textsuperscript{560} of protected expression for defamation under the Pennsylvania Constitution.

In an important footnote the Pennsylvania Supreme Court concluded that the trial court’s conflation of neutral reportage and fair report was erroneous.\textsuperscript{561} Fair report, a long recognized common law privilege, was an “animal distinct”\textsuperscript{562} from neutral reportage and limited to fair and accurate accounts of “governmental proceedings.”\textsuperscript{563} By contrast, neutral reportage involved a purported First Amendment privilege for statements “not made in the course of official proceedings.”\textsuperscript{564} The court intimated that fair report was likewise unavailable.\textsuperscript{565}

Justice Castille concurred with the court’s opinion, but not with its fair report analysis.\textsuperscript{566} He noted that the issue had been raised

\begin{itemize}
\item \textsuperscript{557} \textit{Id.} at 56.
\item \textsuperscript{558} \textit{Id.} at 57.
\item \textsuperscript{559} \textit{Id.} (predicting that the Court “would not so sharply tilt the balance” against reputation as to “jettison” the constitutional malice standard for neutral reportage).
\item \textsuperscript{560} \textit{Id.} at 58. The court relied solely on its decision in \textit{Sprague v. Walter}, 543 A.2d 1078 (Pa. 1988), where the court rejected an “overly broad interpretation” of the state shield law as not mandated by the First Amendment and “repugnant” to the Pennsylvania Constitution. \textit{Norton}, 860 A.2d at 58. The \textit{Norton} court did not expressly cite the “abuse” limitation on protection of expression under the Pennsylvania Constitution. However, it did reference the explicit recognition of reputation by the Pennsylvania Constitution, then quoted \textit{Sprague} as including reputation in the “same category with life, liberty and property.” \textit{Id.} at 57-58 & n.10. These were specifically discussed in Brief of Appellee Wolf, \textit{supra} note 545, at 22. \textit{Sprague} relied specifically on two explicit references to reputation in the Pennsylvania Constitution—its equal status with life, liberty and property and its inclusion as an interest protected by the “remedy by due course of law” provision. \textit{Sprague}, 543 A.2d at 1084-85.
\item \textsuperscript{561} \textit{Norton}, 860 A.2d at 52-53 n.6.
\item \textsuperscript{562} \textit{Id.} The court’s decision rejecting fair report is clearly correct. See the very similar decision in \textit{April v. Reflector-Herald, Inc.}, 546 N.E.2d 466, 468 (Ohio Ct. App. 1988) (rejecting fair report for a sheriff’s comments made after adjournment of a board of commissioners’ meeting).
\item \textsuperscript{563} \textit{Norton}, 860 A.2d at 52-53, n.6.
\item \textsuperscript{564} \textit{Id.}
\item \textsuperscript{565} \textit{Id.}
\item \textsuperscript{566} \textit{Id.} at 59 (Castille, J., concurring). He made some generally positive comments about neutral reportage, \textit{id.} at 59-60, but found that United States Supreme Court
before but not reached by the court majority below and had also been raised as a separate ground for review.\(^{567}\) However, the sole issue accepted was neutral reportage.\(^{568}\) On remand, he thought a legitimate contention could be raised that the source’s\(^{569}\) statements qualified under the well-documented fair report privilege.\(^{570}\)

Examination of the briefs, including two excellent \textit{amicus curiae} briefs,\(^{571}\) demonstrates vividly how difficult a sell the theme of media as “messenger”\(^{572}\) or “conduit”\(^{573}\) was on the facts presented. Appellants were faced with trying to defend neutral reportage absent the “responsible” part of the “responsible, prominent” source limitation found in \textit{Edwards}.\(^{574}\) In other words, the appellants had to justify jurisprudence weighed against the court adopting neutral reportage. \textit{Id.} at 60. See supra text accompanying notes 361-404.

\(^{567}\) Norton, 860 A.2d at 61 (Castille, J., concurring).

\(^{568}\) \textit{Id.}

\(^{569}\) \textit{Id.} at 61-64.

\(^{570}\) \textit{Id.} at 63 (he conceded such did not fall within the “classic” expression of fair report, as it did not involve an account of what happened in the borough council meeting).


\(^{572}\) Brief of Appellants at 19-20, 31-42, 45, Norton, 860 A.2d 48 (Nos. 18, 19 MAP 2003).

\(^{573}\) Brief of Amici Curiae, supra note 571, at 13 (quoting Judge Kaufman’s speech/article quoted \textit{infra} note 680); Brief of Appellants, \textit{supra} note 572, at 16-17, 19, 30.

\(^{574}\) See infra text accompanying notes 795-803. Counsel for plaintiffs had asked the trial court for a “responsible source” instruction and to submit evidence negating such responsibility but it was rejected. Brief of Appellee Wolfe, \textit{supra} note 545, at 7-8, 9. \textit{See} Wolfe \textit{v. Glenn}, 51 D. & C. 4th 46, 52 (Pa. Ct. C.P. 2001), following \textit{DiSalle}, 544 A.2d 1345 at 1363 (dicta), to the effect that “because neutral reportage intends to protect the publication of statements known to be false, the purported reliability of the source is \textit{totally irrelevant}” (emphases added by court). Brief of Appellee Wolfe, \textit{supra} note 545, at 8-9. Counsel correctly noted that even in the Second Circuit the absence of a “responsible
applying “prominent” or “responsible” source alternatives. This put them in the awkward position of defending a double-layered lie: republishing matter from a very suspect source without disclosing the bases for their suspicions. The appellants did the best that they could. They cited the need to bring vital information to the electorate concerning the fitness of an elected public officer, and the censorship that would result if source reliability were the focus.

The media amici curiae expressed bewilderment that the superior court had disavowed neutral reportage because of Edwards’ misconstruction of Time v. Pape. No, they responded, the Edwards doctrine was founded not only on Pape but also on “core constitutional principles” throughout the Supreme Court’s First Amendment jurisprudence, including Sullivan and its progeny! That was a

source” would have felled neutral reportage in light of Cianci’s caution about dated charges by “persons known to be of scant reliability.” Cianci v. N.Y. Times Pub’g Co., 639 F.2d 54, 69 (2d Cir. 1980). Brief of Appellee Norton, supra note 541, at 14 & n.5. A note criticizing Norton v. Glenn appears to be unaware that appellants were not contending the source was “responsible.” Pennsylvania Supreme Court Declines to Adopt Neutral Reportage Privilege—Norton v. Glenn, 860 A.2d 48 (Pa. 2004), 118 H ARV. L. REV. 2029, 2035-36 (2005).

575. See supra text accompanying notes 77-85

576. Reply Brief of Appellants at 8, Norton, 860 A.2d 48 (Nos. 18, 19 MAP 2003) (“The fact that a public official has used a ‘lie as a tool’ is valuable speech about that public official’s fitness for office. . . .”).

577. Id. at 2-3; Brief of Amici Curiae, supra note 571, at 15 (quoting DiSalle, 544 A.2d at 1263 (dicta) (“If the party making the charge is a public official, it is essential for the public to be informed of the calumny of those upon whom it has bestowed its trust, and thereby better to supervise their conduct”)); Brief of Amicus Curiae Committee of Seventy in Support of Appellants at 2, 4-8, 10-24, Norton, 860 A.2d 48 (Nos. 18, 19 MAP 2003) (noting in its discussion of the First Amendment and the state constitution that this public interest was “underscored” by the source/co-defendant’s defeat after neutral reportage of his charges); Brief of Appellants, supra note 572, at 8, 13-15, 17, 18-20, 24-25, 35, 37, 47-48 (noting that the source/co-defendant was a candidate for imminent reelection and that even plaintiffs’ witnesses had conceded the source’s epithets and disruptiveness of borough council were important to the source’s fitness and they would not have known of such except for the article).

578. This would be “antithetical” to protecting accurate reportage, which allows the citizen the opportunity to evaluate public officials’ prevarications, and instead “make the media, not the public, the arbiter of what elected officials are ‘responsible’ or ‘reliable.’” Reply Brief of Appellants, supra note 576, at 13. Denying neutral reportage “encourages journalists to act as censors . . . not the proper role of the press in a democracy.” Brief of Amici Curiae, supra note 571, at 3. See also Brief of Appellants, supra note 572, at 16. If neutral reportage is rejected, the public receives “only those statements by elected officials which the media believes are worthy of public consumption.” Id.

579. Reply Brief of Appellants, supra note 576, at 7 n.2; Brief of Amici Curiae, supra note 571, at 4, 7; Brief of Appellants, supra note 572, at 22-23 n.6.

580. The Pennsylvania court was not sympathetic to this argument, concluding that Edwards’ heavy reliance on it was “ill-placed.” Norton, 860 A.2d 48, 53 (Pa. 2004).

581. Brief for Appellants, supra note 572, at 22-23 n.6.
bewildering quantum stretch, but the media had a go at it, contending that neutral reportage does not “alter” but “necessarily flows” from and is “entirely consistent with” First Amendment “fundamental interests” by “securing the widest possible dissemination of information from diverse and antagonistic sources.”

The calculated falsehood standard created by Sullivan and Garrison, and repeatedly reaffirmed by the Court, was distinguished by the defendants in Norton as applying to a “fundamentally different scenario.” According to the defendants, the Sullivan standard applies when a defendant either communicates defamation based on its own investigation or in its own name, or where the defendant forfeits neutral reportage by espousing, concurring in, or distorting third party charges. In the latter scenarios, “character assassination” via calculated falsehood lies beyond the pale of First Amendment protection, because it has “no benefit to the market place of ideas.” Moreover, the carefully circumscribed nature of the neutral reportage exception to liability for calculated falsehood would ensure it did “not become a sweeping right to report any newsworthy statement,” thereby annihilating common law defamation.

582. Brief of Amici Curiae, supra note 571, at 6-8, 11.

583. Id. at 12 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945))). There is also a hint of an assumption of risk analysis as to public official plaintiffs in appellants’ argument: “[U]npleasant as it may be, the ‘kitchen of politics’ does require that those who wish to cook be able to withstand, at a minimum, the ‘heat’ coming from their fellow chefs.” Brief of Appellants, supra note 572, at 36. The brief cited Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). Of course, Gertz said something like that, but only in justifying why the Sullivan constitutional malice standard applied; in fact, Gertz specifically rejected this analysis as the basis for absolute immunity! Id. at 341. At another point counsel references a public plaintiff’s “access to the press to make their news known.” Brief of Appellants, supra note 572, at 44-45 n.18. Again, this second and less important factor in Gertz was discussed in the context of justifying Sullivan protection, not an absolute immunity. Gertz, 418 U.S. at 344.

584. See supra text accompanying notes 38-62.

585. See case cited supra note 453; see also supra Part II.

586. Brief of Amici Curiae, supra note 571, at 12.

587. Id. at 12-13.

588. Id. at 13, 18.

589. Id. By contrast, neutral reportage “honor[s] the First Amendment’s central meaning,” not perverting it by sponsoring the ‘intentional lie.” Id. (quoting Gertz, 418 U.S. at 340).

590. Brief for Appellants, supra note 572, at 35.

The Norton plaintiffs had a proverbial field day because the law clearly favored them. They savaged the First Amendment argument for neutral reportage as a "contrivance" treating every irresponsible statement of a known suspect source as legitimately and genuinely newsworthy, with no attempt being made to counterbalance the defamation with divulgence of the defendant’s known grounds for treating the source as suspect. In the plaintiffs’ view, the Sullivan mandate of knowing or reckless disregard of falsity was the "outer boundary" and "certainly protection enough for a responsible press." They emphasized the alarmist nature of the indicates, citing Edwards and Barry v. Time, Inc., see discussion infra in text accompanying notes 645-728, 1139-1177, respectively, that “our tradition of neutral reportage extends beyond the political arena to a wide range of matters of legitimate interest and concern, from debates concerning public health and protecting the environment to the arts and professional athletics.” Reply Brief of Amici Curiae, supra, at 19. However, “[f]or present purposes,” the court had only to look at the “specific context” before it. Id. at 30 n.9 (emphasis added). The briefs iterated the point that they were only contending for a right to accurately recount one elected official’s statements about other elected officials. See Reply Brief of Appellants, supra note 576, at 2.

592. Brief of Appellee Wolfe, supra note 545, at 10. See also Brief of Appellee Norton, supra note 541, at 12 (“[Edwards] reached out and created a new privilege.”); id. at 24 (describing Edwards as “manufacturing the neutral reportage privilege”).

593. Brief of Appellee Wolfe, supra note 545, at 18 (arguing that there is “no genuine newsworthiness to the irresponsible, private communicated rantings of a public official whose substantive ideas cannot compete for the public’s attention”). Counsel suggested that if neutral reportage were to be adopted, “an apparently reliable source might maintain a position of public trust” despite the public’s unawareness of the “flawed character” that precipitated such falsities. Id. No reason existed to promote and protect repetition of defamation from a known suspect source. Id.

594. Counsel noted that media editorial selectiveness as to which scurrilous irresponsible statements would be reported dictated disclosure: “If the very newsworthy quality of the utterance (is) in its very outrageousness, allowing the media to make this judgment can be justified only if the public is also to be given sufficient information to determine that the source is irresponsible.” Brief of Appellee Wolfe, supra note 545, at 18. Co-defendant newspaper omitted inclusion of “vast amounts of readily available information” that would have persuaded the reader, as it had the jury, that the source was a prevaricator. Id. at 19. As printed, it was misleading, causing harm to appellee Wolfe among some of his associates and excluding most of the data that would have given credence to any argument for legitimate newsworthiness. Id. Indeed, non-disclosure of the latter was an endorsement and espousal of the charges by “treat[ing] good as if it shared equal stature with evil.” Id.


596. Brief of Appellee Wolfe, supra note 545, at 16. See also id. at 11 & n.4 (stating that common law privileges such as fair report and First Amendment privileges “provide abundant layers of protection for a minimally responsible press”); Brief of Appellee Norton, supra note 541, at 12 (existing First Amendment and common law privileges accorded ample protection “without elevating the news media into the arbitrary role of information dictators”).

597. Brief of Appellee Wolfe, supra note 545, at 11; Brief of Appellee Norton, supra note 541, at 35-36 (noting the impression created by Brief for Appellants that failing to
neutral reportage proponents’ arguments and the dearth of evidence in the more than four decades since *Sullivan* that the media was anything other than thriving and vital. If anything, neutral reportage would, in their view, merely enhance the deterioration of the media by seeking to provide cover for the “lowest common denominator of human behavior.”

This overview hardly does justice to the sophistication of the arguments by counsel for the parties and the *amici curiae*. What stands out in particularly bold relief is the media Jabberwock’s interpretation of the Court’s jurisprudence. For example, in the defendants’ Reply Brief the following stunning conclusion is repeated:

The United States Supreme Court repeatedly has held that the press may not be punished when it publishes accurate information about matters of legitimate public concern . . . To punish the defendants here for accurately reporting [the co-defendant source’s] statements would be antithetical to this fundamental First Amendment principle . . . The plaintiffs have no answer to this argument . . . based on the premise that the publication of accurate information about matters of public concern simply cannot be punished. . . .

Defendants petitioned for *certiorari* to the U.S. Supreme Court on January 18, 2005. The Supreme Court denied the petition on March 28, 2005 without comment or a single dissent. Petitioners’

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599. *Id.*
600. Other references to and discussions of the briefs will arise throughout the article.
601. These are totally at odds with the author’s own understanding.
602. “See *Philadelphia Newspapers, Inc. v. Hepps* . . . (defamation plaintiff must prove falsity of speech involves matter of public concern); *Milkovich v. Lorain Journal Co* . . . (statement on matter of public concern must be provable as false); *Bartnicki v. Vopper* . . . (publication of accurate information on matter of public concern generally cannot be punished); *The Florida Star v. B.J.F.* . . . (same); *Smith v. Daily Mail Publ’g* . . . (same).”
Brief and Respondents’ Reply largely reiterated the positions taken before the Pennsylvania Supreme Court, with petitioners emphasizing those aspects of the case that might persuade the Court to intervene. They contended that the court below had “disregarded important tenets” of the Court’s jurisprudence and “subjected to sanctions a truthful accounting of actual events of legitimate public concern.” Petitioners also argued that the lower courts’ “different approaches” to neutral reportage and “often conflicting conclusions” “underscored” the need for review and clarification by the Court. Lastly, the petitioners identified and emphasized the broad class that would potentially be impacted by the supposed ambiguities of the liability-for-republication issue, which they disparaged as “mired in inconsistent and conflicting judicial pronouncements.”

Amici Curiae, Norton, 544 U.S. 956 (No. 04-979), 2005 WL 1349954. Leave was granted the same day the petition was denied. 544 U.S. at 956.

606. See supra notes 574-591, 592-603.

607. Petition for Writ of Certiorari, supra note 604, at 6. One of the analogues relied on was the Court’s protection for hyperbole, parody and imaginative expression. Id. at 10-11. Petitioners viewed these precedents as “distinguish[ing] between statements . . . intended and understood as assertions of fact and statements that are not.” Id. Petitioners viewed the Court’s precedent as having “repeatedly held that punishment under such circumstances is impermissible.” Id. at 11. This analogy is a curious leap in logic. Reporting factually false statements is a far cry from making statements not reasonably susceptible to a construction that a disparaging statement of fact is being made vis-à-vis plaintiff. For a discussion of the Court’s jurisprudence see supra text accompanying notes 88-93, 170-178, 294, 309-326. Compare Part VII.D infra.

608. Petition for Writ of Certiorari, supra note 604, at 6 (emphasis added). See also id. at 10 (“The court below’s decision to subject the speakers to sanctions is at odds with this Court’s long standing recognition that [t]ruth may not be the subject of either civil or criminal sanctions where discussion at public affairs is concerned.”) (emphasis added) (alteration in original) (citations omitted). This is a reformulation of the argument tendered to the Pennsylvania Supreme Court. See supra text accompanying notes 602-603.

609. Petition for Writ of Certiorari, supra note 604, at 12. The petition does a short overview, id. at 15-16 & nn.5-10, and concludes that media defendants were at risk of liability despite almost thirty years of litigation because of lack of “a coherent or reliable framework.” Id. at 16. Even its supporters concede the confusion enveloping neutral reportage. See, e.g., David McCraw, The Right to Republish Libel: Neutral Reportage and the Reasonable Reader, 25 AKRON L. REV. 335, 335 (1991) (describing neutral reportage as a “source of contradiction and confusion” with courts not able to agree on its viability under the First Amendment or “the extent of its protection”); The Neutral Reportage Privilege, supra note 591, at 688 (noting that the courts’ “patchwork treatment” had left its application “hopelessly unpredictable”).


611. Petition for Writ of Certiorari, supra note 604, at 9 (“In addition to people engaging in oral and written discussions inside the state and all in-state media organizations, the rule can impose punishment in national newspapers; national television and radio broadcasters; cable programmers; internet-based media organizations; internet ‘bloggers’; and even people who simply send emails into the state.”) (emphases added). Of
Petitioners directly countered the respondents’ Sullivan-based “outer boundary” argument by concluding that no republication issue was before the Court in that case. In any event, there was “no conflict” between the Sullivan standard and the current case. In stark and bold terms the petitioners articulated why Sullivan was inapplicable under their proposed rule. If “a report that allegations were made is substantially true” (meaning accurate), and the account “cannot reasonably be understood as an assertion that the allegations themselves are true, there are no statements upon which a defamation action can constitutionally be based”; in such cases, “the question of actual malice does not arise.” In other words, the petitioners showcased the radical argument that all accurate reportage bars, as a matter of federal constitutional law, the need to reach the issue of knowing or reckless disregard of falsity.

The radical nature of the petitioners’ arguments is further evidenced by the aggressive blunderbuss attack they make on the liability-for-republication rule. The focus on neutral reportage is, they suggest, unduly restrictive. They rely on “various theories” proffered by courts, the gist of which is that there is no liability where reports of “allegations [are] made, without implying that the allegations are true . . . If [they] are substantially accurate that is the end of it.” The petitioners cite a number of revolutionary innovations in addition to neutral reportage in order to support this

course, the media’s argument in this respect concedes the mind-boggling, reputation-debilitating, revolutionary impact of the expansive immunity being sought.

612. Petition for Writ of Certiorari, supra note 604, at 8.
614. Id. at 5.
615. Id. Petitioners criticize Respondents as in part also arguing that a report, to be neutral, also had to encompass “an overt expression of the reporter’s personal opinion” of the prevaricating source. Id. at 5 n.4. Petitioners opine that this was rejected by the Court in “a different context,” in Miami Pub. Co. v. Tornillo. Id. This, of course, grossly misinterprets Tornillo. See infra note 656.
616. A media defendant’s need for neutral reportage is clear. As Floyd Abrams has stated in cases such as Troy Publishing Co. v. Norton, the Sullivan constitutional malice test is “of very little help to the press, since the journalist frequently does not believe—or in any event has no idea whether to believe the charges made.” Kimberley Keyes, A Footnote in Legal History, NEWS MEDIA & L., Jan. 1, 2005, available at 2005 WLNR 4888660. Lee Levine, who filed an amicus curiae brief with the Court, termed Troy Publishing an “ideal test case” for neutral reportage. Id.
617. See generally Petition for Writ of Certiorari, supra note 604.
618. Id. at 16-17.
619. Id. at 12.
620. Id.
broad attack on the republication rule, including accurate reportage as truth, accurate reportage as not defamatory, accurate republication of non-official statements as a “refashion[ed]” fair report, and accurate reportage as per se negating constitutional malice.

Respondents’ brief excoriates neutral reportage as a “suspect” doctrine of “limited acceptance born of a misunderstanding” of the Court’s jurisprudence and “nurtured only by the zeal” of media entities intent on garnering absolute immunity from defamation liability. In other words, neutral reportage provides a “license to republish” knowing or reckless falsehood, thereby repudiating the Court’s jurisprudence, which had repeatedly reaffirmed Sullivan as the “outer boundary” of First Amendment media protection. Petitioners’ singular focus on the media’s self-

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621. Such “different doctrinal directions . . . add[ ] additional unpredictability and risk” as to those “reporting and discussing events affecting our political landscape.” Reply Brief of Petitioners, supra note 610, at 6. Of course, the unpredictability, if there is that, is largely generated by media defendants’ uni-focused, aggressive and no-holds-barred collective endeavor to achieve by indirection the absolute immunity the Court has repeatedly denied them.


624. Reply Brief of Petitioners, supra note 610, at 8. Petitioners specifically cite to and rely extensively (see Petition for Writ of Certiorari, supra note 604, at 13, Reply Brief of Petitioners, supra note 610, at 7-8) on Chapin v. Knight-Ridder, 993 F.3d 1087 (4th Cir. 1993), discussed critically infra in the context of the text accompanying notes 1350-1579, and conclude that the Pennsylvania Supreme Court’s decision “directly conflicts” with Chapin, since it rejected fair report as to matters outside official proceedings. Reply Brief of Petitioners, supra note 610, at 8.


628. Id.

629. Id. at 4.

630. Id. at 7.

631. Id. at 5-7. This had been previously and definitively resolved by the Court in Sullivan and the Court’s subsequent jurisprudence. Id. at 7. See supra text accompanying notes 469-474.

632. Brief in Opposition to Certiorari, supra note 627, at 8-10.
perceived need to protect “core political speech” ignored both the already “limited”\textsuperscript{633} opportunities and “daunting task”\textsuperscript{634} confronting public officials and the balancing of competing interests reflected in the Court’s jurisprudence.\textsuperscript{635}

Respondents disparaged the petitioners’ “Parade of Horribles”\textsuperscript{636} as “artfully remov[ed]” from context, with only neutral reportage as the focus,\textsuperscript{637} and “designed to obfuscate the issue through scare tactics.”\textsuperscript{638} Additionally, the petitioners ignored four decades of post-\textit{Sullivan} litigation that accorded “core political speech” the most expansive protection in world history.\textsuperscript{639} Respondents suggested that the Court should give direction to the courts and media by rejecting

\begin{itemize}
  \item \textsuperscript{633} Id. at 11.
  \item \textsuperscript{634} Id. at 5, 12. \textit{See supra} text accompanying notes 457-462.
  \item \textsuperscript{635} Brief in Opposition to Certiorari, \textit{supra} note 627, at 7-9.
  \item \textsuperscript{636} Id. at 11. Petitioners cite a laundry list of examples: a President accusing the Vice-President of conspiracy to topple the government; the Swift Boat Veterans’ political ads about presidential candidate-Senator John Kerry’s military service; Colonel Jerry Killian’s statements about President Bush’s National Guard Service; charges during the 2000 primary campaign that Senator John McCain had fathered an illegitimate African-American child; reports of allegations by Senator Jim Bunning in his recent reelection campaign or by Ross Perot in the 1992 presidential campaign by persons viewing the allegations as “betray[ing] psychological imbalance”; reports of investigations of FBI of particular suspects; reporting the “rumor campaign” against Proctor & Gamble that its logo suggested support for “satanic rites.” Petition for Writ of Certiorari, \textit{supra} note 604, at 7-9. Not reporting such, petitioners suggested, required the media to “take[ ] sides—a feature . . . inconsistent with the First Amendment.” \textit{Id.} at 7. Of course, there’s nothing novel about this media choice. Any time a media defendant decides not to print a “calculated falsehood” to avoid liability it is “tak[ing] sides.” \textit{See discussion supra} Part II.
  \item \textsuperscript{637} Brief in Opposition to Certiorari, \textit{supra} note 627, at 9-10, 13. Proper context would focus on such issues as the “indicia of reliability” of the charge, whether made to interested law enforcement officials such as the Secret Service or FBI, and whether included in official reports coverage by fair report. \textit{Id.} at 12. As Respondents said, neutral reportage as the “only apparent factor” as to liability is, “(i)n reality . . . never the case.” \textit{Id.} at 13.
  \item \textsuperscript{638} \textit{Id.} It was suggested that petitioners’ own anecdotal illustrations, \textit{none of whom had sued}, evidenced the sufficiency of existing law. \textit{Id.} Of course, there are a multitude of other factors persuading plaintiffs not to litigate. Some public persons feel that litigation is expensive and time-consuming (the case in chief had been in litigation almost a decade) and is, in general, more trouble than it’s worth. Many are deterred by the demanding standards of \textit{Sullivan}, the uncompromising attitude of defendants with often vast resources and a no-holds-barred litigiousness often designed to wear a plaintiff and plaintiff’s counsel down. Some are deterred by very practical considerations—what the author calls the “libel plaintiff-lawyer’s counseling dilemma”—the specter of the new life given to old defamation by litigation, particularly in light of the media’s right—even the media defendant sued—to rely on the fair report doctrine to fairly and accurately report legal proceedings with impunity. \textit{See ELDER, DEFAMATION, supra} note 51, §3:15, at 3-51 to -52.
  \item \textsuperscript{639} Brief in Opposition to Certiorari, \textit{supra} note 627, at 9-10. This cannot be seriously contested. \textit{See supra} note 459.
\end{itemize}
this “ill-reasoned and unwieldy” doctrine, thereby “signal[ling] the demise” of neutral reportage. Despite some predictably positive (or, at least hopeful) pre-denial media comments, the Court seems to have agreed with the respondents’ suggestion. The media bells toll throughout the land for the unbeloved departed. Its “rendezvous with death” is no longer a “disputed barricade.”


In Edwards v. National Audubon Society, the New York Times published an article written by its nature reporter repeating the National Audubon Society’s charge that certain scientists who misused its bird count data to defend DDT were “paid liars.” Five prominent scientists who were active in the controversy, including the

640. Brief in Opposition to Certiorari, supra note 627, at 20; id. at 17 (“[T]he jurisprudence of the neutral reportage privilege is a shambles.”).

641. Id. at 5, 20. Petitioners in their Reply Brief use Respondents’ argument against the “Parade of Horribles,” i.e., that none of the illustrations had sued, by noting the cases that could be expected to be filed if the Court accepted Respondents’ argument. Reply Brief of Petitioners, supra note 610, at 7.

642. One prominent media lawyer, Lee Levine, termed Troy Publishing an “ideal test case” involving attractive facts—one public official source against public official plaintiffs—and viewed the media defendants’ liability under a “strict reading” of Sullivan’s constitutional malice as “absurd.” Kimberley Keyes, Stuck in Neutral, NEWS MEDIA & L. Jan. 1, 2005, available at 2005 WLNR 4888659. Floyd Abrams, dean of the First Amendment bar and successful counsel in Edwards, see infra text accompanying note 660, affirmed the need for neutral reportage, and suggested that the Court would hear the issue soon even if it denied certiorari in Troy Publishing. Keyes, supra.

643. Tony Mauro, a Supreme Court correspondent for Legal Times, presciently suggested prior to denial of certiorari the reasons why the Court might not hear the case. See Keyes, supra note 642. “Libel has been pretty settled law for the last decade or so . . . I think a lot of people who follow these things have gotten the general feeling that the Court has a lot of other fish to fry.” Id. Mauro suggested that whether there is any reason to be optimistic about neutral reportage is not unclear, noting that Justice Blackmun, who had favorably viewed the doctrine in his Harte-Hanks Communications, Inc. v. Connaughton concurrence, see the discussion in the text supported by notes 356-360, had been replaced by Justice Breyer, “generally counted as not a great friend of the press in these cases . . . I don’t think he puts this thumb on the scale for the First Amendment . . . he regards it just as one of many factors . . . .” Keyes, supra note 616. On Justice Breyer’s views on the media see supra notes 327, 360, 409.

644. See SEEGER, supra note 37; supra text accompanying note 37.


646. Id. at 121-22. Unlike an opinionative statement “liar” based on the disclosure of the underlying facts—i.e., alleged misuse of bird-count data—use of the adjective “paid” suggested corruption. Id. at 121 n.5.
three plaintiffs, were identified in the article.\footnote{647} In an opinion by Chief Judge Irving Kaufman, the Second Circuit reversed a judgment for the plaintiffs and purportedly dismissed the complaint on two grounds: absence of constitutional malice and neutral reportage.\footnote{648} Accepting Judge Kaufman’s crabbed view of the record, the absence of constitutional malice ground for dismissal was unexceptionable\footnote{649} under existing precedent. This is because the National Audubon Society’s “paid liar” charge, although without foundation, was not known to be so by the \textit{New York Times’} nature reporter who relied on a reputable responsible source.\footnote{650} Judge Kaufman also found no evidence of constitutional malice either in the plaintiffs’ denials when called to respond or in the general information tendered by them on the underlying controversy.\footnote{651} He disparaged the proffered information as totally irrelevant to the libel and held that the denials did not constitute sufficient notice of likely falsity.\footnote{652} The court stated: “[M]ere denials, however vehement . . . are so commonplace in the world of polemical charge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.”\footnote{653} In light of its absence of constitutional malice holding regarding absence of constitutional malice, the court’s alternative ground—neutral reportage—has been regularly viewed as \textit{dicta}.\footnote{654} In

\footnote{647. The district court’s conclusion they were public figures was not questioned on appeal. \textit{Id.} at 119 n.4. Substantial precedent would support the view they were “vortex” or “limited purpose” public figures. \textit{See} DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 5:25 (2003 Supp. 2006) [hereinafter ELDER, DEFAMATION].}

\footnote{648. \textit{Edwards}, 556 F.2d at 120-21.}

\footnote{649. The district court had properly instructed the jury that a defendant could be held liable if its reporter had “serious doubts” about underlying truth even if he had no doubt that he was “faithfully” reporting his source’s allegations. \textit{Id.} at 119. Judge Kaufman apparently had no difficulty with this absolutely correct analysis of controlling law on the issue of constitutional malice. \textit{Id.} at 120-21.}

\footnote{650. \textit{Id.} There was not a “shred of evidence” the reporter had “serious doubts” about the charge emanating from the Society’s spokesperson—“a highly respected amateur ornithologist” and editor of the society’s publication in which the charges originated. \textit{Id.} at 116, 120. The jury found that the spokesman/editor had only cautioned about naming them and had told the writer/journalist he was not calling them “paid liars.” \textit{Id.} at 122. For a volume of parallel precedent finding no basis for a finding of constitutional malice when defendant relies on a reputable or reliable source, see ELDER, DEFAMATION, \textit{supra} note 647, § 7:2, at 7-25 to -32.}

\footnote{651. \textit{Edwards}, 556 F.2d at 120-21.}

\footnote{652. \textit{Id.}}

\footnote{653. \textit{Id.} at 121. This is the general rule on denials. \textit{See} ELDER, DEFAMATION, \textit{supra} note 647, § 7:17. The Supreme Court has cited this rule affirmatively. Harte-Hanks COMM’NS, Inc. v. Connaughton, 491 U.S. 657, 691 n.37 (1989).}

provocative language, Judge Kaufman manufactured a “fundamental principle” that the First Amendment absolutely protects a media defendant that publishes an “accurate and disinterested” account of “serious charges” against a public figure uttered by a “responsible, prominent organization . . . regardless of the reporter’s private views regarding their validity.” In other words, the press could not be required to censor such “newsworthy statements merely because it

jury verdict must be reversed unless the constitutional malice standard was met, the “sole ground” upon which there was a factual issue. Edwards, 556 F.2d at 119 n.4. See also Cynthia J. Crass, The Privilege of Neutral Reportage -- Edwards v. National Audubon Society, Inc., 1978 UTAH L. REV. 347, 353 (“dicta characteristics”). Compare this to the surprising conclusion in Justin H. Wertman, The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern, 65 FORDHAM L. REV. 789, 800 n.84 (1996), which erroneously views the constitutional malice aspect as dicta. It has been suggested that Cianci v. New Times Publishing Co., negated the argument for dicta status of neutral reportage in Edwards. See The Neutral Reportage Privilege, 53 REC. ASS’N B. CITY N.Y. 688, 703-05 (1998). The proponents of this argument readily note, however, that Edwards’ “neutrality” requirements were not met in Cianci. Id. Consequently, Edwards' dicta was merely confirmed but narrowly so in Cianci, a case where it was inapplicable in any event. This would seem to leave its dicta status intact and enveloped in Judge Friendly's less than glittering version. Undoubtedly, this is the second most famous dicta in libel jurisprudence. The most famous is the Gertz v. Robert Welch, Inc., “no false idea” aside, which the Court later treated as dicta in rejecting an “opinion”-“fact” dichotomy in Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-18 (1990). See supra note 158 and text accompanying notes 316-326.


656. Edwards, 556 F.2d at 120 (“Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability”). The court referenced as a supportive analogue for the latter quote the well-known case of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Chief Judge Kaufman stretched the analogy well beyond its breaking point. In Tornillo the Court invalidated a forced statutory right of reply for a maligned candidate as violative of the First Amendment because it involved a coerced governmental regulatory intrusion into the function of editors. Id. at 256-58. All members of the Court clearly distinguished the quite different scenario of a defamed plaintiff asserting his or her right to redress of damaged reputation. The Court cited Sullivan and progeny without a hint of a suggestion that Tornillo affected damage liability in any way, shape or form. Id. at 252, 257. As Justice White said, the case involved the First Amendment’s “virtually insurmountable barrier” as to “government tampering, in advance of publication, with news and editorial content.” Id. at 259 (White, J., concurring) (emphasis added). He reaffirmed that the press was not “wholly at liberty to publish falsehoods damaging to individual reputation,” “distinguishing the vindicatory function of a libel suit for compensatory damages, albeit in “severely emaciated form” as to private persons after Gertz v. Robert Welch, Inc.—a case issued that same day. Id. at 261-62 (emphasis added). He specifically reaffirmed media liability for “knowing or reckless falsehoods” under Sullivan. Id. at 262. Two concurring members of the Court specifically
has serious doubts regarding their truth." The public’s need to be fully apprised of “rag[ing]” controversies required that a defendant be absolved of liability as long as the defendant neither “espouses or concurs” nor “deliberately distorts [the statements] to launch a personal attack of his own.” Applying these criteria, Judge Kaufman found the newspaper account wholly immune—an “exemplar of fair and dispassionate reporting,” which included plaintiffs’ vociferous denials.

noted that Tornillo left open the issue of victims of defamatory falsehoods having a statutory right to “require publication of a retraction.” Id. at 258-59 (Brennan, J., concurring). Note that the Supreme Court perfunctorily and scathingly rejected Chief Judge Kaufman’s parallel expansive interpretation of Tornillo as justification for the immunity he had accorded the media against discovery into the editorial process. See Herbert v. Lando, 441 U.S. 153, 167-69 (1979), where the Court treated Tornillo and Columbia Broadcasting System Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (rejecting any suggestion the First Amendment mandated that broadcasters accept paid advertisements), as invalid as prior restraint because they tried to “control in advance the content of the publication.” Herbert, 441 U.S. at 167, rev’g, 508 F.2d 974 (2d Cir. 1977) (opinion by Kaufman, C.J.). The Court sarcastically rejected as “incredible” the suggestion either decision “silently effected a substantial contraction of the rights” accorded under Sullivan and its progeny. Herbert, 441 U.S. at 168; see also id. at 178 n.1 (Powell, J., concurring).

A couple of authors have interpreted this language as implying that knowledge of falsity might be grounds for forfeiting neutral reportage. Laurence Tribe, American Constitutional Law 638 (1978); John R. Oller, Case Comment, Restricting the First Amendment Right to Republish Defamatory Statements, 69 Geo. L.J. 1495, 1513 n.115 (1981). No court has so held. Occasional dicta in cases resolved on absence-of-constitutional malice grounds have interpreted Edwards as defeasible upon proof of actual knowledge of the falsity of statements accurately reported. Romero v. Abbeville Broad. Serv., 420 So. 2d 1247, 1250 (Fla. Dist. Ct. App. 1982) (dictum); Peck v. Dispatch Printing Co., 1987 WL 13553, at *2 n.6, 4 n.7 (Ohio Ct. App. June 18, 1987) (dictum). Note that this novel doctrine is expressly and repeatedly accorded only to “the press.” Edwards, 556 F.2d at 120 (emphasis added). One decision has made reference to this limitation and said a co-defendant public relations firm was not entitled to neutral reportage protection in part based on its non-media status. Trujillo v. Banco Cent. Del Ecuador, 17 F. Supp. 2d 1334, 1338 (S.D. Fla. 1998) (rejecting both neutral reportage and fair report). Note that this has been criticized as contrary to the promotion of the “public discourse and debate” function of neutral reportage. James E. Stewart & Laurie J. Michelson, Reining in the Neutral Reportage Privilege, 17 Comm. L. 13, 14 (Summer 1999). Another trial court opinion declined to make a final determination on neutral reportage at an early stage but preliminarily denied it in the case of a paid advertisement in The Smart Shopper. Leveault v. Skolas, No. CV-05-093, 2005 Me. Super. LEXIS 79, at *2 (Aug. 12, 2005) (“Unlike the better known participants in Edwards this case does not involve a decision to report accusations[,] rather it involves a decision to accept a paid advertisement containing accusations”). Note that at least the common law privilege of fair report applies coequally to non-media defendants. See David A. Elder, The Fair Report Privilege § 1.19[B] (1988) [hereinafter Elder, Fair Report]; see also Elder, Defamation, supra note 647, § 3:15.

Edwards, 556 F.2d at 120. The court cited its earlier decision, Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969). See infra text accompanying notes 698-703.
At this point, neutral reportage had a great deal on its side: a distinguished court, an esteemed judge, and representation by Floyd Abrams, the dean of the First Amendment bar. Yet, after almost three decades, neutral reportage has hardly swept the field. Indeed, the tepid positive response by courts to neutral reportage resounds in ringing silence from the tree tops. Part of the leaky heritage of neutral reportage is the dubiousness of the precedent on which Edwards relied.

One of Judge Kaufman’s four citations is to Time, Inc. v. Pape, discussed in detail above. Concededly, that decision stands, at most, for little more than the proposition that an interpreter of an extraordinarily ambiguous and ambivalent government report cannot be held to have engaged in a falsehood sufficient for knowing or reckless disregard of falsity in a public person defamation claim. It

660. Id. at 115. Almost fifteen years later Mr. Abrams characterized Edwards as a decision of “extraordinary vision” “a step ahead of the Supreme Court—not always a safe place to be but, at least in this case, the right place to be.” Floyd Abrams, The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc.: The Past and the Future, 65 ST. JOHN’S L. REV. 731, 741 (1991). In memorial tribute, Justice Thurgood Marshall, referencing Edwards, cited Judge Kaufman’s “unwavering respect for the rights of freedom of speech and expression as well as a deeply ingrained belief that a free and robust press, even one of dubious repute, is essential to democratic governments.” Proceedings in Memoriam, United States Court of Appeals for the Second Circuit (June 2, 1992) at CIX.

661. See supra text accompanying notes 113-148. A journalist/defender of Edwards has acknowledged that Kaufman’s conclusions “reflected his established reputation as a First Amendment theorist who traditionally favored the widest possible latitude for media discussion of public issues.” However, his use of precedent evidenced “blunt clarity” but “reveal[ed] as much doubt, ambiguity and confusion as certainty.” Hart, supra note 655, at 230.

662. See supra text accompanying notes 145-147, 241, 345-346, 392-395. Indeed, the case may only stand for the absence of a material falsehood. See supra text accompanying notes 393-395. The media appellants took pains in Norton v. Glenn to detach neutral reportage from substantial reliance on Time, Inc. v. Pape. See supra text accompanying notes 579-583. See also the near consensus in the case law and literature that Time, Inc. v. Pape, does not support the doctrine for which it is cited. See Cianci v. New Times Pub’g Co., 639 F.2d 54, 67 n.15 (2d Cir. 1980) (citing Katherine Sowle, Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. REV. 469, 501-08 (1979) and rejecting the contrary indication in WILLIAM PROSSER, TORTS 832 (4th ed. 1971)); Dickey v. CBS, Inc., 583 F.2d 1221, 1226 (3d Cir. 1978) (rejecting this “ambitious reading,” and stating that the references in Pape to republication of third party sources were merely to emphasize the difficulties of communication and interpretation when the republisher is not republishing verbatim; quoting the “falsification” sufficient conclusion in the Court’s opinion; and holding that Pape was not on point in the case before it or in Edwards, “in which the accuracy of the press’s reporting of the third party statements—as opposed to the accuracy of the third party statements themselves—is admitted”); Newell v. Field Enter., Inc., 415 N.E.2d 434, 452 (Ill. App. Ct. 1980) (following Dickey v. CBS, Inc.); Norton v. Glenn, 860 A.2d 48, 53 (Pa. 2004) (stating that Pape did not “explicitly or even implicitly adopt” a privilege absolving republicators even if constitutional malice is shown—the Court applied the latter standard to the case before it); Dennis J.
cannot reasonably be read as approving an absolute immunity for accurately republishing specific charges despite knowledge of or reckless disregard for their underlying falsity.

Judge Kaufman’s second citation, Medina v. Time, Inc., suffers fatally from the same fundamental flaw: it relies on a misinterpretation of Time, Inc. v. Pape. Captain Medina was implicated in the My Lai Massacre by Time. Specifically, he was libeled by the publication of an eyewitness charge that Medina had executed a small boy who was standing among a large group of adult corpses, one of whom was apparently his mother. This allegation was followed by a question as to why Medina had not been criminally charged. The federal district court granted summary judgment, finding that Medina had failed to controvert affidavits detailing Time’s investigative efforts to verify the accuracy of its charges. In other words, Medina had provided no facts casting doubt on the veracity of the defendants’ affidavits as to their belief in the truth of the article or the quality of the underlying investigation. In sum, the plaintiff had failed to supply any evidence supporting a finding of constitutional malice. The court’s analysis was correct and unexceptionable.

The First Circuit opinion is another matter. The court dramatically revised its focus from the reliability of defendants’ sources and the integrity of its investigation to the “very narrow issue” of whether Time had “asserted the truth of facts” contained in the

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665. Id.
666. Id.
667. Id. at 400.
668. Id.
669. Id. at 399-400; see Brief for Appellee at 4, 6-8, 20, Medina v. Time, Inc., 439 F.2d 1129 (1st Cir. 1971) (No. 7773). Appellee argued that the article was “the result of intensive world-wide investigative effort” and that “[n]o published reports were overlooked and no potential sources of information were ignored.” Id. at 20. Appellee opined that reportage of facts which led to the filing of criminal charges three months later “fall far short of the ... recklessness required by the First Amendment.” Id. Appellants had contended that three publications by other media and appellee’s confirmations via a secondhand confirmatory conversation through a part-time employee with the witness cited in the article constituted reckless disregard and highly unreasonable conduct. Id. The latter was obviously an erroneous misinterpretation of the impact of the Curtis Publishing Co. v. Butts and St. Amant v. Thompson cases. See supra text accompanying notes 71-85. F. Lee Bailey was counsel for Medina. See Medina v. Time, Inc., 439 F.2d 1129, 1129 (1st Cir. 1971).
statements of the third party source.\textsuperscript{670} Although the First Circuit mischaracterized this as the very issue the trial court had resolved,\textsuperscript{671} undoubtedly the focus in oral argument had shifted to appellant’s peculiar “single contention”: whether the defendant had forfeited what was in effect an absolute immunity for mere republication of an inculpatory source’s accusations by asserting their truth.\textsuperscript{672} Of course, the court came to the result suggested by counsel’s artificially limited and confused emphasis, concluding that the “biggest mystery” inquiry had been taken out of context.\textsuperscript{673} That statement followed an extensive delineation of numerous other third party statements incriminating Captain Medina and others for acts at My Lai.\textsuperscript{674} In light of these statements and charges,\textsuperscript{675} which were neither “truncated nor distorted,”\textsuperscript{676} the court decided that the “biggest mystery” inquiry merely posed questions as to “disparity of treatment.”\textsuperscript{677}

\textsuperscript{670} \textit{Medina}, 439 F.2d at 1129-30. The statement in question was: “The biggest mystery so far is why no charges have been placed against [plaintiff], who played an important role in the slaughter by the accounts of a number of his men, although exactly what orders he issued is disputed.” \textit{Id.} at 1130.

\textsuperscript{671} \textit{Id.} at 1129-30.

\textsuperscript{672} \textit{Id.} at 1130. In light of the charge’s prior publication in three other media sources, normally itself sufficient to refute reckless disregard, see \textit{ELDER, DEFAMATION}, supra note 647, § 7:2, at 7-25 to -26, Mr. Bailey focused on the fact that other media had reported such as \textit{allegations}—by contrast, appellee/\textit{Time} had reported the charge as not “merely an \textit{allegation} but rather as \textit{truth}, quoting the source as “He said” and adding the “biggest mystery” query. \textit{See} Brief for Appellant at 2-5, Medina v. Time, Inc., 439 F.2d 1129 (1st Cir. 1971) (No. 7773); Brief for Appellee, supra note 669, at 8, 20-21. Although appellee noted it would not have so published the story “unless it believed it to be true,” it also replied that it was “obviously published” as the witness’s own statement, “clearly identified as such, and not an independent statement of fact” by appellee. Brief for Appellee, supra note 669, at 8. It then added an unanswered and unanswerable head-scratching reply to appellant’s argument: “In any event, it is hard to understand how the distinction which [Medina] seeks to draw is relevant to this appeal. \textit{He cites no authorities. As a matter of uncontradicted \textit{fact}, the article was published on the belief of all concerned that the matters stated therein were true and, as shown above, the article was not published with reckless disregard for the truth as \textit{that standard has been constitutionally defined}}.” \textit{Id.} at 21 (emphases added). Counsel for Appellee, Robert W. Meserve and Gordon L. Doerfer, were clearly correct on the law—indeed, they were only ones in the appeal with a sophisticated awareness of constitutional malice jurisprudence.

\textsuperscript{673} \textit{Medina}, 439 F.2d at 1130.

\textsuperscript{674} \textit{Id.}

\textsuperscript{675} \textit{Id.}

\textsuperscript{676} \textit{Id.} Of course, the court is quoting from \textit{Greenbelt Publishing Co. v. Bresler}. \textit{See} supra text accompanying notes 86-99. But that case relied on a finding that the statement constituted “rhetorical hyperbole” based on accurately disclosed facts from an official public proceeding. In no way can it be interpreted—other than by self-serving bootstrapping—as supporting an \textit{absolute privilege} for knowingly or recklessly \textit{false factual statements accurately reported}.

\textsuperscript{677} \textit{Medina}, 439 F.2d at 1130. Medina’s infamous legacy lives on. \textit{See} Howard v. Antilla, 294 F.3d 244, 253-54 (1st Cir. 2002). That case was resolved on grounds of failure
This result is shocking. The case involved a republished eyewitness charge of a child execution claimed by Captain Medina to be false surrounded by numerous quotations from military personnel and an investigation imputing heinous misconduct to Medina and others. The plaintiff was remediless even if the charges constituted to prove knowing or reckless disregard of falsity in a false light-by-implication case. The court held it was insufficient that defendant/reporter “should have foreseen” that the article would be interpreted as accusing plaintiff of being a third party-convicted felon—under controlling libel by implication precedent plaintiff had to show by the requisite clear and convincing evidence that defendant knew or intended (not merely had an “ambivalent stance” toward) the implication that plaintiff was the known felon. Id. at 254 (emphasis added). The court relied in minor part on the “somewhat analogous situation” in Medina, treating defendant’s article as “essentially an account of two sides of an issue in which she merely raises questions” as to the SEC’s handling of the dispute. Id. at 254-55. The case may be defensible on the ground that the reporter had sought confirmation from SEC itself (which could not resolve the identity issue), defendant had sought data from over thirty sources, and defendant had some corroborations from one of the felon’s lawyers, who thought the photo of plaintiff was his client. Id. at 246, 252-55. The court’s opinion wonderfully illustrates the debilitating impact of Sullivan and its protection of exceptionally sloppy, negligent reporting (newspaper/publisher The New York Times issued a “correction” the next day based on information received on the day of publication), id. at 246-47, including the reporter’s “clearly stingy” provision of contradictory facts on the identity issue, id. at 255. Even the reporter’s non-correlation of the plaintiff’s passport with the felon’s time in jail—information in the reporter’s possession which would have refuted the story—was “at worst, a negligent failure to connect the dots in a voluminous paper trail.” Id. at 254-55.

678. A close analysis of the article shows how far afield from Edwards’ purported neutral reportage/mere “conduit” function Time had strayed. While Time did apparently quote the source’s inculpatory statement accurately in its story, My Lai: An American Tragedy, TIME, Dec. 5, 1969, at 24-26, together with a December 12 sequel, this was done in the context of a detailed investigative examination of the My Lai controversy, making quite clear that it viewed almost all participants—including Medina—as guilty of war crimes. Indeed, to Time the “general outline was painfully clear.” Id. An “inexperienced” “edgy company, expecting a fire fight and anxious to even the score” for comrades “picked off by an invisible enemy,” id. at 24, and, while commanded from a distance by Medina, “a tough soldier” known as “Mad Dog,” id. at 26, engaged in slaughter of “defenseless civilians.” One quoted source identified Medina as having read orders to his troops “to destroy Pinkville [My Lai] and everything in it.” Id. at 28. Another said Medina ordered them to “kill everything that moves.” Id. Other soldier sources were cited as portraying Medina later assembling his troops, directing them not to criticize or complain about My Lai, and promising to “back them up” if an investigation occurred. Id. Medina was also portrayed as part of a “conspiracy of silence” forestalling “official alarm in Washington” for months. Id. Shortly thereafter, the article made the “biggest mystery” statement, “why no charges had been placed against Captain Medina, who played an important role in the slaughter by the accounts of a number of his men, although exactly what orders he issued is disputed.” Id. at 30 (emphasis added). While Time did a sequel article the following week detailing quotations from a press conference by Medina and an interview with CBS’s Mike Wallace quoting him as receiving and giving wholly legitimate orders, Probing The Massacre Probe, TIME, Dec. 12, 1969, at 16-17, the initial article, viewed in its entirety, is a highly damming portrayal of Medina based on what appears to the reader to be in depth objective investigative reporting. If this is the detached, neutral reportage thought to be support for Edwards, it is difficult to imagine what the courts would view as non-neutral.
packaged lies because the reportage involved no “falsification” . . . as it relates to reporting the statements of others.” In other words, an in-depth investigative piece imputing war crimes of the most despicable character was accorded absolute immunity because the defendant merely republished third party allegations. Of course, this approach necessarily barred any legal analysis of (and any journalistic inquiry into) the veracity of the sources and the integrity of their information under St. Amant v. Thompson. An analysis of the New York Times brief demonstrates that the fatally flawed Medina line of cases may have had substantial influence on the Edwards opinion. The questionable nature of this


680. The facts of Medina, see supra text accompanying notes 664-678, and his reliance thereon belie Chief Judge Kaufman’s defense of Edwards in his address, Irving R. Kaufman, Commentary, Press, Privacy and Malice: Reflections on New York Times v. Sullivan, 5 CARDozo L. REV. 867, 873-75 (1984) (suggesting that news reportage is not “a single undifferentiated function” and opining that the distinctive function of the press “merely serv[ing] as conduit” “may require a different legal response” than constitutional malice, which might be appropriate for investigative journalism, as in Watergate). Clearly, the Times story resulting in the Medina litigation was investigative journalism. See also infra text accompanying notes 685-691 and 1155-1159 (discussing Oliver v. Village Voice, Inc., 417 F. Supp. 235 (S.D.N.Y. 1976)).


682. See infra Part V (critiquing the journalistic endeavor precipitated by neutral reportage).

683. Clearly, St. Amant dealt with liability of republishers where the “serious doubts” standard could be shown. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); see supra text accompanying notes 77-85.

684. Brief of N.Y. Times Co. at 23-28, Edwards v. Nat’l Audubon Soc’y, Inc., 556 F.2d 113 (2d Cir. 1977) (No. 77-7018). Some of the decisions cited in the latter and in the briefs in opposition to certiorari, see Brief of Respondent N.Y. Times Co. in Opposition to Petition for a Writ of Certiorari at 11-12, Edwards v. N.Y. Times, 434 U.S. 1002 (1977) (No. 77-576), do not carry any such weight. In Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1027-29 (5th Cir. 1975), no support for a privilege of “accurate-reportage-despite-serious doubts” can be found. The court applied a traditional St. Amant analysis in concluding as to one aspect of the story that the author had “corroborative stories from sources he believed reliable containing facts not inherently improbable” and that his “faith” in his source was not demonstrated to be “unreasonable.” Id. at 1027. There was also uncontradicted evidence that one possibly biased but logical source of information had a proven track record of reliability with the author. Id. at 1028. In analyzing another aspect of the same complained-of defamation, the court cited the author’s right to rely on the same sources and concluded that, overall, the author had “ample reason to write what he did,” citing reliance on stringers not shown to be unreliable, plaintiff’s employer’s official text and the
line of cases is convincingly evidenced by looking at Oliver v. Village Voice. In Oliver, the defendant’s reporter interviewed an investigator with the Watergate-era “Ervin Committee” that linked the plaintiff/executive director of the American Council of Young Political Leaders to the CIA. Although the investigator’s source was not named, a deposition disclosed that the sole source was Howard Hunt, the notorious operational coordinator of the Watergate break-in crew. The plaintiff alleged that the defendants had published a

author’s reasonable interpretation. Id. at 1028-29. Reliance on Novel v. Garrison, 338 F. Supp. 977 (N.D. Ill. 1971), is likewise misplaced. There is language to the effect that co-defendant-Playboy’s interview with co-defendant, Jim Garrison (a Louisiana parish attorney investigating the assassination of J.F.K.), “described not what in its opinion [plaintiff] did but what someone else [Garrison] said he did.” Id. at 982. However, the court then concluded that in view of the sensational milieu surrounding Garrison’s investigation, it could “phantom [sic—apparently “fathom’] no way” defendant could be liable for constitutional malice in “accurately printing the actual statements of an important elected official engaged in” the controversy. Id. at 982-83. The court cited Time, Inc. v. Pape. The court then went on to analyze the underlying content of what was reported via Garrison and republished by Playboy—this is traditional constitutional malice analysis, not absolute immunity for “accurate reportage.” This analysis is made clear from the court’s parallel absolution of Garrison, where it cited the same analysis, including the fact most of the information related originated with plaintiff. Id. at 983-84. Interestingly, the Garrison co-defendant is the same public official before the Court in Garrison v. Louisiana. See supra text accompanying notes 54-62. The third in defendant’s triumvirate of misreliance is Thuma v. Hearst Corp., 340 F. Supp. 867 (D. Md. 1972), involving defendant’s accurate reportage of the sentiments of family and friends that plaintiff/police officer’s shooting of a disturbed youth was “cold-blooded murder.” In dicta the court cited Greenbelt Publishing Association v. Bresler and its dicta suggesting that accurate reportage negated constitutional malice. Id. at 870-71; see supra note 97. However, as in Greenbelt Publishing, see supra notes 88-93, the true, narrow holding in Thuma was that no one could reasonably believe that the language used stated a fact. Paralleling Greenbelt Pub., the statement was merely rhetorical hyperbole that was accurately reported. Thuma, 340 F. Supp. at 870-72. In other words, it was the type of imaginative expression not provable as factually false, see supra text accompanying notes 316-326, not an accurately stated false defamatory fact.

686. Id. at 237. Given the political milieu at the time and the nature of plaintiff’s work, this statement could be defamatory. Id.
687. Id. at 236-37.
story emanating from a suspect source. The court held, as a matter of law, that such reliance was irrelevant: given his Watergate involvement, the “mere fact” of Hunt’s statement made the story legitimately newsworthy. Adopting the plaintiff’s focus on source unreliability would “impermissibly stifle investigative reporting into controversial areas such as Watergate where fact and rumor tend to converge in the elusive search for the truth.” This case involved a suspect source, commingled facts and rumor, yet the only issue as to constitutional malice was the accuracy of the report—not its exceedingly specious contents!

As this author has suggested elsewhere, this purported exception to liability for questionable sources where the grounds for the source’s incredibility are obvious or disclosed provides an “unwarranted absolute immunity” for reports otherwise actionable under St. Amant. This small but very questionable line of cases has immunized defendants where the source has failed a polygraph test or was an undercover agent portrayed as a prevaricator, drug abuser, and robber. While neutrality in reporting the two sides of a controversy may be limited evidence suggesting good faith, there is no justification whatsoever for according indefeasible protection to accurate reportage merely by telling viewers or readers that “there are

688. Specifically, plaintiff alleged the following factors would have justified treating Hunt as unreliable: his dubious credibility; the subject matter’s facially conjectural subject matter; the evidence suggesting that certain parties were engaged in hyperbole about CIA linkage as a self-protective measure; sworn testimony by plaintiff’s lawyer and secretary before the Ervin Committee expressly denying any CIA ties to plaintiff. Id. at 238. Collectively, these would have evidenced sufficient doubts to justify the case going to trial under extensive precedent interpreting St. Amant. See ELSER, DEFAMATION, supra note 647, § 7:2, at 7-37 to -43.

690. Id.
691. Id. at 238-39.
692. ELSER, DEFAMATION, supra note 647, § 7:23.
693. Id. § 7:23, at 7-159.
694. Barry v. Time, Inc., 584 F. Supp. 1110, 1122 (N.D. Cal. 1984). The article at issue also noted the source’s guilty plea to an aggravated assault charge and quoted associates who were exceptionally critical of his character and actions. Id.
695. Barger v. Playboy Enter., Inc., 564 F. Supp. 1151, 1157 (N.D. Cal. 1983) (the liar characterization was only as to his attempts to protect his “cover” as undercover agent), aff’d, 732 F.2d 163 (9th Cir. 1984). Note that Barger was a major source for the neutral reportage alternative found in one of neutral reportage’s broadest and least defensible variants—its application despite the absence of a responsible source—in Barry v. Time, Inc. See infra text accompanying notes 1140-1177.
696. ELSER, DEFAMATION, supra note 647, § 7:17, at 139, § 7:18, at 7-142 to -143, § 7:23, at 7-159 to -160.
substantial grounds to believe the source is a liar but we report the defamatory matter anyway—you be the judge.”

Judge Kaufman’s citation to the Second Circuit’s own precedent of *Goldwater v. Ginzburg* was similarly misplaced. Referencing *Goldwater*, Judge Kaufman concluded that the republisher who “espouses or concurs” or “deliberately distorts” third party statements forfeits the neutral reportage defense. The implication that *Goldwater* supports an absolute privilege for accurate reportage is in error, and the case cannot reasonably be construed in that way. In fact, the opinion stated that reliance upon third party sources, such as books, articles, political campaign literature and letters, is merely probative on the issue of absence of constitutional malice. This view is, of course, supported by extensive and unquestionable precedent. In fact, *Goldwater* is directly at odds with neutral reportage. Relying on and paraphrasing *St. Amant*, the *Goldwater* court specifically stated, “[r]epetition of another’s words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports.”

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697. *Id.* §§ 7:2, 7:23, at 7-159 to -160, §§ 3:27-3:33; *see* McBride v. Merrell Dow & Pharm., Inc., 800 F.2d 1208, 1212 (D.C. Cir. 1986) (“Ambiguity of a statement’s subject matter may be probative evidence negating . . . actual malice (Pape) . . . but it does not call forth for a conclusive presumption precluding resort to actual evidence of the defendants’ state of mind. And although a statement’s ambiguity, or susceptibility to a ‘true’ construction may make it difficult for a plaintiff to prove . . . actual malice, it does not follow that such proof is impossible. Were [plaintiff] . . . to produce, a documentary ‘smoking gun’ in which the defendants admitted that they intended to convey a false impression . . . surely it would have to be conceded that the defendants acted with actual malice.”); *Dickey v. CBS*, Inc., 583 F.2d 1221, 1226 (3d Cir. 1978) (in rejecting neutral reportage and a “unique constitutional analysis” as an erroneous interpretation of *Pape*, the court applied traditional constitutional malice analysis to the case and found the Congressman/source to be reliable—it specifically rejected *Pape*, where “the accuracy of the press’s reporting of the third party statements—as opposed to the accuracy of the third party statements themselves—is admitted”); *DiSalle v. P.G. Publ’g Co.*, 544 A.2d 1345, 1353 (Pa. Super. Ct. 1988) (rejecting an interpretation of *Pape* that would “herald the birth” of a new definition of constitutional malice focusing on “rational interpretation” of what the source said, rather than “subjective awareness of probable falsity of the underlying facts”); *Martin v. Wilson Publ’g Co.*, 497 A.2d 322, 325, 328-30 (R.I. 1985) (the trial judge was in error in determining that liability of defendant was contingent on non-existence of the rumor defendant published based on local “imaginations”—this was not a proper application of the constitutional malice standard).

698. 414 F.2d 324 (2d Cir. 1969).


700. *Goldwater*, 414 F.2d at 337.


702. *Goldwater*, 414 F.2d at 337.
that one cannot claim good faith reliance on such third party reports where those reports are “altered or taken out of context.”

Three eloquent briefs sketched out the issues before the Supreme Court in *Edwards* and foreshadowed the Court’s recent modest concern for the negative impact of media reportage on the expressive interests of media victims. The *amicus curiae* brief acknowledged the “long and honorable tradition” of investigative journalism. However, the Second Circuit’s opinion in *Edwards* had “rewritten” the *Sullivan* standard, resulting in a “complete emasculation” of the law of defamation and upsetting the delicate balance wrought by the Court. The Court had sought to ensure that “no exorbitant price” was imposed on either public persons or the media while maximizing the people’s right to know via “freedom of expression and robust debate on public affairs.” But this balance was “seriously jeopardized” where “equal protection” was not accorded to the petitioners’ First Amendment right to “engage in robust and open debate on controversial issues without fear of destructive reprisals from individuals whose views are endorsed by the media.”

703. *Id.*

704. See *Bartinik v. Vopper*, 532 U.S. 514 (2001), where substantial importance was expressed in the privacy context for “the fear of public disclosure of private conversations . . . hav[ing] a chilling effect on private speech.” *Id.* at 533. See *id.* at 537 (noting that “widespread dissemination can create a far more powerful disincentive to speak privately” than more limited disclosure) (Breyer, J., with O’Conner, J., concurring); *id.* at 553 (stating that the statutes protect a “venerable right of privacy” and “further the First Amendment rights of the parties to the conversation”) (Rehnquist, C.J., with Scalia, J., and Thomas, J., dissenting).


706. *Id.* at 13.

707. *Id.* at 4, 16 (“total emasculation”); see Petition for Writ of Certiorari at 3, *Edwards*, 434 U.S. 1002 (1977) (No. 77-576) (*Edwards* “affords an unprecedented and near absolute immunity to the press”); see also *id.* at 11 (*Edwards* was “an unwarranted and unprecedented departure . . . effectively reading out of existence” the reckless disregard of falsity aspect of *Sullivan*).


709. *Id.* at 16-17. Implicit in *Sullivan’s* “climate of open and robust debate” was that of “informed judgment [which] depends upon the transmission of all responsible points of view.” *Id.*


712. *Id.* at 15; see also Brief as Amicus Curiae, * supra* note 705, at 14, 20 (when the media receive protection for reckless disregard of falsity, “freedom turns into license and the goal [of the Court in *Sullivan*] of the widest possible dissemination of information from diverse and antagonistic sources is defeated”).
The petitioners’ and amicus curiae briefs emphasized the “unprecedented” ability of the mass media713 to undermine the integrity of the debate on public issues and the need for scientific expertise to illuminate the debate.714 Yet, “the creative exchange of ideas the First Amendment seeks to protect as sacrosanct”715 would be frustrated where public figures are deterred from participation by the prospect of “wanton ad hominen attack by a major journalistic entity,”716 with the “virtually over-powering”717 resources of the media being wielded against “a minority point of view . . . [such as that of petitioners] challeng[ing] an established position.”718 Indeed, unless the First Amendment accorded parallel protection to public figures’ expressive rights,719 the law would “cloak the press with the awesome
responsibility of acting as the ultimate filtration process through which all ideas must pass, allowing it unfettered discretion to decide which points of view are worthy of approval, and which individuals and ideas are to receive the punitive sanctions of adverse personal publicity.\textsuperscript{720}

The respondents' briefs in opposition rejected any suggestion that the petitioners’ expressive rights were at issue or that they had been deterred.\textsuperscript{721} Respondents also repudiated any suggestion that the Second Circuit’s opinion had departed from \textit{Sullivan}.\textsuperscript{722} The briefs took somewhat anomalous positions. One concluded that implicit in the Second Circuit’s finding of an “exemplar of fair and dispassionate” reporting was its negation of reckless disregard of falsity.\textsuperscript{723} The other brief argued that \textit{Edwards} was “entirely consistent”\textsuperscript{724} with \textit{Sullivan} and “based” on\textsuperscript{725} \textit{Time v. Pape}. \textit{Edwards} was merely “the latest—and most thoughtful”—emanation of “the principle that the accurate reporting of charges against public figures made by reliable sources must receive special First Amendment protection.”\textsuperscript{726} Respondents suggested that these cases reiterated “a self-evident truth—that the press must be free to report accusations such as those reported by the

imprimatur on sensation for the sense of sensation and not for the sake of responsible journalism.” \textit{Id.} at 6.

\textsuperscript{720} Petition for Writ of Certiorari, \textit{supra} note 707, at 17. Given such unrestrained latitude, there could be no assurance the media would “maintain a neutral and disinterested perspective in the reporting.” \textit{Id.}

\textsuperscript{721} Brief of Respondent National Audubon Society in Opposition to a Petition for a Writ of Certiorari at 5, \textit{Edwards} v. N.Y. Times Co., 434 U.S. 1002 (1977) (No. 77-576) (noting that petitioners had previously characterized National Audubon as “deliberately genocidal” and being guilty of “\textit{de facto} murder”); \textit{see also} Brief of Respondent N.Y. Times Co. in Opposition to a Petition for a Writ of Certiorari, \textit{supra} note 684, at 3.

\textsuperscript{722} Brief of Respondent National Audubon Society in Opposition to a Petition for a Writ of Certiorari, \textit{supra} note 721, at 2 (arguing that the Second Circuit’s opinion is “entirely consonant” with the Court’s jurisprudence).

\textsuperscript{723} \textit{Id.} at 4. Indeed, it was argued petitioners were engaged in a “radical departure.” \textit{Id.}

\textsuperscript{724} Brief of Respondent N.Y. Times Co. in Opposition to a Petition for a Writ of Certiorari, \textit{supra} note 684, at 3.

\textsuperscript{725} \textit{Id.}

\textsuperscript{726} \textit{Id.} at 11. Throughout, the brief primarily emphasized the neutral reportage aspect of the Second Circuit’s opinion. \textit{Id.} at 2-3, 8, 10-13. At the end the brief cited the Second Circuit’s “alternative holding,” absence of constitutional malice. \textit{Id.} at 13. Actually the latter is the \textit{true holding}. The neutral reportage aspect is dicta. See the admission to this effect in the Brief of Respondent N.Y. Times Co. in Opposition to a Petition for Writ of Certiorari, \textit{supra} note 684, at 14. The latter was well-advised to rely primarily on neutral reportage. A compelling case was made in the briefs for the Second Circuit’s “astonishing” “disregard[ ] of critical elements of the record evidence.” Brief as Amicus Curiae, \textit{supra} note 705, at 17-19; \textit{see also id.} at 6-11; Petition for Writ of Certiorari, \textit{supra} note 707, at 5-9, 19-25.
The Supreme Court denied certiorari. The Times without bearing the responsibility for their underlying truth.

V. NEUTRAL REPORTAGE REQUIREMENTS: A CRITICAL OVERVIEW

A. Introduction

A number of decisions have expressed concerns about what is self-evident from reading almost three decades of neutral reportage decisions: the “contours [are] rather ill-defined” and the “weight” to be accorded each factor or qualification is left largely “undefined.” Questions arose from ambiguity as to whether the factors in Edwards were intended as doctrinal elements/limitations or were merely descriptive of the facts in the case. Clearly unenamored with the concept, Judge Friendly endeavored to resolve this ambiguity in the Second Circuit’s subsequent decision, Cianci v. New Times Publishing. He initially noted that Edwards had not “attempt[ed] precise definition of its contours,” but had adopted “important suggestions” that neutral reportage was “limited in scope and required careful examination” in the context of each case’s facts. Later, Judge Friendly characterized these “important suggestions” as “conditions” or “qualifications” and emphasized the need for

727. Brief of Respondent N.Y. Times Co. in Opposition to a Petition for Writ of Certiorari, supra note 684, at 12 (citing the example of a Vice President making defamatory charges against a competitor/candidate).
729. E.g., Cianci v. New Times Publ’g Co., 639 F.2d 54, 68-71 (2d Cir. 1980) (noting that even then “the precise bounds . . . remain[ed] to be delineated”).
733. Cianci, 629 F.2d 54.
734. Id. at 68.
735. Id. at 69. Judge Friendly summarized all the descriptive factors as “conditions” or “qualifications.” Id. at 68-70.
736. Id. at 69.
“careful limitation” because of neutral reportage’s expansive nature. He suggested that without this circumscription, the media would have “absolute immunity to espouse and concur in the most unwarranted attacks” on public persons “based on episodes long in the past . . . by persons known to be of scant reliability.” In other words, the descriptive factors had become cumulative requirements.

Reeling from Judge Friendly’s sharp and incisive critique, Judge Kaufman endeavored to resuscitate Edwards in his short opinion on denial of rehearing en banc. He conceded that he had voted in favor of en banc review because of his concern that Judge Friendly’s panel opinion had “undermined” Edwards’ neutral reportage aspect. Judge Kaufman then creatively reconfigured the denial of en banc review as indicating that his colleagues did not view the panel opinion as “inconsistent with Edwards.” Thus, he was “heartened by this reassurance” that “Edwards survives Cianci unscathed,” although the panel did “not always discuss Edwards in the terms [he] would have chosen.” He seems to be referring to the cumulative “conditions”/“qualifications” language in Judge Friendly’s opinion, which was substantially more restrictive than, if not decidedly at odds with, Judge Kaufman’s own broader interpretations in Edwards and elsewhere. In sum, Judge Kaufman acquiesced

737. Id.
738. Id.
739. Id. at 69-70. This language—or segments of it—has been regularly cited. See, e.g., Connaughton v. Harte-Hanks Commc’ns, Inc., 842 F.2d 825, 847 (6th Cir. 1988) (quoting Cianci, the court found the doctrine “severely limited” to avoid its abuses); Lasky v. Am. Broad. Co., 631 F. Supp. 962, 971 (S.D.N.Y. 1986); In re United Press Int’l, 106 B.R. 325, 329 (D.D.C. 1989); DiSalle v. F.G. Publ’g Co., 544 A.2d 1345, 1358 (Pa. Super. Ct. 1988) (dicta); Martin v. Wilson Publ’g Co., 497 A.2d 322, 330 (R.I. 1985). Judge Friendly noted that without neutral reportage defendants already had the “generous protection” of New York Times v. Sullivan. Cianci, 639 F.2d at 70. He said that Chief Judge Kaufman had himself noted the importance of protecting honor but that such had to yield to the “compelling circumstances” arguing for neutral reportage. Id. Judge Friendly saw no justification for “further erod[ing][such] to the extent demanded” by the facts in Cianci. Id.
740. Cianci, 639 F.2d at 71 (Kaufman, J., concurring).
741. Id.
742. Id.
743. Id. According to Judge Kaufman, on remand defendants’ attempts to get Cianci’s response and “other efforts to verify the charges leveled against him” were appropriate for further evidentiary development on the neutral reportage issue. Id. (emphasis added). This verification suggestion seems to confuse investigative efforts as to the underlying charges, assuredly relevant as to constitutional malice, with the issue of neutral reportage, which is supremely indifferent to a defendant’s conceded “serious doubts.”
744. Edwards v. Nat’l Audubon Soc’y, Inc., 556 F.2d 113, 120 (2d Cir. 1977) (“What is newsworthy is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has
in and affirmed Judge Friendly’s cumulative “conditions”/“qualifications” approach in the interest of damage control.\textsuperscript{746}

**B. The Public Person Requirement**

The plaintiffs in *Edwards* were clearly “public figures.”\textsuperscript{747} Focusing on all-encompassing language in *Edwards*,\textsuperscript{748} and ignoring *Cianci’s*\textsuperscript{749} delimitation, a small but dubious and unpersuasive\textsuperscript{750}
minority view has expansively interpreted neutral reportage to apply to private individuals involved in public issues. However, most cases approving neutral reportage have involved public persons, and

750. Barry v. Time, Inc., 584 F. Supp. 1110, 1127 n.20 (N.D. Cal. 1984) (noting but not resolving the “difficult question” of neutral reportage in the “purely private” situation and the “severe criticism” of the public person limitation, in light of “greater interest” the public may have in charges made against private persons by a “prominent” individual or entity because of the “relevant insight into the defamer’s character”); Bair v. Palm Beach Newspapers, 8 Media L. Rep. (BNA) 2028, 2029, 2032 (Fla. Cir. Ct. 1982) (the privilege may have been applied to an outpatient counselor of a publicly founded drug treatment program as “a matter of public concern”), aff’d on other grounds, 444 So. 2d 1131 (Fla. Dist. Ct. App. 1984); Gist v. Macon County Sheriff’s Dep’t, 671 N.E.2d 1154, 1162 (Ill. App. Ct. 1996) (following Krauss, infra, and applying the rule to a private person under Krauss’s broad standard of extending neutral reportage to “public issues, personalities, or programs”); Krauss v. Champaign News Gazette, Inc., 375 N.E.2d 1362, 1363-64 (Ill. App. Ct. 1978) (applying the doctrine to a psychologist/contractor with government, as such involved press reportage of “information relating to public issues, personalities, or programs”). One Illinois dissenter rejected a claim of neutral reportage in part based on the conclusion “essentially private complaints” involving a business did not meet even a “legitimate public concern” standard. Makis v. Area Publ’ns Corp., 395 N.E.2d 1185, 1192-93 (Ill. App. Ct. 1979) (Romiti, J., dissenting). Four Ohio decisions extended neutral reportage to private persons. April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (extending the privilege to a media defendant reporting a sheriff’s charge plaintiff/cook had been terminated for falsification of time records, finding “no legitimate difference” between public and private plaintiffs); House of Wheat v. Knight-Ridder Co., No. 11335, 1984 WL 4803, at *6 (Ohio Ct. App. Mar. 21, 1984) (extending neutral reportage to “a newsworthy item of public concern,” allegations as to plaintiff’s waste disposal site); Horvath v. The Telegraph, No. CA-8-175, 1982 WL 5841, at *5 (Ohio Ct. App. Mar. 8, 1982) (rejecting a public figure limitation and extended a qualified version of neutral reportage—defeasible by actual or express malice—to “an event of public interest” implicating plaintiffs, a business and its owner); see also infra text accompanying note 1019. The quartet is no longer good law in Ohio. See infra text accompanying notes 1019-1029.

751. See infra text accompanying notes 752-753. One author has suggested that the accusations would have been more “newsworthy” had a private business person tied to the DDT industry been accused of paying the same prominent individual to lie. David Marburger, Note, More Protection for the Press: The Third Circuit Expands the Fair Report Privilege, 43 U. PITT. L. REV. 1143, 1161 (1982).

the overwhelming consensus is that neutral reportage does not apply in private person cases. The cases reflect an almost visceral antipathy to the illogical suggestion that the Supreme Court, having withdrawn from Rosenbloom’s adoption of Sullivan to Gertz’s minimal fault standard, would precipitously and magically reverse itself and revitalize Rosenbloom’s qualified First Amendment privilege into newsworthiness absolutism. This would require a constitutional quantum leap. Even the media, with massive resources at its disposal, have resisted the temptation to abandon the long-accepted reasonable limits on its access to public information. It seems wholly indefensible to destroy either person’s reputation based on a known falsehood. Any suggestion that newsworthiness “bootstrapping” justifies the public pillorying of the falsely implicated private person seems unconscionable, if not barbaric. Note the Court has strongly rejected such “bootstrapping” as sufficient to make a private person a public figure for Sullivan purposes. See supra note 228 and accompanying text.

See supra text accompanying notes 149-169.

See supra text accompanying notes 158-159. This would be a triple leap if one considers the Justice Harlan-based post-Gertz New York private plaintiff-public interest highly unreasonable conduct alternative. See supra notes 73-74, 76 and accompanying text; infra text accompanying notes 1707, 1715. As a thoughtful Illinois dissenter suggested in analyzing Gertz and its progeny, “[i]f comments about private persons which also involve matters of public interest are not to be accorded the more limited protection of the
command,\(^{756}\) has had no success in making this position palatable to the courts.

The leading case, *Khawar v. Globe Intern*, exemplifies the media’s extraordinary difficulties in persuading a court to adopt neutral reportage in the private person setting.\(^ {757}\) A conspiracy theory book summarized in the defendant/tabloid portrayed the plaintiff, a foreign journalist, as Robert F. Kennedy’s true assassin.\(^ {758}\) However, Sirhan Sirhan (not the plaintiff) had been convicted and his conviction upheld on appeal, and he remained in prison for the murder.\(^ {759}\) This, of course, made for a compelling case of constitutional malice.\(^ {760}\) The plaintiff could convincingly establish\(^ {761}\) a *per se* case of liability unless the defendants could use neutral reportage as a defense.\(^ {762}\) The case was truly a David versus Goliath encounter, with the national media joined on the side of tabloid sleaze against a sympathetic victim.\(^ {763}\)

requirement that actual malice be established, it is doubtful that the broader protection of the *Edwards* neutral reportage doctrine is constitutionally required.” Makis v. Area Publ’ns Corp., 395 N.E.2d 1185, 1193 (Ill. App. Ct. 1979) (Romiti, J., dissenting).

\(^{756}\) See supra, e.g., note 571 and accompanying text.

\(^{757}\) 965 P.2d 696 (Cal. 1998).

\(^{758}\) Id. at 698.

\(^{759}\) Id. at 709-10.

\(^{760}\) See id. at 710.

\(^{761}\) See id. at 708-12.

\(^{762}\) See id.

\(^{763}\) In the interest of full disclosure, it should be noted the author assisted counsel for Khawar, Francis C. Pizzuli of Santa Monica, California in the brief on appeal. Mr. Pizzuli was truly the David felling Goliath, as aptly evidenced by a look at the lawyers arrayed against him on the state, local and national level on the brief and as amici curiae for the sleazy tabloid defendant—another wonderful example of the willingness of the national media to gang-up on a plaintiff and round-up the thundering media herd when a precious libel or other protective doctrine is in danger of dismantlement. Other examples can be shown. See the extensive line-up of amici curiae in the ground-breaking hidden camera case of *Sanders v. American Broadcasting Co.*, 978 P.2d 67, 68-69 (Cal. 1999). In the interest of full disclosure, the author was plaintiff’s/appellant’s co-counsel. Id. at 68. For reference to another “strange bedfellows” scenario, involving “the media’s arrogance and circling the wagons mentality,” see David A. Elder, Neville L. Johnson & Brian A. Rischwain, *Establishing Constitutional Malice For Defamation and Privacy/False Light Claims When Hidden Cameras and Deception Are Used By The Newsgetter*, 22 LOY. L.A. ENT. L. REV. 327, 328 n.5 (2002), and *Rice v. Paladin Enter., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997). In this famous decision imposing liability on the publisher of a “hit-man manual,” the court excoriated the press: “Paladin, joined by a spate of media amici, including many of the major networks, newspapers, and publishers, contends that any decision recognizing even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press . . . That the national media organizations would feel obligated to vigorously defend Paladin’s assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least breathtaking.” *Id.*
But the media Jabberwock was left with creaky, arthritic knees to carry a heavy First Amendment burden: it had to persuade the court that the public's need for the insight provided into public figures/sources' psyches and motivation through media reportage of their lies outweighed the reputational interests of private individuals.764

Not surprisingly, the media defendants were able to make this need-to-know argument with a straight face. The Khawar court rejected the argument unanimously.765 Taking no express position on neutral reportage in the public person setting,766 the court nonetheless found no justification for newsworthiness absolutism vis-à-vis private persons. The court found that information about private persons rarely provides valuable information on matters of public interest.767 By contrast, calculated falsehoods768 could have a "devastating effect"769 on the reputations of private person victims. Under the Court's policies in Gertz, private persons neither assume the risk of such disparagement nor have access to the media to controvert media lies.770

The court in Khawar relied heavily on its earlier opinion in Brown v. Kelly Broadcasting, where it adopted the Gertz-minimal fault771 standard.772 In Brown, the court had found reasonable redress for private reputational damage "essential to our system of ordered liberty."773 In the Khawar court's view, reasonable redress is not found in a defamation action exclusively against a source, who might be unable to pay damages or be insolvent.774 In any event, the court

764. Khawar, 965 P.2d at 706-07. The court did not resolve the book author's public figure/source status in light of its conclusion neutral reportage could not be justified in private person cases even if the source was a public person. Id. Note that courts "uniformly treat" authors as public figures. ELDER, DEFAMATION, supra note 647, § 5:17, at 5-134 to -136.
765. Khawar, 965 P.2d at 706-08, 713.
766. Id. at 698, 706.
767. Id. at 707.
768. See supra Part II.
771. See supra text accompanying notes 159-169.
774. Id. The court was clearly alluding in part to the author of the book, who defaulted. Id. at 699. The book publisher settled. Id.
doubted whether monetary damages are ever sufficient to redress reputational injury.\textsuperscript{775}

The \textit{Khawar} decision also implicitly raises the specter of the often arbitrary nature of the public person “limitation” on neutral reportage. Although the court carefully, articulately and correctly found \textit{Khawar} to be that rare journalist\textsuperscript{776}/private figure\textsuperscript{777} (and refused to include him within the oxymoron\textsuperscript{778} called “involuntary” public figure\textsuperscript{779}), courts and commentators endorsing \textit{Edwards’} public person limitation seem to view status determinations as easily, and almost perfunctorily, resolved.\textsuperscript{780} As the plethora of decisions interpreting\textsuperscript{781} (and often misinterpreting\textsuperscript{782}) the Supreme Court’s “four horsemen of public figuredom” amply evidence, there is considerable confusion about who or what is a public figure.\textsuperscript{783} One court disparaged the determination as similar to “trying to nail a

\textsuperscript{775} \textit{Id.} at 707. The court upheld a judgment totaling $1,175,000, including $100,000 for reputational damage, $400,000 for mental distress, $175,000 in presumed damages and $500,000 in punitive damages. \textit{Id.} at 699-700. There was substantial evidence to support the damage award, including \textit{Khawar}’s undoubted fear for his own and his family’s security—resulting in part from threatening phone calls, death threats to him and his children and vandalism to his residence and son’s car. \textit{Id.} at 699. The court noted \textit{Khawar} was the subject of “sensational and defamatory accusations” in a tabloid which distributed 2.7 million copies of the issue in question. \textit{Id.} at 703.

\textsuperscript{776} Journalists and authors are generally treated as public figures. \textit{See supra} note 764.

\textsuperscript{777} \textit{Khawar}, 965 P.2d at 701-04. \textit{Khawar} arranged to stand near RFK on the podium and had a friend photograph him there knowing his image would be publicized by other photographers. \textit{Id.} at 699. However, the court correctly refused to find this sufficient for “limited purpose” public figure status. \textit{Id.} at 702-04. Other courts might have held \textit{Khawar} to be a public figure. \textit{See ELD\textbf{ER}, DEF\textbf{AMATION, supra} note 647, § 5:17, at 5-131 to -133; cf. Knudsen v. Kan. Gas & Elec. Co., 807 P.2d 71, 75-78 (Kan. 1991) (freelance writer critical of a public utility was a “vortex’ public figure); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571-73 (Tex. 1998) (reporter who sued for a portrayal he was a participant in a “set up” resulting in an unsuccessful attack on the Waco Branch Davidian Compound was a public figure—by reporting live from the site of the controversial raid and talking with fellow journalists about it, he became a public figure). Others may have treated \textit{Khawar} as a “course of conduct” public figure. See the strong criticism of the latter in \textit{ELD\textbf{ER}, DEF\textbf{AMATION, supra} note 647, § 5:12}.

\textsuperscript{778} \textit{See} \textit{ELD\textbf{ER}, DEF\textbf{AMATION, supra} note 647, § 5:8, at 5-73 to -74}

\textsuperscript{779} \textit{Khawar}, 965 P.2d at 702. Assuming this status was ever justifiable, it was limited to an individual who “despite never having voluntarily engaged the public’s attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.” \textit{Id.}

\textsuperscript{780} \textit{See id.}

\textsuperscript{781} \textit{See ELD\textbf{ER}, DEF\textbf{AMATION, supra} note 647, §§ 5:6, 5:8-5:27}

\textsuperscript{782} \textit{See, e.g., id. §§ 5:8, 5:12}

\textsuperscript{783} For an overview see \textit{id.} § 5:6, at 5-50 to -52, §§ 5:7, 5:8 at 5-65 to -66.
jellyfish to the wall.” 784 Another analogized the process to Justice Stewart’s “I know it when I see it” 785 definition of obscenity.

Although not as standardless as these characterizations suggest, public figure determinations are often difficult, usually fact-intensive, and may pose difficulties at the margins786 for a media defendant endeavoring to fathom whether neutral reportage can be relied on to defend reportage of lies. The “public official” determination poses similar difficulties. While Rosenblatt v. Baer787 has provided general criteria, and the Court has subsequently suggested that the case does not subsume all government paycheck recipients,788 courts have too often equated public employee status with “public official.”789 Moreover, again, cases at the margin are difficult to predict even where courts struggle to take the issue seriously.790

The Court’s attachment to Sullivan in public person-public concern cases is well documented and unlikely to be modified in the imminent future. Yet, it needs to be emphasized that the two foci justifying public status and application of the Sullivan standard, the primary assumption of risk rationale and secondary access to the media to reply rationale,791 admittedly often work fitfully and unfairly

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786. See, for example, Sunshine Sportswear & Elec. v. WSOC Television, Inc., 738 F. Supp. 1499, 1507, 1510 (D.S.C. 1989), where the “public figure” neutral reportage determination was made solely on plaintiff’s extensive advertising, which precipitated the controversy in issue, rejecting any preexistence requirement. For a criticism of this minority approach see generally ELDER, DEFAMATION, supra note 647, §5:18.
787. 383 U.S. 75 (1966). After identifying the “strong interest in debate about public issues and about those persons . . . in a position significantly to influence the resolution of those issues,” the Court generally identified those “responsible for government operations.” Id. at 85. Public officials status applies at least “to those among the hierarchy of government employees who have, or appear to the public to have substantial responsibility for or control over the conduct of government affairs” and “[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.” Id. at 85-86. However, this interest must “exist entirely apart from the scrutin[y] and discussion occasioned by the particular charges in controversy.” Id. at 86 n.13. For detailed analyses of why mere governmental affiliation is not enough see ELDER, DEFAMATION, supra note 647, § 5:1, and David A. Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan, 33 BUFF. L. REV. 579 (1984).
788. ELDER, DEFAMATION, supra note 647, § 5:1, at 5-1 to -5.
789. Id. § 5:1, at 5-17 to -20.
790. Id. § 5:1, at 5-23 to -33.
at best\textsuperscript{792} while “exact[ing] a correspondingly high price” from libel victims. Under \textit{Sullivan}, “[p]lainly many deserving victims, including some intentionally subjected to injury, will be unable to surmount” this “extremely powerful antidote to . . . media self-censorship.”\textsuperscript{793} But at least public persons have a modest chance of redress, even given the stringent standards imposed and the gross disparity in resources available to litigants.\textsuperscript{794} By contrast, neutral reportage obliterates \textit{any} right to redress even where the plaintiff can prove a defendant’s accurate republication is foundationally a pack of lies. The Court’s jurisprudential justifications for the public person-private person dichotomy have little significance for or claim to basic fairness in the separate and distinct context of neutral reportage.

\textbf{C. The “Responsible, Prominent” Source Requirement}

In \textit{Edwards}\textsuperscript{795} and \textit{Cianci},\textsuperscript{796} the National Audubon Society was considered the prototypical “responsible, prominent” source whose “serious charges”\textsuperscript{797} were deserving of republication protection despite the republisher’s doubts about the truth of the matter accurately republished. Most courts\textsuperscript{798} have agreed and “narrowly limited”\textsuperscript{799} the

\textsuperscript{792} See e.g., ELDER, DEFAMATION, supra note 647, § 5:12 (criticizing lower courts’ application of “central figure” and “course of conduct” analyses as in conflict with the Court’s jurisprudence).

\textsuperscript{793} \textit{Gertz}, 418 U.S. at 342.

\textsuperscript{794} For examples, see supra the collective and aggressive herd mentality evidenced in notes 310, 571, and 763 and infra notes 1226, 1445.


\textsuperscript{796} There are several references to the “responsible, prominent” and “responsible and well-noted” characterization in Judge Friendly’s synthesis of cumulative “\textit{conditions} or “\textit{qualifications}.” \textit{Cianci v. New Times Publ’g Co.}, 639 F.2d 54, 69-70 (2d Cir. 1980) (emphases added). While there are also quotations from \textit{Edwards} discussing more generalized protection for reporting newsworthy charges, Judge Friendly specifically rejected an earlier characterization of neutral reportage by Chief Judge Kaufman as extending \textit{Edwards} to “newsworthy material” as dictum “not intended to supersede the fuller exposition” in his \textit{Edwards} opinion. \textit{Id.} at 69 n.17. See supra note 749 for a full discussion.

\textsuperscript{797} \textit{Edwards}, 556 F.2d at 120.

\textsuperscript{798} Harte-Hanks Commc’ns, Inc. v. Connaukton, 491 U.S. 657, 660 n.1 (1989) (noting that the district court had rejected neutral reportage because the source was not responsible); Levin v. McPhee, 917 F. Supp. 230, 239 (S.D.N.Y. 1996) (finding that not all the sources cited were “responsible, prominent” persons comparable to the Audubon Society); Bair v. Palm Beach Newspapers, 8 Media L. Rep. (BNA) 2028, 2029, 2032 (Fla. Cir. Ct. 1982) (executive director of a publicly-supported drug treatment center met the
neutral reportage privilege to such sources. However, a vociferous minority has dissented. An exceedingly modest set of cases has divided the cumulative adjectives and allowed a neutral reportage defense if the source is a "prominent" party to the controversy (at least as to a public plaintiff), sometimes relying on the readily available standards for public persons (public official and public

standard), aff'd on other grounds, 444 So.2d 1131 (Fla. Dist. Ct. App. 1984); El Amin v. Miami Herald, 9 Media L. Rep. (BNA) 1079, 1080-81 (Fla. Cir. Ct. 1983) (invoking a city police department—presumably a "responsible source"—the court did not specifically discuss the "responsible source" issue, terming the matter a "newsworthy event"); Wade v. Stocks, 7 Media L. Rep. (BNA) 2200, 2201-02 (Fla. Cir. Ct. 1981) (businessman, property owner, "a person of substance speaking on the record sufficed"); Owens v. CBS, Inc., 527 N.E.2d 1296, 1308-09 (I1l. App. Ct. 1988) (an unemployed brother and sister who lived near plaintiff and who did not get along with plaintiff's family or with each other were not "responsible, prominent persons"—particularly since the brother was viewed by police as "a little thief"); Davis v. Keystone Printing Serv., Inc., 507 N.E.2d 1358, 1368-69 (Ill. App. Ct. 1987) (the doctrine was inapplicable to "alleged alcoholic ex-drug addicts who had already professed a desire to harm plaintiff's reputation"); Fogus, 444 N.E.2d at 1102 (finding that "unnamed youths" did not meet the "responsible prominent" source requirement); Rand v. N.Y. Times Co., 4 Media L. Rep. (BNA) 1556, 1558 (N.Y. Sup. Ct. 1978) (friend of a professional singer was not a "prominent responsible" source); Watson v. Leach, No. 95 CA 12, 1996 WL 325912, at *3 (Ohio Ct. App. June 7, 1996) (a state auditor's office met the Edwards standard); April, 546 N.E.2d at 470 (finding a sheriff was a "responsible prominent" source); J.V. Peters & Co. v. Knight-Ridder Co., No. 11335, 1984 WL 4803, at *5 (Ohio Ct. App. Mar. 21, 1984) (state attorney general's office sufficed); Martin v. Wilson Publg Co., 497 A.2d 332, 329-30 (R.I. 1985) (refusing to extend neutral reportage because a "responsible source" was absent); cf. Sunshine Sportswear & Elec. v. WSOC Television, 738 F. Supp. 1499, 1510 n.7 (D.S.C. 1989) (finding that one source, the Better Business Bureau, met the "responsible prominent" requirement and the other source, a competitor of plaintiffs, was "newsworthy"); Woods v. Evansville Press, 11 Media L. Rep. (BNA) 2201, 2205 (S.D. Ind. 1985) (finding that the source was a departing news anchor, a prominent local person and presumably knowledgeable about the station's past and future, but he was also an "apparently . . . disgruntled" employee leaving for reasons of dissatisfaction with plaintiff/employer), aff'd on other grounds, 791 F.2d 486, 488-89 (7th Cir. 1986). On review in the latter, the court held that plaintiff had not fulfilled its requirement of showing defendant had "serious doubts" about the source's credibility for constitutional malice purposes. The latter is not, of course, an affirmative finding that the source was a "responsible source," a separate requirement on which defendant-asserter of neutral reportage would have had the burden of proof.

799. Fogus, 444 N.E.2d at 1102; see also Owens, 527 N.E.2d at 1308 (quoting Fogus); Davis, 507 N.E.2d at 1368-69 (quoting Fogus); Martin, 497 A.2d at 329-30 (if viable, neutral reportage was "extremely limited" to an "identified and responsible source").


figures) developed in the constitutional malice setting. In this view, “prominence” (public official or public figure source status) alone suffices.

The rationale for this minority view is syllogistic. Source reliability is irrelevant to the purposes fulfilled by neutral reportage—the public interest in all disclosures about public controversies. By

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For reasons given above, these standards may not provide predictable parameters, at least in gray area cases. See supra text accompanying notes 786-794.

803. Ward, 733 F. Supp. at 83-84; Barry, 584 F. Supp. at 1126-28; DiSalle, 544 A.2d at 1363 (dicta). This construct did not apply in DiSalle because the source, a contestant over a will, was not a public person. DiSalle, 544 A.2d at 1363. Furthermore, it did not meet the “public controversy requirement.” See id. A will contest was hardly the kind of controversy the public needed information about to fulfill its self-governance functions. Id.; see also Condit v. Dunne, 117 F. Supp. 2d 344, 371 (S.D.N.Y. 2004) (suggesting that some of the matter republished might not have been of “public concern”). In Barry the court interpreted an Illinois case involving denial of neutral reportage to charges from “unnamed youths,” Fagus, 444 N.E.2d 1100, as not involving a determination on trustworthiness grounds but on being an “unnamed” source. The court distinguished another case, Krauss v. Champaign News Gazette, 375 N.E.2d 1362, 1364 (Ill. App. Ct. 1978), involving a prominent local figure, an assistant state’s attorney, as being a public figure and recognized in the community. Therefore, the citizens/public could decide for themselves whether to credit his accusations. Barry, 584 F. Supp. at 1125-26.

804. Ward, 733 F. Supp. at 83-84; Barry, 584 F. Supp. at 1116 (adopting the test devised for public figuredom in Waldbaum v. Fairchild Publ’ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980) (“If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.”)). Scrutiny of source trustworthiness would “create a chilling effect,” forcing a reporter to assess a source’s or organization’s credibility or suffer risk of defamation liability. Barry, 584 F. Supp. at 1126 (quoting Levin, supra note 732, at 1277). Levin criticized a “prominence” requirement as “too narrow . . . it would exclude any number of responsible but little-known, organizations . . . [with] the effect of strengthening established groups while stifling growth of new and unknown movements . . . at odds with the spirit of the free ‘marketplace of ideas.’” Levin, supra note 732, at 1277. For an approval of Barry’s approach see David McCraw, The Right to Republish Libel: Neutral Reportage and the Reasonable Reader, 25 AKRON L. REV. 335, 359-60 (1991) (stating that a limitation to a “responsible” source would “necessitate a sometimes difficult judicial assessment” of a reporter’s evaluation of an accuser and maybe the reasonableness thereof and would “work counter to First Amendment purposes,” by treating only responsible accusers’ statements as valuable to self-government concerns. For example, an irresponsible “fringe group’s” harassment of a public figure should be reported and “unpopular minority voices” should not be barred from media reportage by “a broad judicial stroke painting them as irresponsible.”). See also DiSalle, 544 A.2d at 1362 (where the maker of the defamatory accusation has “a significance to the controversy at issue, the reporting of that falsehood takes on an importance independent of the substance of the statement. For example, if a state’s governor falsely accuses the mayor of one of that state’s major cities of mismanagement, the reporting of this charge gives the electorate a valuable insight into the character of their state’s top official”) (dicta); see also 2 D0B88, supra note 753, at § 415 (if neutral reportage is adopted, the author suggests that the media should be able to report the public defamation of a private person by a mob leader fomenting the ransacking and bombing of buildings—whether this person is “prominent” is “irrelevant.”). Of course, assessing such credibility and trustworthiness is just the task imposed on media as to sources they rely on
definition, then, a “responsible” source/trustworthiness requisite is likewise deemed irrelevant. In other words, the neutral reportage purpose is to shed light on the parties to the controversy, with the citizenry left to judge the merits of their competing positions. The net effect is unconscionable; it provides absolute protection to dissemination of charges by such an exemplar of trustworthiness as a convicted felon who has flunked a lie detector test. Moreover, at least one court would not even mandate this tepid “prominence” minimum and would extend neutral reportage to the “irresponsible” and “unprominent.”

Of course, there is admittedly something exceedingly strange about the “responsible” source/trustworthiness requirement. A

in order to avoid liability under Sullivan-St. Amant. See, e.g., supra text accompanying notes 77-85, 181-186, 296-308, 499-506.


806. Barry, 584 F. Supp. at 1127. The court suggested the cases implied that accusations from an anonymous source or “man on the street” would not support application of neutral reportage. The court did not need to resolve this scenario in light of the source’s prominence in the case before it. Id. at 1126 n.19.

807. Barry, 584 F. Supp. at 1121-28 (finding the source to be a “central factor” in a recruiting controversy at the University of San Francisco and that plaintiff/coach was “another key participant”); see also Ward, 733 F. Supp. at 84-85 (giving Globe defendants neutral reportage protection for accurate republication of charges made in a News of the World article). The latter tabloid would, of course, be a public figure under consensus precedent. See ELDER, DEFAMATION, supra note 647, § 5:17.

808. In re United Press Int’l, 106 B.R. 323, 329-30 n.16 (D.D.C. 1989) (under either the “responsible” or “prominent” criterion, “the ‘robust and intimidated press’” Judge Kaufman sought to protect “would undoubtedly suffer.” The court conceded Edwards and Cianci may have intended that the source be “responsible” or “prominent.”). In a curious statement Judge Richey seemed concerned such criteria, if imposed, would “undoubtedly [be] defined in light of the values of some established class.” He did not further elaborate. A better example of a media’s relativistic thinking being reflected in a court opinion cannot be imagined. See also Sunshine Sportswear & Elec. v. WSOC Television, Inc., 738 F. Supp. 1499, 1510 n.7 (D.S.C. 1989) (noting that one of two sources was a business competitor of plaintiffs, whose views the court deemed “newsworthy”); Smith v. Taylor County Pub’g Co., 443 So.2d 1042, 1044, 1047 (Fla. Dist. Ct. App. 1983) (one of two accurately quoted sources was the purported victim of plaintiff’s assault—there was no discussion of the “responsible” source issue—the court’s cryptic analysis only noted the necessary of protecting “a disinterested report of a newsworthy event”); Orr v. Lynch, 401 N.Y.S.2d 897, 899 (App. Div. 1978) (dicta) (the quoted source was the purported victim of a shooting by plaintiff/police officer. The court applied an “informational function” analysis to reportage of the victim’s claims as “legitimate matters of public concern” despite the author’s personal disbelief in the source’s veracity). New York later disavowed Orr as support for neutral reportage, noting that it was resolved on constitutional malice grounds. See infra note 999.
prevaricating source could not and cannot be relied on with impunity in the constitutional malice setting; by definition, a defendant knows or suspects the matter is false.\textsuperscript{809} Indeed, frank and thoughtful authority acknowledges that neutral reportage is necessary or useful only where constitutional malice can be proved.\textsuperscript{810} In other words, sole reliance on neutral reportage tacitly concedes constitutional malice.\textsuperscript{811} In this sense it is difficult to challenge the suggestion that “no cogent reason”\textsuperscript{812} has been proffered for the “responsible” source limitation. While it may be correct that this determination is a proxy for newsworthiness,\textsuperscript{813} it is absurd\textsuperscript{814} to suggest that it is also a proxy\textsuperscript{815} for reliability/trustworthiness. After all, the matter at issue is, by definition, a calculated falsehood attributable to the defendant republisher, the antithesis of reliability/trustworthiness.\textsuperscript{816}

While there is a fleeting superficial symmetrical attraction to the “prominent” source/public person alternative exemplified in Norton,\textsuperscript{817} the attraction evaporates in the face of the endemic unfairness and disequilibrium between the competing interests in such a scenario. If adopted, the “prominent” source/public person gets an opportunity via the republisher’s immunity from liability to gain widespread exposure for a calculated falsehood. The public person plaintiff takes a knock-out blow below the belt and is left remediless

\begin{itemize}
\item \textsuperscript{809} See the detailed analysis in Elder, Defamation, supra note 647, ch. 7.
\item \textsuperscript{810} DiSalle v. P.G. Publ’g Co., 544 A.2d 1345, 1355 (Pa. Super. Ct. 1988) (\textit{dicta}) (“[T]he need for the neutral reportage doctrine is manifest only in those circumstances where the defendant is not already protected by the constitutional requirement of actual malice”).
\item \textsuperscript{811} Id.
\item \textsuperscript{812} Barry, 584 F. Supp. at 1126-27; DiSalle, 544 A.2d at 1362 (\textit{dicta}).
\item \textsuperscript{813} Coliniatis v. Dimas, 965 F. Supp. 511, 520 (S.D.N.Y. 1997) (\textit{dicta}) (involving a case that had granted summary judgment based on lack of constitutional malice). In light of the Greek-American concern and interest in Olympic Airways, it was newsworthy that the allegations were made by the airline’s law firm, “responsible, prominent” sources under Edwards. Id.
\item \textsuperscript{814} DiSalle, 544 A.2d at 1361-62 (\textit{dicta}) (criticizing the Edwards/Cianci reliance on prominence and trustworthiness as having no adequate nexus to First Amendment interests justifying neutral reportage: “(B)ecause neutral reportage intends to protect the publication of statements known to be false, the purported reliability of the source is \textit{totally irrelevant}” (emphasis added)).
\item \textsuperscript{815} Coliniatis, 965 F. Supp. at 520 (“[S]uch functions] to insure that an irresponsible republisher of unsupported allegations cannot hide behind the aegis of the privilege”) (\textit{dicta}); see Wertman, supra note 654, at 805 (noting that the prominence criterion both protects speech central to the First Amendment and ensures that false speech protected by this privilege is from a person whom the public has an interest in hearing); see also Stewart and Michelson, supra note 657, at 14.
\item \textsuperscript{816} See supra text accompanying notes 79-85, Part II.
\item \textsuperscript{817} Norton involved elected public official plaintiffs and a co-defendant public official source. See supra text accompanying notes 540-546, 572-578.
\end{itemize}
against the media republisher of the lie, all in the interest of letting the public be the “ultimate arbiter”818 of the competing positions. As a distinguished jurist said in another context, “[a]n instinctively felt sense of injustice cries out against such a sharp bargain.”819

As stated above, a court adopting the “responsible” or “prominent” source alternative usually has independent scienter of the charges’ falsity. This is almost a sine qua non in cases of neutral reportage. The question then arises as to whether a defendant has any duty to disclose this information. The law is not clear but strongly weighs against such a requirement. In its “neutrality” analysis, Cianci briefly referenced the defendants’ failure to reveal facts undermining the credibility of two of its important sources.820 However, the overweening philosophy of neutral reportage doctrine is that it applies in the face of the media republisher’s “serious doubts regarding [the statement’s] truth.” Edwards reasoned that the press is not required to “take up cudgels against dubious charges in order to publish them without fear of liability.”821 This expansive non-duty position is disastrous for plaintiffs. Even as to a so-called “responsible” source, the matter remains a calculated falsehood, a lie. Yet, defendants have no responsibility as journalists or publishers to inform the reader or viewer why they know or have serious doubts about the truth of the matter reported. Non-disclosure results in the reader or viewer not knowing what the republisher knows or suspects. In addition, the republisher’s imprimatur and credibility envelop the lie (whether or not the defendants specifically “endorse” or “concur”) in a magical fog of pseudo-credibility. In other words, the reader or viewer who does not know it is a calculated falsehood reasonably believes that a normally credible republisher822 wouldn’t republish a lie, at least without disclosing the grounds for knowing or suspecting falsity. Plus, the republisher retains its “credibility” by not disclosing the non-meritorious nature of what it is republishing.

822. The courts have recognized this by allowing a media defendant normally to rely on (and thereby refute reckless disregard of falsity) by relying on other media sources. See Elder, Defamation, supra note 647, § 7:2, at 7-25 to -31.
If the source is merely “prominent” and not otherwise “responsible,” another layer of deception is added. For example, in Norton, the reporter would have had no duty to disclose any of the grounds for his disbelief in the public official’s/source’s reliability, including the source’s rant at the reporter pelting him with the same homophobic charges he had thrown at the plaintiffs. What is the purported rationale for this scenario? To let the citizen, not the media, be the “final arbiter” between the competing positions! But, of course, this non-duty frustrates the purported rationale by denying the reader and/or viewer the information necessary to make a deliberative decision, and leaves the status of the competing positions grossly distorted, thereby measurably tainting the supposed citizen-centered decision-making process.

To summarize, the neutral reportage republisher acting as “conduit” or “messenger,” but not as “advocate,” is allowed to perpetuate, promulgate, and give potentially unlimited publicity to incredibly damaging lies while disclosing only the “serious charges” harmful to the plaintiff and omitting those either discrediting the source or revealing the republisher’s incredibility and damaging its reputation. This is a bizarre and unconscionable scenario. The plaintiffs were clearly correct in Norton. For neutral reportage to have even an arguable glimmer of respectability, a source has to be either “responsible” or there has to be an “objectively reasonable disclosure of the source’s irresponsible character.”

823. See supra text accompanying notes 541-546.
824. See supra text accompanying notes 469-484.
825. See supra text accompanying note 571.
826. Brief of Appellee Wolfe at 18, Norton v. Glenn, 860 A.2d 48 (Pa. 2004) (Nos. 18 MAP 2003 & 19 MAP 2003). See supra text accompanying notes 592-599, 626-635. For variants on Norton/Appellee’s back-up argument, see Crass, supra note 654, at 358-59, where the author correctly noted the anomaly posed by Edwards’ “responsible, prominent” source requisite—“this responsible organization published a false, defamatory charge without factual basis.” Id. at 358 (emphasis added). The author would require defendant to disclose any information about the source known by defendant to be false or which it strongly believed to be false—merely printing plaintiff’s denial or not espousing or concurring would not suffice. See also Levin, supra note 732, at 1281-82 (although Edwards does not mandate “strict editorial balance,” “the republisher might well be held to have asserted the truth of the underlying charge if he omitted any mention of contrary information in his possession”); McCraw, supra note 804, at 365 (proposing a requirement of “full disclosure of the context of the accusation, including such relevant factors as the absence of proof, evidence reflecting on the credibility of the accuser, the existence of a controversy, denials by the accused, and facts shedding light on the accuser’s perspective and biases”; if such are made and the reader is reasonably put on notice, the controverted changes are not asserted as true by the republisher and any reputational harm by “can fairly be shifted” to plaintiff/accused); Oller, supra note 657, at 1504, 1520 n.151, 1524 (although Edwards impliedly suggested a reporter accurately recounting newsworthy
scenario of the irresponsible source absent disclosure of the grounds for his irresponsibility, the Pennsylvania Supreme Court did the only responsible thing: it rejected neutral reportage as an exceedingly bad idea.827

Assuming arguendo that the “responsible” source limitation has a modicum of merit, problems arise in how one defines “responsible,” what nexus one requires to the “serious charges” parroted by the source, how broadly or narrowly one examines the information known to the reporter about the source, and at what point in the source-reporter relationship one assesses it. A laundry list of unanswered (perhaps unanswerable) questions can be posed in this regard. Is there a per se rebuttable presumption of “responsibleness” as to certain classes or categories of sources, such as other local or national media or local, state, or national public officials? Or can a

accusations “need not seek out and print rehabilitating information from other sources,” nonetheless a republisher “withhold[ing] information in his possession that substantially refutes the charges . . . should assume the risk that a jury would find the omissions materially misleading.”); Mark W. Page, Price v. Viking Penguin, Inc: The Neutral Reportage Principle and Robust, Wide Open Debate, 75 MINN. L. REV. 157, 195 n.208 (1990) (suggesting limits to the expanded “robust, wide open debate” version adopted in Price, for example: “[S]uppose a republisher publishes a harsh attack on an individual. In its attack, it republishes defamatory falsehoods and mentions that they are only allegations. The republisher has information that would alleviate the harshness of the allegations but withholds the information because it desires maximum impact . . . . [T]he factfinder should find adoption and hence liability.”). See also SMOLLA, supra note 753, §§ 4:97, 4:99.

Although rejecting a “responsible” source requirement, the author is ambiguous as to refutatory evidence. Id. In the first section Dean Smolla correctly concludes that inclusion of denials and contradictory evidence would not bar liability at common law; in the second section he seems to treat such as optional—the “neutrality” requirement “does not mean . . . that denials or responses to the charge, or accurate reportage of counter evidence, may not be included.” Id. While these variants on Norton’s “responsible” or full disclosure alternative are modest improvements on Edwards, they, like the Norton fall-back argument, are strange birds indeed. Defendant is absolutely immune for printing accusations from a “responsible, prominent” source as long as facts demonstrating the source is a liar are disclosed. Yet, the harm to plaintiff’s reputation will almost always be the same even with disclosure, with the source’s “responsibleness” still reinforced at least in part by the media’s reputation and the reader’s/viewer’s natural assumption that the media defendant wouldn’t put its reputation (and money) on the line unless it somehow believed the source despite the refutatory information. To some not unreasonable readers or viewers the unstated premise may even heighten the source’s impact or allure. Note under this full disclosure view the media is not printing a large, prefatory warning to the effect: WARNING: HAZARDOUS TO YOUR INTELLECTUAL HEALTH. DO NOT PUT ANY CREDENCE IN THE ACCUSATIONS ACCURATELY REPORTED OR TO THE FACT THAT WE HAVE REPBULISHED THEM. THE LAW ALLOWS US TO DO SO WITH IMPUNITY AS LONG AS WE DISCLOSE WHY WE BELIEVE THE SOURCE IS DISSEMINATING A PACK OF LIES. DISSEMINATION OF SUCH LIES IS DEEMED BY THE LAW TO BE IN THE PUBLIC INTEREST. Such a warning would largely negate the harm to the plaintiff, but deservedly leave the defendant looking ludicrous, unable to envelop itself in its traditional self-righteous mantle of public-spiritedness.

plaintiff explore via discovery whether and to what extent a reporter has found the resource reliable in the past, an inquiry not unlike the multi-factored analysis used in proving constitutional malice. What effect is to be given to contradictions in the source’s story or indicators evidencing incredibility in the telling? And why does the very same information that raises “serious doubts” not also render the source per se irresponsible? (Apparently it does not, or neutral reportage would not exist.) The cases provide little or no guidance as to why a “responsible” source can and should be respected where the reporter has “serious doubts” about the source’s veracity or the information tendered.

Must the credibility-negating information pre-exist the “serious charges” or may it arise thereafter but before republication? At what point during this pre-publication assessment does other information known to the reporter transform the so-called responsible source from the “serious doubt”/no duty to “take up cudgels” variety to an “irresponsible” source? How would the court resolve this issue where a defendant asserts source anonymity? The case law provides little guidance. The few cases that involve sources characterized as “responsible” are largely conclusory in nature or seem to be conceded as such by the plaintiff. The issue is one rarely developed by plaintiffs, but ought to be. It may also constitute a quagmire of fact-intensive inquiries that may, as in cases of constitutional malice, make summary judgment less available or present factual issues resolvable only by trial.

D. The “Neutrality” Requirement

In Edwards, Judge Kaufman appears to attempt to carefully qualify the nature of the absolute privilege created for the media. Although “[l]iteral accuracy is not mandated, a defendant must

828. See Elder, Defamation, supra note 647, § 7:2, at 7-27.
830. It has been noted, perhaps erroneously (or at least overly broadly), that one of the supposed advantages of neutral reportage—unlike constitutional malice—is the availability of summary judgment. Barry v. Time, Inc., 584 F. Supp. 1110, 1114 n.16 (N.D. Cal. 1984). For a further discussion see infra note 1177. This seems highly unlikely if plaintiff challenges the “responsibleness” of a source.
“reasonably and in good faith” believe that its published report “accurately conveys” the charges. But Edwards makes it “equally clear” that liability may still be imposed under Sullivan if the defendant either “espouses or concurs” in the charges recounted, or “deliberately distorts” them to launch a personal attack” of its own. In other words, neutral reportage is unavailable where a defendant’s account is “neither accurate nor disinterested.” By contrast, Edwards was an “exemplar of fair and dispassionate reporting,” that included the defamed scientists’ “outraged reactions.” The Second Circuit’s decision in Cianci subsequently reaffirmed these “conditions” and “qualifications” and found that “almost none” of them had been fulfilled in the case before it.

Judge Kaufman’s references to fairness and accuracy were clearly meant to draw on the history and vitality of fair report, a well-
established doctrine based on compelling public policies. Indeed, a series of purported neutral reportage cases has found the doctrine wanting on one or more grounds that would have forfeited fair report in an appropriate case: misidentification; manipulation of the evidence to create a false impression; material omissions or inaccuracies; and contextual and other indicia of non-neutrality.

841. See Elder, Defamation, supra note 647, § 3:1; Elder, Fair Report, supra note 657, § 1.00[a].

842. Other limited indications have suggested that “source attribution,” a general requirement for fair report, see Elder, Fair Report, supra note 657, § 1.17, is also a basis for refusing to apply neutral reportage. White v. Fraternal Order of Police, 909 F.2d 512, 528 (D.C. Cir. 1989) (suggesting neutral reportage was inapplicable because the source—the Fraternal Order of Police—was not identified as such); Martin v. Wilson Publ’g Co., 497 A.2d 322, 329-30 (R.I. 1985) (limiting neutral reportage (if viable) to an identified and “responsible source”); see also Barry v. Time, Inc., 584 F. Supp. 1110, 1125-26 (N.D. Cal. 1984) (interpreting Fogus v. Capital Cities Media, Inc. 444 N.E.2d 1100, 1101-02 (Ill. App. Ct. 1982), as involving “unnamed youths,” not an irresponsible source).


845. Cianci, 639 F.2d at 69. The court noted that the article created the false impression that the prosecutor decided to drop rape charges after the victim withdrew charges and because polygraph test results were not admissible, when in fact the prosecutor’s interview with the reporter said the parties’ and their counsel’s actions were irrelevant—the only issue was proof sufficient to meet the beyond-a-reasonable-doubt requirement. Id.

846. Id. Judge Friendly emphasized that no references to plaintiff’s innocence claims regarding the rape charges had been included, except in a “backhanded form” where plaintiff’s lawyer referred to the charges as a “shakedown.” Id. Furthermore, nothing was contained in the story concerning plaintiff’s position that the sum of $3,000 was paid to resolve contemplated civil litigation, not to persuade her to withdraw criminal allegations, and no disclosure had been made of the victim’s attorney’s statement that no crime had occurred. Id. (noting “failure to reveal facts undermining the credibility of such critical figures” as the victim); see also Price v. Viking Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989) (interpreting Cianci in dicta as involving a failure to tell the other side of the story); Schiavone Constr. Co. v. Time, Inc., 619 F. Supp. 684, 699, 700 n.9 (D.N.J. 1985) (finding that omission of “the exculpatory while reporting the ‘discreditable’” forfeited fair report and neutral reportage). One case involving a material omission purporting to forfeit neutral reportage, i.e., a failure to disclose that a fine of plaintiff/company related only to a labeling violation and not to the public health charges made in the article, was actually made in the context of a discussion of statutory fair report under New York law. Ocean State Seafood, Inc. v. Capital Newspaper, 492 N.Y.S.2d 175, 179 (App. Div. 1985).

such as the defendant “concurring” in or “espousing” the charges. Examples of concurrence or espousal have included embellishments, additions based on the defendant’s investigation or research, advocacy of a source’s credibility, and understating earlier investigative reporters’ tactics in gathering information. One case, 

Crane v. Arizona Republic, even suggested that neutral reportage may be narrower than fair report in one respect: the absence of a doctrine of “literary license.” This seems unjustified by the clear tenor of the

848. Flowers v. Carville, 310 F.3d 1118, 1128 & n.5 (9th Cir. 2002) (dicta) (republications of matter purportedly taken from earlier media stories were in contexts—Clinton spokespersons’ memoirs, Larry King Live and an interview with Tim Russert—“bellying] any claim such were merely ‘neutral reports’”); Price, 881 F.2d at 1434 (dicta) (distinguishing Cianci as involving a misrepresented chronology of events and an explicit charge of obstructing justice).

849. Cianci, 639 F.2d at 69; see also Price, 881 F.2d at 1434 (dicta). For good examples, see Int’l Ass’n of United Mine Workers Union v. United Mine Workers of Am., No. 2:04cv00901, 2006 U.S. Dist. LEXIS 28048, at **25-26 (D. Utah May 1, 2006) (where defendant adopts statements “not as reports or statements by others, but as their own personal representations,” the case stands on “a different footing”) and Condit v. Dunne, 317 F. Supp. 2d 344, 371 (S.D.N.Y. 2004) (defendant/journalist had no claim to neutral reportage where he violated the “critical neutrality element” by concurring in the reported allegations, i.e. that it was unambiguous that he thought plaintiff was complicit in the disappearance of Ms. Levy). However, a later editorial not the basis for the litigation could not be viewed as an endorsement. Coliniatis v. Dimas, 965 F. Supp. 511, 520 n.2 (S.D.N.Y. 1997).


851. Englezos & Aesop, Inc., 980 S.W.2d at 32-33 (adding that statements “clearly went beyond the bounds” of the privilege). See also the trial court’s determination that a tabloid’s blow-up and arrow to identify plaintiff (unidentifiable in the book) was not an accurate and neutral report in Khawar v. Globe Int’l, Inc., 965 P.2d 696, 700 (Cal. 1998).


853. Cianci, 639 F.2d at 69. The article at dispute cited the “hard-nosed techniques” of the first reporters, but the victim herself alleged they had made threats and harassed her, i.e., if she did not talk, they would print the story with her name, identifying her family, including pictures of her residence and her children. Id.

854. 729 F. Supp. 698, 711 (C.D. Cal. 1989) (noting that the “literary license” doctrine of fair report was based on its “capture of the substance” rule of fairness and accuracy), aff’d in part and vacated in part on other grounds, 972 F.2d 1511, 1525 n.10 (9th
precedent that applies the same standards to both.855 In contrast, the
Eighth Circuit may have adopted an unjustified “relatively expansive
conception”856 of neutrality, extending it to cases where an author
deliberately makes known his or her personal predisposition.857

855. See supra notes 841-853.

856. In re United Press Int’l, 106 B.R. 325, 329 (D.D.C. 1989); see also Wertman, 
supra note 654, at 807-08 (noting that Price was “significantly more permissive” than
Edwards, allowing a “one-sided report” by an actively involved participant in the
controversy if the defamatory statements themselves were “reported neutrally”).

its earlier opinions in Janklow v. Newsweek, Inc. I and II, see infra the text accompanying
notes 934-988 for an extended analysis, the court noted it had “refined” “neutral reporting,”
allowing it even where the author evidenced a “transparently pro-Banks” perspective.
Price, 881 F.2d at 1434. The focus was on “accurate reflections of what was said or done”—
indicia of an author’s “general disposition” did not equate to espousal of each specific
charge therein. Id. One commentator has concluded that the court rejected the “wider
context” in favor of the “immediate context” of the particular charge, thus bestowing on the
author the following:

[A]n author may so distort a controversy, and may be so adept at winning the
reader to his side, that a reader presented with a specific factual allegation no
longer can make a neutral, disinterested evaluation. . . . The court circumscribed
this “neutrality” requirement because it valued [the book] not for the
information the book provides the public, but for the role it plays in public
debate.

Page, supra note 826, at 186. Note that this broad “neutrality” concept overlapped with the
Eighth Circuit’s now repudiated broader opinion doctrine and is likely not good law. See
infra text accompanying notes 983-988.
The case law in general, and Edwards as contained by Cianci, treats “neutrality” as mandating at least a bonafide attempt to give the defamed plaintiffs (or a representative part of a plaintiff class) an opportunity to deny the charges. One decision

858. Ward v. News Group Int’l, Ltd., 733 F. Supp. 83, 85 (C.D. Cal. 1990) (noting that defendants made the account “very neutral” in part by publishing plaintiff’s denial); Lasky v. Am. Broad. Co., 606 F. Supp. 934, 936-38 (S.D.N.Y. 1985) (noting that neutral reportage applied “only if [the report] is fair to the individual involved in the public issue, representing his or her side of the story as well as the other,” and refusing to dismiss plaintiff’s complaint where defendant had published plaintiff’s “general recollection” of a meeting from which the defamatory statement was taken but where defendant did not include plaintiff’s “specific denial”—the latter was included only in a “correction” admitting unfairness to plaintiff in this respect); Barry v. Time, Inc., 584 F. Supp. 1110, 1127 (N.D. Cal. 1984) (stating that plaintiff could not claim an “unbalanced or one-sided picture” since, as in Edwards, defendants had solicited and publicized plaintiff’s denial); see also Int’l Ass’n of United Mine Workers Union v. United Mine Workers of Am., No. 2:04cv00901, 2006 U.S. Dist. LEXIS 28048, at *25-26 (D. Utah May 1, 2006) (two media defendants were protected by neutral reportage where they “[a]lmost invariably” “sought each party’s position”; however, another defendant did not benefit from the doctrine where it neither sought nor offered plaintiffs an opportunity to reply to the published charges); Wade v. Stocks, 7 Media L. Rep. (BNA) 2200, 2201-02 (Fla. Cir. Ct. 1981) (the reporter’s attempt to elicit all sides of the story, including plaintiff’s, was treated as essential to neutral reportage); Watson v. Leach, No. 95 CA 12, 1996 WL 325912, at *3 (Ohio Ct. App. June 7, 1996) (incorporation of plaintiff’s comments was part of an accurate and disinterested report); J.V. Peters & Co. v. Knight-Riddner Co., No. 11335, 1984 WL 4803, at *6 (Ohio Ct. App. Mar. 21, 1984) (treating the reportage of plaintiff’s manager’s “rebuttal reaction” as an element of neutral reportage).


860. Cianci, 639 F.2d at 71 (Kaufman, J., concurring) (noting for consideration on remand defendant’s assertion it had tried repeatedly to get plaintiff’s version of the events prior to publication); Edwards v. Nat’l Audubon Soc’y, Inc., 556 F.2d 113, 117-18, 120 (2d Cir. 1977) (noting that plaintiff had tried to contact all the named “paid liars” and succeeded with three and that the author had “thus in good faith elicited both sides of the story to the best of his ability”); Nelson, supra note 805, at 495 (stating that the “neutrality” requirement imposes a “good faith duty” to attempt to get the accused party’s response). In one case, Coliniatis v. Dimas, 965 F. Supp. 511, 515-16 (S.D.N.Y. 1997), the editor/publisher tried unsuccessfully to contact plaintiff. The magistrate found that defendant’s “hurried investigation” of plaintiff’s side of the controversy, reportage of the denial of the source (upon which the law firm based its letter that defendant synthesized), and subsequent publication of plaintiff’s rebuttal did not meet Edwards’ requirements. The federal court disagreed. In light of the other facts indicative of a “well-balanced and neutral” report, it was apparently sufficient that only the original source’s denial and the law firm’s “no comment” were disclosed. Id. at 520 (dicta).

861. In Edwards Chief Judge Kaufman noted defendants’ attempts and successful contacts with three of the five referenced scientists, all of whom “categorically denied the changes,” that one called them “almost libelous,” that the article had quoted the latter, and that all three “ridiculed the accusations as ‘emotional,’ ‘hysterical,’ and unfounded.” Edwards, 556 F.2d at 117-18. Chief Judge Kaufman viewed this as “having in good faith
went a step beyond an opportunity to deny and mentioned the defendant’s discussion of the plaintiff’s benevolent and business activities unrelated to the charges.862 This discussion presented the plaintiff in a somewhat more positive light.863 One court has stated that a “well-balanced and neutral” account included a full depiction of disputed or missing evidence.864 Another decision involving a “prominent” but “irresponsible source” emphasized that the defendant had not camouflaged facts about its source that tended to impugn his credibility.865

elicited both sides of the story.” Id. at 118. Later he noted defendant had “published the maligned scientists’ outraged reaction” in the article. Id. at 120. Judge Friendly emphasized the above reportage of denials as part of his three part focus on defendant’s “fair account” in Edwards. Cianci, 639 F.2d at 68 n.16. By contrast, in the case before him, defendant did not get plaintiff’s “version of events,” although it did meet with his counsel and allow certain documentary submissions. Judge Friendly quoted from Professor Sowle’s supportive analysis of neutral reportage, indicating that neutrality would be met “only if it is fair to the individual involved . . . presenting his or her side of the story as well as the other.” Id. at 69. The latter paralleled fair report requirements, allowing “an ongoing, balanced report of the day-to-day events at a public trial, but . . . not . . . a partial report . . . report[ing] only the prosecution’s evidence in a criminal case and omit[ting] the defendant’s.” Id. at 69 n.18. Note, however, that the fairness and accuracy requirements under fair report generally do not require that plaintiffs’ denials or views be solicited and reported—it is enough that the report or proceeding be accurately synthesized. ELDER, DEFAMATION, supra note 647, § 3:32, at 3-100; ELDER, FAIR REPORT, supra note 657, § 3.03[B][4]; McCraw, supra note 804, at 361. As one court stated, in fair report the defendant “had it wished, could have devoted the entire issue to the statement without any effort to neutralize the accusation by giving the accused the opportunity to deny. The question then becomes how well does the editor sleep with his own conscience . . . our concern as human beings desirous of a fair world, not as judges resolving a legal issue.” Jamason v. Palm Beach Newspapers, Inc., 450 So.2d 1130, 1133 (Fla. Dist. Ct. App. 1984). Very occasional case law, possibly reflecting the impact of neutral reportage, has cited reportage of the critics on the other side of a legal proceeding as important in assessing “fairness” in fair report cases. Law Firm of Daniel P. Foster v. Turner Broad. Sys., Inc., 844 F.2d 955, 961 (2d Cir. 1988) (stating that FBI spokesperson’s statements about an executed search were “balanced” by interviews challenging its legitimacy).

862. Ward, 733 F. Supp. at 85.
863. Id. Together with plaintiff’s denial, this was part of a “very neutral” account. Id.
864. Coliniatis, 965 F. Supp. at 520 (dicta) (defendant’s investigation was “fully described” and the article included its “admonitions and hedging language”).
865. Barry v. Time, Inc., 584 F. Supp. 1110, 1122, 1126-28 (N.D. Cal. 1984). The court relied heavily on a case, Barger v. Playboy Enterprises, Inc., concluding that no constitutional malice could be shown where defendant fully disclosed the grounds suggesting that defendant’s source was suspect. Id. at 1127-28. For a strong criticism see infra text accompanying notes 1140-1177.
Extremely modest case law has taken issue with the idea that “neutrality” mandates an opportunity for a plaintiff’s response. In United Press International, the court found that a “close reading” of Edwards rejected any suggestion of a “both sides” requirement. The court found it “sufficient” that the defendant had “verified” that its sources said what they had reported, despite the fact that the state supreme court had found these same sources suspect and that the defendant’s reliance on them posed jury issues of constitutional malice. The court disparaged the “both sides” argument as “essentially an incident” of and not an addendum to the no espousal or concurrence limitation. Providing the plaintiff’s side of the story might negate any risk of an account being interpreted as an espousal, but “adds nothing” to “neutrality” where otherwise there is reportage of a “simple and straightforward story.”

866. Some cases apply neutral reportage to accurate and disinterested reports with no mention of reportage of plaintiff’s denial or side, thereby arguably implicitly rejecting this requirement. See, e.g., Woods v. Evansville Press, 11 Media L. Rep. (BNA) 2201, 2202-03 (S.D. Ind. 1985) (although plaintiff’s recent purchase of a television franchise had been repeatedly discussed in news stories and plaintiff had been previously interviewed by defendant, he was apparently not given a response opportunity in the five day window from the source interview (plaintiff’s departing news anchor) and the publication of the story—only the source was contacted to confirm the story), aff’d on other grounds, 791 F.2d 480, 488-89 (7th Cir. 1986); April v. Reflector-Herald, Inc., 546 N.E.2d 466, 470 (Ohio Ct. App. 1988); see also SMOLLA, supra note 753, §4.99 (the “neutrality” requirement “does not mean . . . that denials of responses to the charge . . . may not be included”); Dobbels, supra note 662, at 1211 n.47 (noting it was unclear whether Edwards mandated a rebuttal opportunity); Hart, supra note 655, at 233 (recommending “an opportunity for immediate reply” as a factor in an overall assessment in the context of applying criteria of neutrality based on “widely professional ethics and practice”). A couple of commentators have taken the extremely dubious position that mandating a right of response would violate the media’s constitutionally protected right of “autonomous editorial discretion” under Miami Herald Publishing Co. v. Tornillo. See Oller, supra note 657, at 1519 n.148; Craig Smyser, Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication, 58 TEX. L. REV. 623, 644-45 (1980). This conclusion is an overly ambitious reading of the Court’s holding in that case. See supra note 656.


868. Id. at 330-31; see also Khawar v. Glove Int’l, Inc., 965 P.2d 696, 705 (Cal. 1998) (stating dicta to the effect neutral reportage involves inclusion of plaintiff’s response “where practical”).


870. Id. at 326-28. This was the binding law of the case. Stunningly, this did not bar the court from incoherently finding that plaintiff had failed to prove falsity under Philadelphia Newspapers, Inc. v. Hepps. See supra text accompanying notes 254-293.


873. Id. The court conceded that “the more factually involved and one-sided” the report, the more significant was the duty to give “both sides.” Id. at 330 n.18. Here,
Under this minority view, reportage of the plaintiff's response might be a preferred journalistic practice and provide a better account, but neutral reportage is not forfeited by its absence. The court’s reading of Edwards arguably might be correct. However, Cianci's circumscription is inconsistent with a calculated ignorance of the plaintiff's point of view. Moreover, this minority doctrine effectively holds that republication of lies sufficient for constitutional malice should not be given the modest mitigation of a denial or retort by a plaintiff, suggesting that they are, indeed, what they are—a pack of damaging lies.

E. The “Raging Controversy” Requirement

As the purported raison d'être of neutral reportage is promoting the reportage of “rag[ing] controversies,” several decisions including Edwards as limited by Cianci treat “raging controversy” as an important limitation. Under this view, a defendant has no claim to the privilege where it is the creator rather than the conductor of the controversy. Thus, the defendant was denied the privilege as to “journalist-induced charges” resulting from “purely investigative reporting,” particularly of dated matter. Another

however, the account was hardly “involved,” as it contained two separate single paragraph accounts of the charges. Id.

874. Id. at 330.

875. See supra text accompanying note 837-838. While his analysis of Edwards is not without logic, he ignores the constraining influence of Cianci. See infra note 880.

876. See supra text accompanying notes 733-746, 796, 839-840 and infra text accompanying note 880.


879. Edwards, 566 F.2d at 115-17, 120.

880. Cianci v. New Times Publ'g Co., 639 F.2d 54, 66-69 (2d Cir. 1980). Earlier the reference was to “violent controversy.” Id. at 67.


882. Levin, 917 F. Supp. at 239; McManus, 513 F. Supp. at 1391.

883. McManus, 513 F. Supp. at 1391. Unlike the reporter in Edwards, who had contacted the National Audubon Society to solicit the scientists’ names after the Society’s report had been issued, “an autonomous news event,” in McManus the reporter “solicited
decision refused to apply the doctrine to an arguably preexistent controversy that was shielded from public view until reported by the defendant. Where a defendant republisher first manufactured and then disseminated the fabricated controversy, neutral reportage was likewise rejected. Any other result would undermine First Amendment values and impair the press as an institution.

The charges” (plaintiff’s alleged “homicidal tendencies”)—“no controversy raged before the reporter entered the scene.” Id. at 1397; cf. Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989). One commentator has characterized that decision as extending neutral reportage beyond a “raging” controversy to investigative reporting and allowing the author to “actively participate in the debate.” Page, supra note 826, at 185-87. Compare this with the attempt, frustrated by the Fourth Circuit, of defendant/New York Times to get absolute privilege (as non-defamatory) for a story largely generated by columnist Nicholas Kristof. For this, see the important case of Hatfill v. New York Times discussed infra in the text accompanying notes 1581-1625.

884. For example, the rule did not cover elicited thirty year-old recollections during a docu-drama about McCarthyism. Lasky, 631 F. Supp. at 971. This was not the “raging and newsworthy controversy” contemplated by Edwards. Furthermore, “no controversy raged” until the defendant elicited the recollection. Indeed, it was not even a “charge” under Edwards but a “recollection” in response to the reporter’s inquiry. Id. All the above is technically dicta because that aspect of the plaintiff’s claim had been abandoned. Id. at 971 n.3. On the latter see supra note 847. In another case, Lasky was followed as to author-elicited alternative versions of a Russian artist’s murder eighteen years after the fact. Levin, 917 F. Supp. at 239. The Second Circuit affirmed on grounds of opinion under the broad New York rule. The court acknowledged that recounting personal “versions” of an unresolved mystery death of a Russian artist implicating plaintiff in the murder could be defamatory. Levin, 119 F.3d at 195-96. The court nonetheless found it opinionative in light of the “clear signals” that the “versions” were “nothing more than conjecture and rumor.” Id. at 196-97. One authoritative commentator has characterized this as rather a surprising conclusion and suggested that Levin “supports the neutral reportage privilege without saying so.” 2 Dobbs, supra note 753, at § 420. If this is true, then Levin has sub silentio adopted a very broad version of neutral reportage—based on a controversy that was elicited and not “raging,” emanating from sources not meeting the “responsible, prominent” requirement of Edwards and extended to private persons, an issue not resolved by the Second Circuit, as the district court noted. Levin, 917 F. Supp. at 239.

885. Crane v. Ariz. Republic, 729 F. Supp. 698, 711 (C.D. Cal. 1989), aff’d in part and vacated in part on other grounds, 972 F.2d 1511, 1525 n.10 (9th Cir. 1992). A secret governmental investigative proceeding did not qualify as a “preexisting ‘raging controversy’” Id. at 711. The court acknowledged that this might be an anomalous conclusion in light of its finding the same proceeding was entitled to fair report status under the extremely broadly interpreted California statute. However, the dichotomy was justified by the media’s “‘watchdog’ function in fair report and the greater protection given the individual rather than the government. Id. Aside from the dubiousness of fair report in such settings, the distinction is otherwise difficult to fathom. Since governments function through only individuals, and co-plaintiff was—as head of the Los Angeles branch of the Organized Crime Strike Force at the time of the alleged misconduct—a “public official,” id. at 708, arguably a “public supervisory” function could arguably have been asserted. As to “public official” status, see supra text accompanying notes 787-790, 800-803.


887. Id. at 284. Fabricated matter referred to during legislative debates on plaintiff’s bill, was protected by New York’s statutory absolute privilege of “fair report,” a “principle of
Other courts have viewed neutral reportage more expansively and suggested that Edwards did not condition neutral reportage on the preexistence of a “raging controversy.”888 Under this view, it is sufficient that there is a preexistent newsworthy controversy.889 One decision even rejected any preexistence requirement entirely, and only required that the matter be “serious and newsworthy.”890 This makes the public, not the press, the “final arbiters” of the merits of the charges reported.891 In other words, the “raging controversy” facet is illustrative of the public need for, rather than functioning as an element of or limitation on, the doctrine.


890. United Press Int’l, 106 B.R. at 324-25, 330-31 & n.19 (where the matter in question was of “great public interest,” i.e., reporting third party statements of plaintiff as the alleged “Godfather” of the Hawaiian underworld, “the press should enjoy the freedom to report them without regard for the 'history' of the dispute”); SMOLLA, supra note 753, § 4:99 (the serious charge must be preexistent “or generate a public controversy in their own right”). See also Wertman, supra note 654, at 813-22, for a discussion of adoption of a “public concern” test instead of a “newsworthiness” test in addition to public person plaintiff status. While the author may be correct in that “public concern” under Court jurisprudence, see supra note 409 and text accompanying notes 267-277, 320-326, does not equate to and is more limited than “newsworthiness,” this hardly narrows neutral reportage to any significant degree. See infra note 1579. Indeed, it is a distinction that is difficult to draw, as the author’s illustrations seem to compellingly illustrate—reportage from a news wire of a newspaper story about “hefty markups” on a Care-Pac to soldiers abroad is covered but not a republication of attacks on an anti-pornography activist/entertainer by a pornographic magazine as heading a “wacko group” “engaging in censorship and intimidation tactics,” “frustrated,” “threatened by sex,” and a “deluded busybody.” The latter was not of “public concern” because, although newsworthy under Edwards, it “add(ed) nothing to public debate ‘around sensitive issues.” Wertman, supra note 654, at 822. This is a difficult distinction to make and defend on its facts. Maybe the true reason for denial would be the lack of any “responsibleness”—the author only uses “prominent organization” in describing the source.

The “raging controversy” limitation seems wholly artificial, as does the non-extension of neutral reportage to cases involving investigative journalism. These limitations may well reflect conscious or unconscious squeamishness concerning the voracious omnivore let loose upon the land. Unvarnished newsworthiness provides the media optimal latitude to engage in self-defining and self-serving bootstrapping and lets the media Jabberwock vent its increasing preference for sensationalism unmitigated by any sense of the public good or the legitimate needs of a self-governing people.

892. See supra text accompanying notes 877-887.
893. See supra text accompanying notes 881-885. See also the Eighth Circuit’s analysis in Price v. Viking Penguin, Inc. discussed infra in the text accompanying notes 953-981.
894. See Judge Friendly’s concerns in Cianci and Judge Kaufman’s response delineated supra in the text accompanying notes 733-739 and notes 740-746.
895. See infra text accompanying note 1579.
896. For a wonderful example of this, see the discussion of ABC’s ostensibly pristine motive in the famous Food Lion litigation, where ABC purportedly had the public’s health interests at heart in doing its hidden camera story on allegedly widespread unsanitary food-handling practices but waited an incomprehensible six months after completing the story to release it—during a key “sweeps” week, a period when advertising rates are set. As the author has co-authored elsewhere, the reason for this “exquisitely timed release” “appears clear and incredibly damning. ‘Prime Time Live’ was not doing well vis-à-vis its competitors in a ratings war and a universally appealing, titillating piece might ‘jump-start’ it into competitive status vis-à-vis its newsmagazine competitors. So the delay was for purely economic reasons.” Elder, Johnson & Rischwain, supra note 763, at 369-70.
897. Id. at 405 (criticizing media use of hidden camera stories disseminated “to vast audiences, feeding a voracious, lip-smacking demand for such by viewers”).
898. Id. at 360-61 (“In sum, hidden cameras convey a defamatory impression and put the target in a false light by definition with an appalling impact on the stunned deer-in-the-headlight victim. Media defendants know this and are indifferent to it, an indicator of the arrogance that is an unconscionable corollary of the blurring of the line between entertainment and news, reality and pretense. The hidden camera practice has been condemned as dangerous and as tantamount to ‘vigilante justice’ with the media as unilateral determiners of guilt with the authorities being contacted only after the bottom line—ratings—have been secured. The public is horrified by such arrogance and the credibility of serious journalism impaired. Almost seventy-five percent of the public has condemned hidden camera use.”); see also Kathleen Parker, What if News Were Fiction?, ORLANDO SENTINEL, Oct. 29, 2005, at B11 (describing the media’s speculation over “Plamegate:” “The media don’t cover the news. They hunt it down, beat it to death, resuscitate it, and beat it to death again. Television news programs aren’t information outlets so much as guess-the-news game shows where ‘experts’ analyze the unknown and pundits predict the unknowable. When there’s nothing left to say, they enter the realm of fiction . . . with the explosion of alternate media, including ‘citizen journalism,’ the lines between fiction and journalism have become blurred. . . . Speculation is the new journalism. In the absence of facts, speculation may nourish curiosity, but it also distorts both perception and reality. The media can’t be seen as separate from the events they cover, especially when coverage is itself a creation. These fictionalized versions of non-events, first cousins to gossip, are not innocuous. After so much chatter, ideas are imprinted on the human psyche, opinions are formed. Guilt becomes presumptive . . . We’ve never had greater access to information nor more difficulty discerning truth. Trying to
But, of course, that is the result when the citizenry becomes the “ultimate arbiter”: breathtaking boundarylessness, with “seriousness” and “newsworthiness” residing in the “eye of the beholder,” and the media/conduit/messenger aiding and abetting the descent into squalor.

VI. A STATUS REPORT: EDWARDS’ EXCEPTIONALLY MODEST PROGENY

The media appellants and amici curiae in Norton v. Glenn strongly asserted that neutral reportage is a widely documented and followed doctrine. According to these parties, neutral reportage has been “recognized throughout the nation by numerous courts,” supported by “a wealth of authority” and “widely recognized.”

The appellants and amici curiae enlisted two leading media scholars’ assessments that neutral reportage has received a “slow but steady...
acceptance" and that the response to the doctrine has been "generally favorable but not unmixed." On the other hand, the appellees disparaged neutral reportage as a doctrine of limited acceptance that has been rejected by "the gross weight of authority." As the following analysis discloses, the appellees' conclusions, writ large in the Pennsylvania Supreme Court's decision, are closer to the mark.

Overwhelmingly, the Federal Courts of Appeals have either declined to adopt neutral reportage or have not reached the issue. For example, the Ninth Circuit has termed it not a "settled rule" but "an open and difficult question." The D.C. Circuit has made note of the doctrine but has not reached this issue.

904. SMOLLA, supra note 753, § 4:100. More recently, post Norton v. Glenn, Dean Smolla has been less optimistic, noting neutral reportage has made some headway, is "one of the most significant developments" in modern defamation law, is "emerging and controversial," "does not seem gratuitously generous to the media," but also noting Pennsylvania had in Norton "joined the growing ranks" of rejectionist jurisdictions. See Id. §§ 4:100-4:100.50.

905. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (2002) § 7:32, at § 7:3.2, at 7-80. The same conclusion is found post-Norton in id. § 7.3.2.4.3, at 7-42.

906. Brief of Appellee Norton at 15, 24, Norton v. Glenn, 860 A.2d 48 (Pa. 2004) (Nos. 18 & 19 MAP 2003); Brief of Appellee Wolfe, supra note 826, at 14; see also 2 DOBBS, supra note 753, at § 415 (noting that "[a] few courts" have adopted neutral reportage and that the concept is "not preposterous" and suggesting expansion in cases of fair report in cases like Chapin v. Knight-Ridder, Inc., involving unofficial remarks of a Congressman "come increasingly close" to neutral reportage).

907. Weaver v. Oregonian Publ'g Co., 878 F.2d 388, 388 (9th Cir. 1989). The court noted that Oregon had not adopted the privilege, referencing McNabb v. Oregonian Publishing Co., 686 P.2d 458, 462 (Or. Ct. App. 1984), where Edwards had been cited—but only as to its constitutional malice aspect—and the case was resolved on such grounds. Weaver, 878 F.2d at 388. In a later case the Ninth Circuit did not reach the neutral reportage issue in light of the lower court determination of its inapplicability, a conclusion neither party contested on appeal. Crane v. Ariz. Republic, 972 F.2d 1511, 1525 n.10 (9th Cir. 1992), affg in part and vacating and remanding in part on other grounds, 729 F. Supp. 698, 710-11 (C.D. Cal. 1989) (finding that neither the "raging controversy," see supra note 885, nor "neutrality," see supra note 854, requirements were met). In Crane the Ninth Circuit did quote Edwards positively—"what is newsworthy about such accusations is that they were made"—in another context, interpreting the exceptionally broad interpretation given to California's statutory fair report statute, which had been applied to accounts of non-public official, informal governmental proceedings. Crane, 972 F.2d at 1518, 1522. On the California Statute see infra the text accompanying notes 1489-1501. Most recently, in Flowers v. Carville, 310 F.3d 1118, 1128 & n.5 (9th Cir. 2002), the court noted in dicta that "some courts" had recognized neutral reportage, citing Edwards and Barry. The court then opined that the privilege would not apply in any event because context "believe[d]" any claim that they were merely 'neutral reports' of earlier news stories." Id. at 1128 n.5. Clearly, however, the court was not espousing the privilege but merely suggesting that, assuming arguendo it had merit, it was nonetheless inapplicable under the facts in question. This was made particularly clear by Judge Kozinski's spirited defense of the "venerable principle" of republication liability. Id. at 1129. A federal district court has acknowledged
The Fourth Circuit’s stance is ambiguous in that it has expressly stated that the issue is open.909 Earlier, the Fourth Circuit had referenced a broad version of Edwards’ neutral reportage as to “newsworthy events”910 but then unequivocally distanced itself from this concept by reaffirming the republisher liability rule and declining to give even a qualified privilege of fair report to accounts of foreign governmental reports.911 Indeed, the court’s analysis in that case would be inconsistent with neutral reportage. Emphasizing that the informational rationale for fair report was the one “most directly applicable,”912 the court rejected any suggestion that this rationale could justify even a defeasible common law privilege.913 In declining the Ninth Circuit’s position but adopted neutral reportage based in large part on an expansive reading of its prior constitutional malice decision and another equally indefensible New York federal trial opinion. See Barry v. Time, Inc., 584 F. Supp. 1110, 1124 (N.D. Cal. 1984). See also the detailed critical discussion in the text accompanying notes 1147-1177.

908. White v. Fraternal Order of Police, 909 F.2d 512, 514, 528 (D.C. Cir. 1990) (noting that it was “not essential to reach” it to answer the issues before it and following the position of the court below); see also Ollman v. Evans, 750 F.2d 970, 989 n.39 (D.C. Cir. 1984) (refusing to delve into the “uncertain” issue of whether neutral reportage applied to anonymous quotations in an opinionative column). In dicta White suggested neutral reportage would be inapplicable in any event because of absence of “source attribution.” White, 909 F.2d at 528. There was a positive earlier reference in dicta (the statements had been found opinionative) to neutral reportage in McBride v. Merrill Dow & Pharmaceuticals, Inc., 540 F. Supp. 1252, 1254 (D.D.C. 1982). The case was reversed in part on other grounds on appeal. See McBride v. Merrill Dow & Pharm., Inc., 717 F.2d 1460 (D.C. Cir. 1983). The District of Columbia Circuit did not discuss neutral reportage but implicitly rejected its applicability on the facts. It characterized the testimony in the FDA proceeding as not defamatory—“(a) suggestion of long-windedness is not defamatory”—and also concluded the republished comments were protected by fair report. Id. at 1464-65. Noting the District of Columbia’s non-adoption, a later federal bankruptcy case in the district adopted an expansive version in In re United Press Int’l, 106 B.R. 323, 328-31 (D.D.C. 1989), relying in large part on Barry v. Time, Inc. For strong criticism of this line of cases see infra text accompanying notes 1159-1177. Most recently, in McFarlane v. Esquire Magazine, 74 F.3d 1296, 1307 (D.C. Cir. 1996), the court noted that “displays of bias” might deprive defendant “of any ‘neutral reporting’ privilege,” citing United Press Int’l, but then noted its opinion in White had left “open the scope of the opinion” under District of Columbia Circuit precedent. Id.

909. Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1097 (4th Cir. 1993). The court noted that it had “never adopted or rejected” Edwards and seemed to recognize its minority status—it noted that only a “smeating of courts” had adopted neutral reportage, including one in its circuit. Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc., 738 F. Supp. 1499, 1510 (D.S.C. 1989).


911. Id. at 878-80. Defendants relied on Korean media accounts. Some were republished verbatim and one television station rebroadcast a story from the Korean Broadcasting System. Id. at 877.

912. Id.

913. The basis for defeasance of the proferred privilege was common law malice. Lee, 849 F.2d at 877; id. at 886 n.14 (Kaufman, J., dissenting).
to deviate from the high court’s minimal fault-falsity requirement as to a plaintiff/private person, the Fourth Circuit repulsed any suggestion that the press’s burden of verification as to reliability was measurably different from that of a “domestic non-official source.”

The law in the Third Circuit is not entirely clear either. In *Dickey v. CBS, Inc.*, the Third Circuit vigorously rejected neutral reportage as irreconcilable with *St. Amant v. Thompson* and *Gertz v. Robert Welch*. Subsequently, however, in *Medico v. Time, Inc.*, Judge Adams opined that *Dickey*’s rejection of neutral reportage was *dicta*, and he cited *Edwards* favorably. Disingenuously, the *Medico* opinion did not acknowledge that its own references to *Dickey* and *Edwards* were *dicta*, nor did it admit that, by its standard, Chief Judge Kaufman’s neutral reportage was also *dicta* because the court separately immunized the media defendant, New York Times Company, on the ground of absence of constitutional malice. Thus,

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914. *Id.* at 880 (majority opinion).
915. *Id.* Having found minimal fault and falsity sufficient as to private persons in reports of “newsworthy events” (see *supra* the discussion of the broad minority version of *Edwards* in the text accompanying notes 747-756), it is highly unlikely that the court would find First Amendment values so compelling as to require an *absolute* privilege for “domestic non-official sources.” Rather, the court would reaffirm the *St. Amant v. Thompson* constitutional malice standard as sufficiently protective. The Fourth Circuit also emphasized the willingness of some foreign states to “take advantage of our liberal First Amendment rights in order *maliciously* to defame, or carelessly and without adequate inquiries excoriate private reputation.” *Lee*, 849 F.2d at 880 (emphasis added). In light of such, any press burden was outweighed by the injury to private reputation. By parallel reasoning, the court would tread exceedingly cautiously in giving *absolute* immunity to those misusing the First Amendment by making knowingly or recklessly false statements as to public plaintiffs. Yet, the Fourth Circuit’s decision in *Chapin* extending fair report outside its traditional parameters to unofficial public statements of a Congressman, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097 (4th Cir. 1993), leaves the issue somewhat unclear. Note that *Chapin* was heavily relied on in the briefs in *Norton v. Glenn*. *See infra* note 1358. Perhaps the ambiguity is traceable to *Chapin’s* reflected sense that the Court’s First Amendment jurisprudence *mandated* fair report protection. *Chapin*, 993 F.2d at 1097. As suggested below, *see infra* notes 1570-1579, this is clearly a gross misreading of precedent. More in line with *Lee*’s thoughtful analysis of First Amendment jurisprudence is the Fourth Circuit’s rejection of special First Amendment protection for accurate-reportage-as-non-defamatory in *Hatfill v. The New York Times*. *See infra* text accompanying notes 1580-1610.

916. 583 F.2d 1221 (3d Cir. 1978).
917. *Id.* at 1225-26.
918. 643 F.2d 134 (3d Cir. 1981).
919. *Id.* at 145.
920. *Cf.* DiSalle v. P.G. Publ’g Co., 544 A.2d 1345, 1359 (Pa. Super. Ct. 1988). In noting the battle of dicta in *Dickey–Medico* and *Edwards*’ parallel dicta status, the court noted: “[T]he [neutral reportage] rule itself was given life under similar circumstances and because we are giving the rule serious consideration in spite of the questionable nascency, we see no reason to treat its critics any differently.” *Id.* at 1359 n.15 (emphasis added).
921. *See supra* note 654.
Medico is third level dicta founded in Edwards, an opinion that is no more than intellectual quicksand.

On its merits, Dickey’s argument is more compelling because the defendant in that case made no attempt to reconcile neutral reportage with St. Amant.922 There are also several other reasons to question Medico’s cryptic analysis of Dickey. The reference was bolstered in large part by reliance on the constitutionally defective Medina v. Time, Inc. line of cases923 in an opinion that attempted to predict—wrongfully, it would appear924—what the Pennsylvania Supreme Court would have done925 instead of what the First Amendment mandated. Moreover, Medico’s holding on the fair report issue is at odds with controlling fair report precedent, common sense, and the needs of the First Amendment.926

The Seventh Circuit has not reached the neutral reportage issue. In Wood v. Evansville Press,927 an unreported federal district court opinion, the court did grant summary judgment alternatively on neutral reportage grounds.928 The court’s analysis was not deep and appears to have been preeminently based on an overly broad reading929 of an earlier Seventh Circuit opinion that quoted even

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923. Medico, 643 F.2d at 145 & n.37. The court cited Medina, Oliver v. Village Voice, Inc. and Novel v. Garrison for its conclusion “other federal courts have, as a matter of federal law, expressed reluctance to hold the press responsible for publication defamatory statements originally by others.” Id.
924. The Pennsylvania Supreme Court has rejected fair report as to statements by public officials outside the settings of governmental proceedings and press conferences where the government official is discussing official and authoritative governmental action or policy. See supra text accompanying notes 561-565 and infra text accompanying notes 1361-1374.
925. Medico, 643 F.2d at 137-47; see also infra text accompanying notes 1358, 1388. The Medico court looked at “[c]onstitutional considerations” as a factor that “might well influence” the Pennsylvania Supreme Court’s decision but took care to point out it was not basing its decision on the First Amendment. Id. at 143-46; see also infra text accompanying notes 1510-1519.
926. See the discussion of Medico and its progeny infra text accompanying notes 1358-1577.
928. The court found no knowing or reckless disregard under Indiana’s post-Gertz minority retention of Rosenbloom v. Metromedia, Inc., see Elder, Defamation, supra note 647, § 6:9, in private person-public interest cases. Wood, 11 Media L. Rep. (BNA) at 2203-04. The court’s analysis began as almost an apparent afterthought (“inclined to accept”) and later was described as an “alternative theory” for summary judgment. In the end paragraph the court granted summary judgment “for reasons” outlined above. Id.
929. The district court said the Seventh Circuit had “expressed accord with the holding” in Edwards. Woods, 11 Media L. Rep. (BNA) at 2205 (emphasis added).
broader philosophical jargon from Edwards. On appeal, the Seventh Circuit affirmed only on the alternative ground of absence of constitutional malice. The court stated that it had not “had occasion” to consider adoption of the neutral reportage privilege and that it was not necessary to do so in the case before it.

The Eighth Circuit is often cited as a strong proponent of a very liberal version of neutral reportage. That is inaccurate. As the South Dakota Supreme Court noted, the Eighth Circuit made no reference to neutral reportage in its panel decision in Janklow v. Newsweek, Inc. The reason for the absence of any reference is clear: the court seems to have relied on the truth of the allegation (or, at least, the absence of falsity). The Janklow I court called the report materially true and noted that the plaintiffs had not suggested that the “basic facts” were false. The Eighth Circuit then cited to and preeminently relied on Garrison v. Louisiana for the proposition that “a materially true statement” was protected by the First Amendment. Most of the rest of the Janklow I panel decision dealt with the issue of whether the plaintiff's/public official’s alleged prosecutorial revenge motive was protected opinion. The majority viewed it as an issue of fact. En banc, in Janklow II, the majority and dissenting opinions flipped sides, with the majority taking the

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930. The language quoted was from Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 109-10 (7th Cir. 1977). In noting that plaintiff’s “major thrust” was on falsity, not constitutional malice, the court quoted from Edwards to the extent that a public figure’s reputational interest “in the purity of reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informal and self-governing people depend.” Id. (quoting Edwards v. Nat’l Audubon Soc’y, Inc., 556 F.2d 113, 122 (2d Cir. 1977)).


932. Id. Compare the Seventh Circuit’s very questionable application of Illinois “substantial truth” doctrine, according such accurate reportage even broader protection. See infra text accompanying notes 1225-1307.

933. See supra text accompanying notes 856-857.


935. Id. at 647.

936. Id. at 644, 647. Also, in discussing and rejecting liability for libel-by-omission, the court quoted S.D. CODIFIED LAWS § 20-11-3 (1995), requiring a libel to be “false and unprivileged.” Id. (emphasis added).

937. See supra text accompanying notes 54-62.

938. Janklow I, 759 F.2d at 649. The court preceded its Garrison truth reference by a statement any harm to plaintiff was the result of “a materially accurate report of historical fact.” Id. This holding was affirmed en banc in Janklow v. Newsweek, Inc. (Janklow II), 788 F.2d 1300, 1301 (8th Cir. 1986).


940. Id. at 649-52.

position that the revenge/motive issue was protected opinion\textsuperscript{942} under a version of \textit{Ollman v. Evans}.\textsuperscript{943} The \textit{en banc} opinion took pains to reaffirm, however, that the two non-opinion aspects of \textit{Janklow I} remained in effect:\textsuperscript{944} the defendant “correctly reported the material facts of the rape allegation”\textsuperscript{945} and there was no suggestion that defendant \textit{Newsweek} “believed [its] truth.”\textsuperscript{946} The two \textit{Janklow} opinions leave considerable doubt as to what the Eighth Circuit was reaffirming. Neither opinion mentioned neutral reportage. The only discussions of \textit{Cianci v. New Time Publishing} in either \textit{Janklow I} or \textit{II} occurred in their analyses of the opinion rule.\textsuperscript{947} \textit{Garrison} was relied on for a truth defense.\textsuperscript{948} Indeed, it is not altogether clear from the opinion that the court distinguished...
or even recognized the distinction between) truth and accuracy. What is obvious, however, is that the matters in question involved reports of federal actions and proceedings (a formal charge of rape and a decision not to prosecute and an equally formal tribal court decision to suspend the plaintiff’s license to practice in tribal courts), which are entitled to fair report protection under common law doctrine. These conclusions in no way equate to or justify redenominating such accurate reportage of formal judicial actions and proceedings as neutral reportage.

In a later case, Price v. Viking Penguin, Inc. the Eighth Circuit interpreted its earlier Janklow analyses as adding “neutral reportage.”

949. This court is not alone. See supra text accompanying notes 191-192, 217-227 and 418-420. But Janklow II does at one point concede the rape allegation is “now acknowledged to be false.” Janklow II, 788 F.2d at 1301 (emphasis added).

950. Janklow II, 788 F.2d at 1301; Janklow I, 759 F.2d at 646-47.

951. Janklow I, 759 F.2d at 647 n.3 (citing a titled civil disbarment proceeding issued after plaintiff’s purported failure to appeal in response to the court’s order). One case opined that a “difficult question” of fair report need not be resolved as to its application to an Indian tribe’s resolution in light of its unfairness and inaccuracy. Medure v. Vindicator Printing Co., 273 F. Supp. 2d 588, 617 (W.D. Pa. 2000). Note that the facts in Janklow involved a judicial proceeding that meets the general requirements for absolute privilege under the common law. See ELDER, DEFAMATION, supra note 647, §§ 2:5-2:9, 2:11.

952. See ELDER, DEFAMATION, supra note 647, § 3:6 (official proceedings, reports and acts of executive and administrative agencies and officers and municipal corporations), § 3:7 (informal official reports, press conferences and statements of important executive officers), § 3:8 (arrests), § 3:9 (informal, authorized police records and reports); see also ELDER, FAIR REPORT, supra note 657, §§ 1.06-1.09 (paralleling the sections in ELDER, DEFAMATION). The Janklow I majority opinion did briefly discuss S.D. CODED LAWS § 20-11-5(4)(1995)—providing qualified protection (not defeasible merely by malice inferred from publication) for a “fair and true report” (emphasis added)—and said it would be inappropriate to reach the issue raised by defendants, as this was a matter of South Dakota law, which should be resolved by the federal district court in the first instance. Janklow I, 759 F.2d at 653-54. This was especially so since defendant Newsweek’s First Amendment defense of no constitutional malice (as to the revenge/motive claim) might render any statutory defense superfluous. Id. The court referenced Hackworth v. Larson, 165 N.W.2d 705, 710-12 (S.D. 1969), involving fair and true report statute forfeited by absence of good faith or reasonable grounds for belief in truth. Id. at 654. The court correctly held the statute did not comply with the Court’s jurisprudence as to constitutional malice. See discussion supra Part II.

953. On judicial proceedings covered see ELDER, DEFAMATION, supra note 647, § 3:4 and ELDER, FAIR REPORT, supra note 657, § 1.01.

954. 881 F.2d 1426 (8th Cir. 1989).

955. The court’s subsection heading—“Reckless Disregard and Neutral Reporting”—does not make it entirely clear that it was aware that neutral reportage constitutes an absolute privilege, not a qualified one defeasible by constitutional malice. The court’s analysis initially stated that only after plaintiff showed statements to be both defamatory and false, did defendant’s “conduct . . . in preparing the challenged work become [r]elevant.” Id. at 1433. It then gave an unexceptional overview of constitutional malice before stating that to the latter the court had “added” neutral reportage. It is, at least, arguable the court was “adding” another way of refuting constitutional malice, see the
reporting” (using that term by name and referencing Edwards for the first time) protection to “recitation of official actions or statements by public bodies . . . even if the implications are harmful.”956 In reality, however, this is no more than a restated version of fair report with the ambiguous addendum of protection for “harmful implications.”

An examination of the Price opinions both at trial and in the Eighth Circuit makes it unclear what use the Eighth Circuit made of (and what meaning, if any, was given to) neutral reporting. The federal district court cited Janklow I's confusing material accuracy equals truth957 analysis in concluding that “mere reporting of claims or suspicions . . . conceded . . . published by others”958 was not actionable, which is essentially a repudiation of republisher liability.959 Tellingly, the Eighth Circuit made no reference to neutral reporting or Edwards in its analysis of the five specific claims.960 In its conclusion, as in the analysis of the claims, it focused on the opinion/required proof of falsity and constitutional malice findings.961 In any event, all of the claims failed for lack of constitutional malice as

text supported by notes 445-539, not espousing the absolute privilege adopted in Edwards. This is reinforced by the court's later prefatory analysis of the book focusing on “literary context” (opinion) and the “quality of the author's investigation.” Id. at 1434-37 (emphases added).

956. Id. at 1434. Of course, any “harmful” result from a “fair and accurate” account covered by the fair report privilege would be protected. However, the court seems to be according protected status to something in addition thereto from an “implication” beyond what would be protected by traditional “fairness and accuracy” criteria. For an analysis of the latter see Elder, Defamation, supra note 647, §§ 3:18-3:26; Elder, Fair Report, supra note 657, §§ 2:00-2:08.

957. Price v. Viking Penguin, Inc., 676 F. Supp. 1501, 1510-11 (D. Minn. 1988) (rejecting plaintiff's suggestion authors have no privilege to function "as a sort of conduit for untreated sewage of raw rumor"). The district court quoted Janklow I's analysis relying on Garrison. Id. at 1510-11. The district court repudiated an earlier opinion in which it had affirmed defendants' potential liability for "republication alone." Id. at 1511 n.24. In rejecting a suggestion the author's own disbelief in the rumors reported showed constitutional malice, the court replied such were reported as "rumors . . . rather than as true statements asserted by the author. . . . The existence of a rumor can be an important historical fact. Because plaintiff does not question the existence of the rumors, he is not asserting that their accurate reporting is a false statement. . . ." Id. at 1512 n.27. Compare this to the Rhode Island Supreme Court's potent rejection of this argument in Martin v. Wilson Pub's Co., 497 A.2d 322, 325-28 (R.I. 1985).


959. See infra text accompanying notes 1178-1185.


961. Id. at 1446-47 (stating that "we have searched diligently for fault" and required plaintiff to demonstrate that it was "a factual matter capable of a jury's resolution," that he "could demonstrate its falsity," and that he could meet the requirement of constitutional malice—"a high degree of awareness of a particular statement's probable falsity" by clear and convincing evidence (emphasis added)).
a separate and independent ground of non-liability, leaving any neutral reporting in these discussions and the court’s preliminary analysis as gratuitous dicta.

Two of the five claimed defamatory statements in Price did not even arguably involve Janklow-based neutral reporting. On the third claim, the court held that both an author’s “use”/“reliance”/“repetition” of the prosecutor’s comments and concessions and an appellate judge’s criticism were privileged without clarifying either whether the statements negated constitutional malice or were privileged as fair report, or whether an undifferentiated soup mix of the two applied. To decide the fourth claim, the court analyzed the defendants’ republication of a rumor regarding the plaintiff’s suspected involvement in the killing of a Native American woman. The court first rejected the claim as too non-specific to be actionable. Only in dicta did the court conclude (accepting arguendo the plaintiff’s non-opinionative interpretation) that the plaintiff could show neither falsity nor reckless disregard of falsity. As to truth-falsity, the court said it was sufficient that some people did in fact suspect the plaintiff’s involvement, and his denials were irrelevant. In other words, any accurate republication could not constitute a falsity—a

962. Id. at 1445-46. The court concluded plaintiff’s “arguments lack the specificity called” for in St. Amant. Id. at 1445. The court noted that plaintiff had never questioned the accuracy of the author’s extensive quotes from “primary sources” or alleged that he otherwise “published particular false material facts” with “knowledge of their probable falsity.” Id. at 1445-46. Also see the district court’s parallel conclusion in Price, 676 F. Supp. at 1512-15 (finding no constitutional malice as to any statement of fact about plaintiff).

963. Price, 881 F.2d at 1445. The “harassment” statements involved “rhetorical hyperbole”/opinion and reportage of an account of a home entry where there was no plaintiff showing that defendant/author had actual or constructive notice that the source’s account was false. Id. The “Character Statements” were all nonactionable opinion. Id.

964. Id. at 1440-43 (the “Myrtle Poor Bear” claim). There was also a brief discussion as to whether defendant/author’s failure to interview a peripheral figure concerning plaintiff’s constructive knowledge of the witness’ bizarre mental history met St. Amant’s reckless disregard of falsity criteria. Id. at 1441 n.13.

965. Id. at 1442-43.

966. The court relied on Greenbelt Publ’g Ass’n v. Bresler for its holding. Id. at 1443. This is a flagrantly erroneous misreading of the Court’s precedent. See supra text accompanying notes 86-100. The Price opinion also noted that plaintiff’s version was also disclosed. Price, 881 F.2d at 1443.

967. Price, 881 F.2d at 1443-45 (“Anna Mae Aquash” statement).

968. Id. at 1444.

969. Id. at 1444-45.

970. Id. at 1444 (dicta).

971. Id. (dicta). This probably reflects Janklow’s anomalous equation of accuracy and truth under Garrison. See supra text accompanying notes 937-940.
stunning repudiation of the common law\textsuperscript{972} in no way justified by Supreme Court jurisprudence.\textsuperscript{973} On issue of reckless disregard of falsity, the court noted several things: the defendants’ report of the suspicion; the plaintiff’s counter-accusation identifying a third party; the official FBI exonerations; and the author’s own strong indication absolving plaintiff of the suspected killing.\textsuperscript{974} The court then stated that “merely reciting the accusations and counter-accusations” without espousal was not actionable—otherwise, authors could never write about such controversies.\textsuperscript{975}

The fifth set of defamation claims in \textit{Price} was based on implications that the plaintiff had suborned perjury and engaged in an “alleged” cover-up and obstruction of justice of a “disputed” rape.\textsuperscript{976} The first of the two was held to be opinion based on accurately reported underlying facts taken from the public record; as the Eighth Circuit noted, if anything, the strong condemnation of the trial judge in dismissing a criminal case went much further.\textsuperscript{977} The court then held that even if part of the defamatory statement was factual, the plaintiff had supplied no proof in refuting it, for example, by showing any failure to investigate that a witness’s story was false.\textsuperscript{978} Alternatively, the author’s reliance on judicial criticism of the public record repudiated any suggestion of reckless disregard of falsity.\textsuperscript{979} As to the “alleged” cover-up and obstruction of justice implication, the court found any intended “defamatory implication” indistinguishable from \textit{Janklow II} since it was based on “accurately recited historical events.”\textsuperscript{980} The court noted that the implication “closely mirror[ed]” the views of the trial judge, who viewed the plaintiff’s actions as

\textsuperscript{972} See infra Part VII.A.
\textsuperscript{973} See supra Parts I & II.
\textsuperscript{974} Price, 881 F.2d at 1444-45 (\textit{dicta}).
\textsuperscript{975} \textit{Id.} (\textit{dicta}). The court appears to have been saying that accurate reportage by definition precluded constitutional malice as to underlying falsity. Of course, this is fallacious if that is what the court intended. See supra notes 97, 207, 217 and text accompanying notes 670-703. Neutrality may be a legitimate (but not controlling) factor as to constitutional malice. See \textit{ELDER, DEFAMATION}, supra note 647, §§ 7:17, at 7-139, 7-142 to-143, 7:23, at 7-159 to -160. Or perhaps the court’s analysis of the reckless disregard aspect of constitutional malice merely reflects confusion as to whether the court intended an absolutist version of \textit{Edwards}/neutral reportage. See supra note 955.
\textsuperscript{976} Price, 881 F.2d at 1437-40 (the “Louis Moves Comp” statements).
\textsuperscript{977} \textit{Id.} at 1435, 1438-39.
\textsuperscript{978} \textit{Id.} at 1439.
\textsuperscript{979} \textit{Id.} This reliance on a reputable source in negating constitutional malice is consistent with a great volume of precedent. See \textit{ELDER, DEFAMATION}, supra note 647, § 7:2, at 7-27 to -32.
\textsuperscript{980} Price, 881 F.2d at 1439-40.
“outrageous, and [his] account incredible.”

Again, nothing suggests an absolute privilege of neutral reportage.

In summary, *Janklow I* and *II* reflect gross confusion as to the truth-accuracy distinction and at best stand for nothing more than a mildly expanded version of fair report (the expansion of which has now likely been repudiated). The attempt in *Price* to resuscitate and redefine Janklow’s earlier confusion as to neutral reportage *a la Edwards* is expansive, incoherent *dicta*. An analysis of *Price* discloses nothing that would support this expansion as to its claims. Consequently, there is little or no justification for adding the Eighth Circuit to the pro-neutral reportage side. Even if *Price* could be interpreted as a pro-neutral reportage decision, the Eighth Circuit reaffirmed that the underlying claims related exclusively to alleged governmental misconduct; the court specifically concluded that nothing in its opinion implied any stand on expanding the law “beyond the enabling of self-government.”

Thus, *Price* cannot be interpreted as providing any neutral reportage protection beyond public official plaintiffs defamed in their official capacities to either public figure plaintiffs generally or to private plaintiffs. Moreover, putting the Eighth Circuit in the neutral reportage camp is particularly risky in light of the Eighth Circuit’s express repudiation of *Price-Janklow’s* broad opinion doctrine (which gave rise to the uniquely expansive version of “neutrality” in *Price*) in light of *Milkovich v. Lorain Journal* and the Eighth Circuit’s allowance of libel-by-implication claims of both the libel-by-omission and libel-by-juxtaposition versions.

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981. *Id.* at 1439 (characterizing a lengthy quote from the trial judge).
982. *See infra* text accompanying notes 984-988.
983. *Price*, 881 F.2d at 1430 n.2.
984. Although the court refers to *Price* as a “public figure,” its analysis clearly indicated it meant “public official.” *See id.* at 1431. It affirmed the federal district court, which had held *Price* to be a “public official,” *Price v. Viking Penguin, Inc.* 676 F. Supp. 1501, 1511-12 (D. Minn. 1988) (concluding that precedent had “consistently found” law enforcement officials to be “public officials”), noted that plaintiff’s actions all related to his actions in his “official capacity,” and quoted from and relied on the Court’s decision in *Rosenblatt v. Baer* providing guidance to “public official” status, and cited only to “public official” cases. *Price*, 881 F.2d at 1431.
986. *See supra* text accompanying notes 856-857.
988. *Toney*, 85 F.3d at 392-96. Although the case involved a private plaintiff, the whole tenor of the opinion by retired Justice Byron White suggests that its rejection of the *Janklow-Price* broad opinion doctrine would not be so limited. The court repeatedly reaffirmed the actionability of libel-by-implication at common law without regard to status, *id.* at 392, 395-96, then repudiated *Janklow-Price* in light of *Milkovich, id.* at 393-94. Of
In light of the above analysis, the South Dakota Supreme Court’s well-reasoned repudiation of neutral reportage remains unscathed. The court analyzed neutral reportage at length in the context of a case brought by Governor and former Attorney General Janklow for alleged libel in a book, *In the Spirit of Crazy Horse*, that was highly critical of his actions as Attorney General.\(^{989}\) The court noted that the state fair report statute codifying the common law allowed only a defeasible qualified privilege.\(^{990}\) The court then quoted at length from Judge Friendly’s “critique”\(^{991}\) of *Edwards* by *Cianci*\(^{992}\) and adopted his analysis in concluding that a media defendant “already enjoys the generous protection”\(^{993}\) accorded by *Sullivan* in public person cases. In thus declining to adopt neutral reportage, the court cited the absence of any reference to or consideration of neutral reportage in parallel Eighth Circuit litigation.\(^{994}\) The court also reinstated the plaintiff’s claim against booksellers and distributors\(^{995}\) as long as they were accorded *Sullivan* protection\(^{996}\) in addition to the scienter required by the common law.\(^{997}\)

Despite neutral reportage’s genesis in the Second Circuit, New York\(^{998}\) rejected the doctrine unequivocally in the case of *Hogan v.*


\(^{990}\) Id. at 879. The privilege required good faith and absence of malice in the common law sense, i.e., “without intent to harm or with reckless disregard for the rights of another.” *Id.*

\(^{991}\) Id. at 880.

\(^{992}\) See supra text accompanying notes 729-739.

\(^{993}\) *Janklow*, 378 N.W.2d at 881.

\(^{994}\) The court referred to *Janklow v. Newsweek*, Inc. (*Janklow I*), 759 F.2d 644 (8th Cir. 1985), noting it to be of “particular interest” that neutral reportage had not been considered, with the court affirming summary judgment on grounds of immaterial inaccuracy, the nonactionability of newspapers for facts omitted and truth. *Janklow*, 378 N.W.2d at 880-81.

\(^{995}\) *Janklow*, 378 N.W.2d at 881-82. Note that, had neutral reportage been adopted, any reputable book publisher such as Viking Press would have been a “responsible prominent source,” entitling any accurate republisher, synthesizer or reviewer to neutral reportage protection, thereby circumventing established constitutional doctrine. For a further discussion see infra Part VIII.

\(^{996}\) *Janklow*, 378 N.W.2d at 882.

\(^{997}\) *Id.* at 881 (adopting *RESTATMENT (SECOND) OF TORTS* § 581 (1977) (secondary distributor is liable only if he, she or it “knows or has reason to know” of the publication’s defamatory nature)).

Although the case involved a private individual-public interest matter (and precipitated application of New York's "gross irresponsibility" standard), the plaintiff's status was unquestionably irrelevant to the court's analysis. Accordingly, there is no reason to think that the court would have resolved the issue differently had the libel claim been brought by the public official (suggesting that constitutional privilege should not be dependent on "the whim and circumstance" of whether a case could be tried in federal court rather than state court). The Second Circuit has correctly noted that New York's rejection of neutral reportage would not be binding on it as a matter of federal constitutional law. Law Firm of Daniel P. Foster v. Turner Broad. Sys., Inc., 844 P.2d 955, 961 n.12 (2d Cir. 1988). The court cited a division between New York appellate divisions on the issue, failing to note that the Court of Appeals had adopted the rejecting division's views as controlling law. See infra note 999. A later decision, Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 105 n.11 (2d Cir. 2000), conceded New York had rejected neutral reportage.


1000. Hogan, 446 N.Y.S.2d at 840-41, 843 (remanding for trial on this issue but barring punitive damages for failure to make an arguable case of constitutional malice). On the important significance of these holdings see infra text accompanying notes 1681-1684.

1001. This is confirmed by the court's later decision in another private person Chapadeau case, Weiner v. Doubleday & Co., 549 N.E.2d 453, 455-56 (N.Y. 1989), where the court rejected the defendants' suggestion—that accurate summarization of the sometimes irreconcilable views of book sources without endorsing them was protected opinion—as a reformulation of the position the Court of Appeals had rejected in Hogan. As in Hogan, the court categorized neutral reportage in broad terms—"an objective report of newsworthy charges with attribution"—and rejected it point-blank, without any limitation as to plaintiff status. Id. at 456 (dicta). See also the opinion in Hellman v. McCarthy, 10 Media L. Rep. (BNA) 1789, 1794 (N.Y. Sup. Ct. 1984), where the court rejected any suggestion Hogan could be limited to private individuals as "unavailing . . . no such limit can be read into [Hogan]'s sweeping rejection of Edwards." Id. (emphasis added). Although two sentences later the court said the broadcast at issue "is protected by" neutral reportage, id. (emphasis added), the whole context, including the introduction to the sentence—"in any event"—suggest that this was a misprint and that the court meant to include a "not" after "is." Or perhaps the court meant to cite generally but unclearly to the fair report privilege under New York law. What is undoubted is that Hellman cannot
candidate father rather than plaintiff/son regarding the equally tainting accusation that an arrest had been “fixed”—a charge the court emphasized could have decided a bitterly contested election. The court analyzed the differences between fair report and neutral reportage and concluded that adoption of a “special category of absolute privilege for attributed quotations” would “upset[ ] the balance” carefully crafted by Sullivan-Gertz purely for the perceived newsworthiness of the charges, which it found indefensible.

Although not entirely clear, Michigan also appears to repudiate neutral reportage in the public official setting. In Postill v. Booth Newspapers, Inc., a Michigan appellate court rejected neutral reportage in a case involving two public officials, correctly concluding that the media’s interests were “adequately protected” by Sullivan. Appellants in Norton v. Glenn have suggested that

legitimately be cited as support for New York’s adoption of neutral reportage—the case against the media republishers was allowed to proceed. Id. at 1795. For a recent, unsuccessful attempt somewhat paralleling that in Weiner, 549 N.E.2d 453, claiming that accurate reportage is non-defamatory, see infra the discussion of Hatfill v. New York Times in Part VII.D.

1002. Hogan, 446 N.Y.S.2d at 840.
1003. “Fair Report,” a “notable exception” to republisher liability, had previously been denied under analogous circumstances to private, non-official statements by public officers to reporters. Id. at 841. The court concluded that Edwards involved neither “agency” nor “oversight” functions. Id. at 841-42. See infra text accompanying notes 1547-1579.
1004. Hogan, 446 N.Y.S.2d at 842. The court did make a brief reference to Dixon v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977), noting that it stated Edwards applied only to public figures. Hogan, 446 N.Y.S.2d at 841. However, this single parenthetical reference was in a brief listing of the case law and literature on “neutral report” and plaintiff’s status was not otherwise discussed in the court’s neutral reportage refutation. Indeed, the court specifically rejected a broad absolute privilege for “attributed” quotations based on “perceived newsworthiness” without regard to status. Id. at 841-42. Compare Judge Sack’s suggestion that it would be “entirely consistent” with New York’s rejection of neutral reportage in private figure cases where there is adequate protection under New York’s “behavior-oriented ‘gross irresponsibility’” standard to adopt neutral reportage in public person cases “governed by the truth-oriented [Sullivan] privilege.” SACK, supra note 905, § 7.3.2.4.6.2, at 7-53. For a critical analysis of Judge Sack’s views on the interplay between neutral reportage and New York’s “gross irresponsibility” standard in private plaintiff-public concern cases see infra text accompanying notes 1658-1715.
1005. 325 N.W.2d 511, 517-18 (Mich. Ct. App. 1982). In a later opinion the Postill court saw no need for “further discussion” of Postill’s rejection of neutral reportage since the issue had not been addressed at the trial level, briefed to the court and the case was otherwise resolvable on absence of constitutional malice grounds. Spreen v. Smith, 394 N.W.2d 123, 126, 128 (Mich. Ct. App. 1986).
1006. Since the court specifically held that plaintiffs had not met the constitutional malice requirement, Postill, 325 N.W.2d at 516, 518-19, 521, the neutral reportage discussion may be technically dicta.
1007. Id. at 517-518.
Postill’s utility as precedent is questionable in light of later footnote dicta\textsuperscript{1009} by the Michigan Supreme Court. Although the court did use the term neutral reportage—and, in opinionative dicta, noted that the doctrine’s “existence and scope . . . remain[ ] as yet undefined”\textsuperscript{1010}—it is not at all clear upon close analysis that the court was referring to an absolute privilege such as that envisioned in Edwards. The court did not mention the Postill decision. Its confusing reference to neutral reportage was made in the context of discussing why its holding (i.e., that there was no threshold proof of material falsity) abnegated any need to resolve the question of negligence liability.\textsuperscript{1011}

The conclusion that the court’s neutral reportage reference in some way relates to absence of fault is further reinforced by the court’s detailed listing of cases negating fault, relying either on the wire service defense\textsuperscript{1012} or on reputable governmental sources or documents\textsuperscript{1013}—examples of non-actionable disseminations without “good reason to suspect falsity,” e.g., via inherently implausible

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\textsuperscript{1008} Brief for Pennsylvania Newspaper Association et al. as Amicus Curiae Supporting Appellants at 23 n.2, Norton v. Glenn, 860 A.2d 48 (Pa. 2004) (Nos. 18, 19 MAP 2003).  \\
\textsuperscript{1010} Id. at 207.  \\
\textsuperscript{1011} Id. (“[W]e need not resolve the question of negligence. Nevertheless, we observe that plaintiff’s theory regarding fault apparently was that the newspaper reporter had been poorly trained and consequently failed to further investigate information provided to him by the police.”). The neutral reportage reference was followed by a lengthy listing of the Cox Broadcasting/Cohen/Daily Mail/Florida Star line of cases, which focused on true matter. See discussion supra Part I.E. The only exception in Rouch’s footnote analysis was its reference to Greenbelt Publishing Association v. Bresler, which involved false, defamatory matter and has been cited elsewhere—erroneously—as supporting an absolute protection for fair report. See supra text accompanying notes 86-100. Note that Cox Broadcasting was also cited as support for Section 611’s absolute privilege. RESTATEMENT (SECOND) OF TORTS APP. VOL. 5, 135 (1981). It is arguable, then, that the court’s neutral reportage discussion was loosely intended to refer to a First Amendment based privilege for fair report. But compare the footnote in the earlier Rouch decision by a different justice rejecting any suggestion Cox Broadcasting supported an absolute privilege for “fair reportage.” This reliance was “misplaced”—Cox Broadcasting was interpreted as a truth/absence of fault, not a privilege, case as to defamation. Rouch v. Enquirer & News of Battle Creek, Mich., 398 N.W.2d 245, 252 n.8 (Mich. 1986). On the other hand, maybe the court’s reference to neutral reportage meant just that; but the rest of its analysis, see infra notes 1014-1018, betrayed endemic confusion about its absolutist nature.  \\
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information. Of course, this absence-of-fault focus is dramatically at odds with neutral reportage, which applies in the face of knowing or reckless disregard of falsity. In any event, it is highly unlikely that a state court disavowing a more-than-Gertz fault standard in light of its state constitution and strong public policies protecting reputation would countenance reputation-obliterating neutral reportage.

Ohio is unequivocally on the anti-neutral reportage side of the equation. Despite several lower court decisions adopting a broad version of neutral reportage (including its extension to private

1014. Rouch, 487 N.W.2d at 207-08 n.3. The court then noted that there was no question as to the accuracy of the police report itself. Id.
1015. See supra text accompanying notes 55-57.
1016. Rouch, 398 N.W.2d at 258-67 (rejecting a Rosenbloom level standard and a common law public interest protection exceeding Gertz’s negligence standard).
1017. Id. at 260 n.21 (quoting the Michigan Constitution’s protection of expression qualified by liability for “abuse” thereof and other courts’ heavy reliance on such provisos in adopting Gertz). See also supra notes 315, 560, 903, and infra text accompanying notes 1037, 1115, 1318. For a detailed analysis see ELDER, DEFAMATION, supra note 647, § 6:2, at 6-14 to -16.
1018. Rouch, 398 N.W.2d at 258, 261-65 (emphasizing the importance of reputation, the fact that negligence “comports with a careful balance of the very weighty policy concerns,” and the absence of any empirical showing that a Gertz standard of care has resulted in self-censored reportage, the court found no basis for a finding that a “further sacrifice” of a private person’s right to a remedy could be justified).
plaintiffs), the Ohio Supreme Court cryptically rejected neutral reportage in a case involving misreportage of a contempt citation of an attorney on the ground that it had “never recognized the neutral reportage doctrine and [it] decline[d] to do so at [the] time.”

Although the plaintiff's status was not resolved, the court’s rejection of neutral reportage can in no way be construed as limited to private person plaintiffs because the court sternly rejected neutral reportage as bad constitutional law.

The plaintiff’s status in Young had been at issue before the court below and was remanded for further proceedings. On remand, and later on appeal, the plaintiff was found to be a public figure. It is unfathomable to think that after having rejected neutral reportage in such an unequivocal fashion, the court would suddenly rethink the issue and resuscitate neutral reportage based on the plaintiff’s newly clarified status. The court’s rejection of neutral reportage as bad constitutional law is made clear by a contrast with the dissent, which staunchly, if hyperbolically, defended a very expansive version of neutral reportage as a “golden opportunity” to join “enlightened jurisdictions” accepting this “widely recognized” doctrine. A more recent decision, involving an

defamatory aspersions against an associate justice/candidate for reelection contained in campaign literature by the Republican party county chair and the country committee, trial co-defendants with the media defendants. The court found the statements to be protected opinion and then, in dicta, applied neutral reportage to the opinionative statements. Id.


1021. This is well reflected by the court’s rejection of neutral reportage on its face, id. at 1138, rather than reaffirming on the more limited ground adopted by the court of appeals, which had found the deletion of a middle initial and extrajudicial addition of locale information to be substantial inaccuracies forfeiting both fair report and neutral reportage. Young v. Morning Journal, No. 94CA005952, 1995 WL 255925, at **2-3 (Ohio Ct. App. May 3, 1995). Note that April was cited repeatedly in the Khawar briefs before the California Supreme Court. The latter court correctly interpreted Young as “expressly declin(ing) to recognize the neutral reportage privilege in any form.” Khawar v. Globe Int'l, Inc., 965 P.2d 696, 706 n.4 (Cal. 1998) (emphasis added).

1022. Young, 669 N.E.2d at 1138.


1024. See supra note 1021.


1026. Id. at 1140 (Douglas, J., dissenting).

1027. Id. at 1139 (Douglas, J., dissenting). This is clearly greatly exaggerated. See generally discussion this section.
“excellent example”\textsuperscript{1028} for its possible application—reportage of accusations and statements against an incumbent judge during an election campaign—correctly concluded that \textit{Sullivan}, not \textit{Edwards}, was the standard for determining media “messenger” liability.\textsuperscript{1029}

Like Ohio, an appellate decision in Massachusetts rejected neutral reportage in a private person setting without limiting the rejection.\textsuperscript{1030} Similarly, Kentucky repudiated neutral reportage point-blank and did not circumscribe its holding to the private person plaintiff before it.\textsuperscript{1031} The Kentucky court cryptically concluded that neutral reportage had not received the imprimatur of the Supreme Court or other jurisdictions.\textsuperscript{1032} The tenor of the court’s opinion and its sarcastic characterization of the defendant’s claim,\textsuperscript{1033} the potential for gross abuse exemplified by the multiple repetitions\textsuperscript{1034} of unprofessionalism and corruption to plaintiff/lawyer,\textsuperscript{1035} the court’s rejection of the contention accurate republication did not constitute fault,\textsuperscript{1036} and several indicia of an intention to provide an injured

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\textsuperscript{1029} \textit{Id.} at 549. In light of \textit{Young} and \textit{Conese}, the case of \textit{Watson v. Leach}, No. 95 CA 12, 1996 WL 325912, at *2-4 (Ohio Ct. App. June 7, 1996) (applying neutral reportage to a township trustee public official-public figure in the case of reportage of an informal report from the auditor’s office concerning an emergency grant for road repairs), issued a few months before \textit{Young}, cannot be viewed as authoritative or defensible.

\textsuperscript{1030} Reilly v. Associated Press, 797 N.E.2d 1204, 1211 n.4 (Mass. App. Ct. 2003). The Supreme Judicial Court refused to decide the neutral reportage issue in a case involving one conceded public figure and two other plaintiffs where factual questions existed as to their statuses. Lyons v. New Mass Media, Inc., 453 N.E.2d 451, 455-58 (Mass. 1983). Given the fact that the issue had not been raised below on summary judgment and the case was being remanded for trial, the court deemed it “inappropriate” to reconsider “settled Massachusetts law.” \textit{Id.} at 457 n.3 (emphasis added).


\textsuperscript{1032} \textit{Id.} A later case followed this across the board rejection. Pearce v. Courier-Journal & Louisville Times Co., 683 S.W.2d 633, 636 (Ky. Ct. App. 1985). Justice Lukowsky concurred in \textit{McCall} on two grounds—it was not required by the First Amendment and had been limited to public persons. \textit{McCall}, 623 S.W.2d at 894 (Lukowsky, J., concurring).

\textsuperscript{1033} \textit{McCall}, 623 S.W.2d at 885 (majority opinion) (“These allegations were published, in spite of the fact that the newspaper knew—and admitted it knew—that there was no evidence of any such crime on the part of [plaintiff] . . . What we have here is a situation where the newspaper says to the reader, ‘we don’t find any evidence of a crime on the part of [plaintiff], but we heard some contrary stories and we are going to repeat them anyway.’” (emphasis added)).

\textsuperscript{1034} \textit{Id.} at 884-85. The entire article is incorporated into Justice Lukowsky’s separate opinion. \textit{Id.} at 889-93 (Lukowsky, J., concurring).

\textsuperscript{1035} \textit{Id.} at 884-85 (majority opinion).

\textsuperscript{1036} \textit{Id.} at 885-87 (majority opinion). After rejecting neutral reportage, the court said defendant’s contention that it “simply reported allegations is without merit.” \textit{Id.} at 887.
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party effective redress\textsuperscript{1037} all suggest that the court viewed neutral reportage as a fundamentally bad doctrine.

Illinois courts are split over neutral reportage.\textsuperscript{1038} One camp extends an extremely broad\textsuperscript{1039} minority\textsuperscript{1040} version of neutral reportage to non-public plaintiffs.\textsuperscript{1041} The opposing camp holds that the Court’s status-based jurisprudence “fully and exclusively expressed”\textsuperscript{1042} the level of protection accorded to the media. The Illinois Supreme Court has not definitively resolved the issue, but its decision in Catalano v. Pechous\textsuperscript{1043} suggests that the court disfavors the concept. The court noted that with “few exceptions,” Sullivan and its progeny had been “primarily concerned” with constitutional malice in cases involving republications of defamatory statements originating with a third party source.\textsuperscript{1044} It then expressly reaffirmed the post-

\textsuperscript{1037} The court acknowledged that it could have adopted a higher-than-Gertz standard of fault but chose simple negligence, implicitly rejecting a journalistic malpractice standard. Id. at 886; see also id. at 895 (Lukowsky, J., concurring). This negligence standard was consistent with Kentucky’s specific limitation of expression for liability for “abuse” thereof, a qualification that augured against greater protection than the First Amendment and would leave intact Kentucky’s common law rules and statutes. Id. at 886 (majority opinion); see also id. at 894-95 (Lukowsky, J., concurring) (“abuse” provision reflected a longstanding policy since 1792 of no “greater protection”). For other courts’ referencing of state constitutional provisions, see supra notes 315, 560, 903, 1017, and infra text accompanying notes 1115, 1318. The McCall court also gave an advisory opinion that when Time, Inc. v. Hill was curtailed in private person-false light cases, it would adopt a Gertz simple negligence rule. McCall, 623 S.W.2d at 888. Although not discussed in the false light analysis, clearly the McCall court would have rejected neutral reportage in such a setting. On false light see supra the text accompanying notes 65-70, 179-186 and note 206.


\textsuperscript{1040} Khawar v. Globe Int’l, Inc., 965 P.2d 696, 706 n.4 (Cal. 1998) (noting that “almost all” jurisdictions had limited neutral reportage to public plaintiffs but referenced the Illinois division, with one group extending it to private persons).

\textsuperscript{1041} See supra text accompanying notes 750-751.


\textsuperscript{1043} 419 N.E.2d 350 (1980).

\textsuperscript{1044} Id. at 360.
Sullivan vitality of common law republisher liability\textsuperscript{1045} as long as a republisher acts with knowing or reckless disregard of falsity.\textsuperscript{1046} In affirming the claim against the source and absolving the media defendants that non-recklessly relied on him,\textsuperscript{1047} the court also took care to note that it was “not indicting [sic] approval”\textsuperscript{1048} of Edwards and specifically referenced Dickey,\textsuperscript{1049} the leading opinion rejecting neutral reportage.

Other jurisdictions denominated as supporting neutral reportage do not in fact do so. For example, close analysis of two Vermont decisions often cited as supporting an absolute privilege of neutral reportage discloses that no such interpretation is warranted. One case, Burns v. Times Argus Association,\textsuperscript{1050} involved only the issues of public figure status\textsuperscript{1051} and whether the requisite Sullivan standard had been met. The court concluded that the standard had not been met.\textsuperscript{1052} While the court quoted broad aspects of Edwards

\textsuperscript{1045}. Id. at 361 (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977)); see also Soloaia Tech. v. Specialty Publ’g Co., 852 N.E.2d 825 (Ill. 2006). The court simultaneously extended absolute fair report protection to mere civil filings without judicial action, Soloaia Tech., 852 N.E.2d at 842-44, 848, while reaffirming a magazine’s republisher liability for printing a defamatory email from an unnamed “industry veteran” despite a disclaimer that the letter did not reflect the magazine’s view. Id. at 832-33, 840-42, 848; see also Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003).

\textsuperscript{1046}. Catalano, 419 N.E.2d at 361.

\textsuperscript{1047}. The court rejected any suggestion it was applying “different standards” and suggested that the media defendants would have been liable had the source informed the reporter that the charge of bribery was sans any corroborating evidence or based on mere “instinct.” Id. at 361-62. The court also rejected opinion status for the inference of bribery from the source’s “[t]wo hundred pieces of silver-thirty for each alderman” statement; any other result would give the source absolute protection rather than Sullivan’s qualified protection. It relied in large part on Cianci. Catalano, 419 N.E.2d at 353, 357.

\textsuperscript{1048}. Id. at 362.

\textsuperscript{1049}. Id.; see supra text accompanying notes 916-926 (discussing Dickey).

\textsuperscript{1050}. 430 A.2d 773 (Vt. 1981).

\textsuperscript{1051}. The court held that plaintiff/wife of a lieutenant governor/candidate for governor was a public figure for purposes of issues germane to her active involvement in his campaign. Id. at 775-77.

\textsuperscript{1052}. The court found neither recklessness nor even negligence. Id. at 778. While defendant’s reporter had quoted from an anonymous source, which normally would have sufficed for constitutional malice, the reporter had also done a balanced overall portrayal, including suggesting the matter was intended to discredit her husband’s candidacy. Id. at 774. Most importantly, the reporter had discussed the matter with the state finance commissioner. Although there was “some disagreement” over the discussion’s context, it was undisputed the commissioner was in fact investigating the matter at issue—the alleged personal use by plaintiff of state credit cards—and had possession of a minimum of two card slips signed by plaintiff. Indeed, plaintiff had conceded using the cards during her testimony at trial. Under such circumstances, Burns is a classic case of reliance on a reputable public figure, the antithesis of constitutional malice. See Elder, DEFAMATION, supra note 647, § 7:2, at 7-27 to -32.
and deemed its “philosophy . . . significant,” there is no indication that absolute immunity was either intended or adopted. In fact, the tenor of the opinion suggests the contrary. In a later decision, Ryan v. Herald Association, the same court specifically rejected as without merit the defendant’s reliance on neutral reportage. Assuming arguendo that neutral reportage provided absolute protection, that issue had not been resolved in Burns and was not decided in the case before the court.

Three Washington cases are often cited as supporting neutral reportage, but none of them do. A trial court opinion cited out-of-state neutral reportage precedent but viewed the doctrine as only a qualified privilege defeasible by constitutional malice. Next, an appellate decision involved accurate reportage of statements of interested parties and public officials regarding evaluation of farm land in disagreement with the plaintiff/professional’s appraisals. Again, without citing or presaging neutral reportage (which was only created three years later), the court found no basis for finding that the defendant’s actions in accurately reporting this irreconcilable difference in opinion constituted a knowing or reckless disregard as to underlying falsity of the disputed appraisals. Lastly, the Washington Supreme Court’s decision in Herron v. Tribune Publishing Co., involved fair report for media republication of allegations in a recall petition despite the reporter’s awareness of likely falsity. Although Edwards was cited twice, the court specifically stated that

1053. Burns, 430 A.2d at 778 (dicta)
1054. 566 A.2d 1316 (Vt. 1989).
1055. Id. at 1321. Also, if otherwise available, the privilege would have been forfeited because defendant’s account was inaccurate—defendant’s reporter negligently erred in confusing plaintiff with another with a different first name. Id. at 1317-21 (dicta).
1057. Mellor v. Scott Pub’g Co., 519 P.2d 1010, 1018-19 (Wash. Ct. App. 1974). The court rejected any suggestion defendant had the duty to resolve the correctness of this disputed issue—this was a matter for the board of equalization and the courts. Id. at 1018. Indeed, as to one claimed-as aspect, use of “windshield appraisals,” defendants quoted a telephone contact with plaintiff (reported in defendants’ account), which seemed to defend the use of and reliance on such appraisals as legitimate, a point later replicated in plaintiff’s deposition testimony. Id. at 1018-19. For parallel cases finding no constitutional malice in failing to predict which of two conflicting accounts a jury would later believe, see Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 478 (8th Cir. 1987) (stating that Sullivan “did not require [defendant] to be right or be silent”), and News-Journal Co. v. Gallagher, 233 A.2d 166, 170 (Del. 1967) (holding that since defendant published both versions, it was “hardly their function to decide which of the conflicting versions was right”).
1058. Mellor, 519 P.2d at 1018-1019. Such disputes are inherent in appraisals and are “the stuff out of which condemnation trials are made.” Id. at 1018.
1060. Id. at 257, 259-64.
the Edwards neutral reportage doctrine was not before it.\textsuperscript{1061} The
court’s single very limited reliance on Edwards—that the plaintiffs
had not shown that the defendants had made the charges their
own\textsuperscript{1062}—was in the context of a discussion of non-forfeiture of fair
report, a major area where issues of neutrality and fair report
overlap.\textsuperscript{1063} In sum, the court’s carefully calibrated opinion
demonstrates that the case falls within the historical parameters of
fair report.\textsuperscript{1064}

Limited Georgia precedent is likewise said to support neutral
reportage, but an examination of Georgia case law discloses no basis
for this conclusion. In the leading case, McCracken v. Gainesville
Tribune, Inc.,\textsuperscript{1065} the defendant/newspaper was accorded protection
under Georgia’s statutory codification of fair report by accurately
reporting statements before a meeting of a local legislative body, the
county commissioners of roads and revenues.\textsuperscript{1066} Two references to
Edwards were made.\textsuperscript{1067} In discussing the fair report-based public
interest that “the public be informed about the privileged
proceedings,”\textsuperscript{1068} the court made a garbled and confused reference to
“public proceedings, public controversy, public officials and public
figures” and the right of the press to report on these items without
assuming liability for doing so.\textsuperscript{1069} The court also equated the
statutory limitation of “fair and honest” with neutral reportage of the
legislative matters at issue.\textsuperscript{1070} The court seemed clueless as to the
important differences between fair report and neutral reportage. A

\textsuperscript{1061} Id. at 259-60 & n.6.
\textsuperscript{1062} Id. at 261-62.
\textsuperscript{1063} See supra text accompanying notes 841-857.
\textsuperscript{1064} The court emphasized the “government entanglement” in the detailed statutory
mandates to process a recall petition and “the public’s... commanding interest” in being
made aware of public “proceedings in which government may check the electorate’s
constitutional powers.” Herron, 736 P.2d at 261. The court specifically distinguished
accurate reportage of the contents of defamatory campaign literature, emphasizing that
such, unlike a recall petition, did not justify application of the “public proceedings”
privilege. Id. The former would be covered only by the constitutional malice standard. Note
that reportage of campaign literature and allegations is a close analogue to the out-of-
official proceedings statements involved in Norton v. Glenn, 860 A.2d 48 (Pa. 2004),
involving source statements of a candidate for reelection. See supra text accompanying
notes 540-546. Accordingly, the Herron court’s analysis augurs strongly against adoption of
neutral reportage.
\textsuperscript{1065} 246 S.E.2d 360 (Ga. Ct. App. 1978).
\textsuperscript{1066} Id. at 361-62.
\textsuperscript{1067} Id.
\textsuperscript{1068} Id.
\textsuperscript{1069} Id.
\textsuperscript{1070} Id. at 362
later decision, *Lawton v. Georgia Television Co.*,\(^{1071}\) replicated this commingled confusion in litigation involving a secret, official state National Guard report.\(^{1072}\)

Florida precedent likewise evidences considerable confusion between fair report and neutral reportage. For instance, several decisions mentioning neutral reportage seem to actually be fair report cases involving reports of official action.\(^{1073}\) By contrast, another decision, perhaps reflecting concern at the open-endedness of the broad version proffered, had rejected neutral reportage, apparently confusing it with a type of *Rosenbloom* general or public interest

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1072. *Id.* at 276-78; *cf.* infra Part VII.C.
1073. *Huszar v. Gross*, 468 So.2d 512, 513-16 (Fla. Dist. Ct. App. 1985) (involving defendant’s reportage of official actions and proceedings and official comments by the director of the division of securities of the state controller’s office). Clearly, the case was one of fair report. Equating fair report and neutral reportage, the court states: “The article was a fair and accurate report of . . . official statements and of a judicial proceeding. Such neutral reportage is protected by the First Amendment.” *Id.* at 515. (emphasis added). The appellate court’s analysis parallels the trial court’s grouping of “disinterested and neutral reportage,” Section 611 and the qualified privilege of fair report under Florida law as interrelated, if not fungible grounds, in giving protection to reports of “an official action of public interest.” *Id.* at 516 (emphasis added); *see also* Clark v. Clark, 21 Media L. Rep. (BNA) 1650, 1651-54 (Fla. Cir. Ct. 1993) (finding that stories about an arrest accurately recounting open and public police records were “substantially true”—*see infra* the criticism in Part VII.B.—and protected by fair report and neutral reportage); *El Amin v. Miami Herald*, 9 Media L. Rep. (BNA) 1079, 1081-81 (Fla. Cir. Ct. 1983) (neutral reportage was one of three alternative grounds—together with fair report and absence of fault—for dismissing a libel claim based on media defendants’ account of a publicly disseminated police report); *Hatjioannou v. Tribune Co.*, 8 Media L. Rep. (BNA) 2637, 2638-41 (Fla. Cir. Ct. 1982) (finding summary judgment appropriate because of the absence of a defamatory statement and applying both the fair report and neutral reportage privileges to statistical data officially disseminated by the county sheriff’s office); Wade v. Stocks, 7 Media L. Rep. (BNA) 2200, 2201-02 (Fla. Cir. Ct. 1981) (citing neutral reportage as one of several alternate grounds together with fair report as to reportage of statements in a counterclaim filed in a judicial proceeding). Another trial court, *Victor v. News and Sun-Sentinel Co.*, 10 Media L. Rep. (BNA) 2073, 2074-76 (Fla. Cir. Ct. 1984), dismissed several libel counts concerning the closing of a dinner theatre as not having a defamatory meaning and also as protected by opinion/fair comment and neutral reportage—there was only an abbreviated discussion of the latter. Two of the counts involved reportage of bankruptcy filings and may have been covered by fair report. *See id.* at 2073. Other cases correctly characterize *Huszar* as a fair report case. *See Ortega v. Post-Newsweek Stations*, Fla., Inc., 510 So.2d 972, 975 (Fla. Dist. Ct. App. 1987), *A later federal decision, Trujillo v. Banco Cent. Del Ecuador*, 17 F. Supp. 2d 1334, 1337-39 (S.D. Fla. 1998), involved a lobbyist’s/public relations firm’s attempt to rely on neutral reportage and fair report regarding press releases on behalf of its client based on government action. Citing *Huszar*, the court found no basis for either neutral reportage—defendant was “neither disinterested nor neutral”—nor fair report. *Id.* at 1338. The confused commingling of the two is aptly demonstrated in the court’s synthesis of what plaintiff alleged—that the press release was “a non-media, partisan attack which misconstrued government action, rather than a neutral media report of government-disseminated information.” *Id.* (emphasis added).
qualified constitutional privilege. One trial court did expressly adopt neutral reportage as one of several grounds for non-liability. However, the appellate court affirmed, applying a “wire service defense”—absence of fault doctrine. Another appellate decision affirmed a dismissal of an action based on accounts of a police officer’s and an alleged victim’s statements, but the discussion was cryptic with little analysis.

The Oklahoma cases leave the law somewhat unclear but likely fall on the rejectionist side of the divide. An unpublished court of appeals opinion appears on first look to have adopted neutral reportage for accurate reports of charges by a candidate against his opponent incumbent. However, the court (after a lengthy quote

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1074. Ortega, 510 So. 2d at 973-77.
1075. Bair v. Palm Beach Newspapers, 8 Media L. Rep. (BNA) 2028, 2029-32 (Fla. Cir. Ct. 1982), aff’d on other grounds, 444 So.2d 1131 (Fla. Dist. Ct. App. 1984). As the second of three “separate grounds” (one of the others included the substantial underlying truth of the misrepresentations reported), the trial court commingled: (1) a common law qualified privilege about “events of public concern”; (2) the adoption of Rosenbloom/constitutional malice in such cases; and (3) neutral reportage. Bair, 8 Media L. Rep. (BNA) at 2029-32. Ground (1) was based largely on Layne v. Tribune Co., 146 So. 234 (Fla. 1933), the genesis of the “wire service defense.” Id.; see infra note 1076. Another opinion relied on was Abram v. Odham, 89 So.2d 334, 335-37 (Fla. 1956), involving accurate reportage of charges by a candidate at a political rally. The privilege in that case was defeasible by common law “express malice.” Id. at 338. Abram is one of the cases cited in support of the RESTATEMENT (SECOND) OF TORTS § 611 (1977) controversial extension of an absolute fair report privilege to public meetings. See RESTATEMENT (SECOND) OF TORTS APP. VOL. 5, 138 (1981). Ground (2) reflected the ambiguity as to whether Rosenbloom or Gertz controlled in the private person-public concern setting. Bair, 8 Media L. Rep. (BNA) at 2031-32. The tagging on of Ground (3) neutral reportage does not make it clear whether the court was aware that neutral reportage constitutes an absolute privilege. The case gave mixed signals. It quoted language from Edwards—“regardless of the reporter’s private views regarding their validity.” Id. at 2032 (quoting Edwards, 556 F.2d at 120). But it also found “foundational support” in Florida’s qualified privileges. Id. On the fair report in public meetings issue, see infra note 1132.


1077. Smith v. Taylor County Publ’g Co., 443 So. 2d 1042, 1044, 1047 (Fla. Dist. Ct. App. 1983). The court cryptically affirmed dismissal of a “news story” based on these two sources—a police officer and an alleged victim—but distinguished a claim based on a column which recited the same matter but also cited factual specifics about an earlier incident—the latter denied the column opinion status, since it portrayed plaintiff as a “violent person with violent tendencies.” Id.

from Edwards) cited Oklahoma’s leading opinion rule precedent\textsuperscript{1079} and concluded that all the allegedly defamatory statements were either true or opinion and thus, not actionable.\textsuperscript{1080} Although the black letter rule relied on neutral reportage,\textsuperscript{1081} that aspect seems to be \textit{dicta}. This reading is reinforced by the court’s final perfunctory paragraph where the court concluded that there was no proof of constitutional malice.\textsuperscript{1082}

A decade later an Oklahoma appellate court relied on neutral reportage in protecting a newspaper from liability for reporting the official public statements of a prosecutor at a courthouse news conference.\textsuperscript{1083} The Oklahoma Supreme Court, however, affirmed solely on common law fair report under Restatement (Second) of Torts Section 611.\textsuperscript{1084} Four justices dissented in part, with three expressly rejecting neutral reportage as inapplicable in the private person setting.\textsuperscript{1085} The court majority criticized the court below\textsuperscript{1086} and expressly did not reach the neutral reportage issue,\textsuperscript{1087} while it took great pains to distinguish neutral reportage from the long-established tradition of fair report.\textsuperscript{1088} The court then provided an extraordinarily powerful justification for fair report, citing “the need in a free, self-

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\item \textsuperscript{1079} Id. at 2151-52 (citing Miskovsky v. Okla. Publ’g Co., 654 P.2d 587, 593 (Okla. 1982)).
\item \textsuperscript{1080} Id. The court’s analysis is cryptic. Its use of “truth” could be referring to “accuracy” in the sense of the accuracy equals pseudo-truth misnomer, see \textit{infra} Part VII.B, or it could mean “truth” in the sense of “accuracy” for neutral reportage purposes. Or it could mean truth in the classical sense. The court’s emphasis as a whole on the opinion versus false fact dichotomy seems to support the latter.
\item \textsuperscript{1081} Palmer, 9 Media L. Rep. (BNA) at 2151.
\item \textsuperscript{1082} See id. at 2152. However, the court then added a contraindication. In its end summary it cited the aforementioned “prior decisions” as “dispositive.” Id.
\item \textsuperscript{1083} Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 986 (Okla. 1994).
\item \textsuperscript{1084} See id. at 989-92.
\item \textsuperscript{1085} Id. at 993 (Simms, J., concurring in part, dissenting in part); see also id. at 1001 (Summers, J., concurring in part and dissenting in part).
\item \textsuperscript{1086} Id. at 986 n.7 (majority opinion) (concluding that there was no need for the court below to have reached neutral reportage since the case was “well within” the fair report privilege under the common law).
\item \textsuperscript{1087} Id. at 990 (citing its “self-erected ‘prudential bar’ of restraint” in reaching constitutional issues resolvable on other grounds). The court noted that it had similarly avoided neutral reportage in \textit{Crittendon v. Combined Communications Corp.}, 714 P.2d 1026 (Okla. 1986). Wright, 873 P.2d at 989-90 n.29. An analysis of \textit{Crittendon} discloses that the court avoided a \textit{constitutional “fair reportage”} discussion by relying on Oklahoma’s fair report statute as to judicial proceedings. No neutral reportage issue was before the court or discussed. \textit{Crittendon}, 714 P.2d at 1028-30.
\item \textsuperscript{1088} Wright, 873 P.2d at 985, 986 n.7, 989-990 n.29 ("The neutral reportage privilege is \textit{not} the same as and should not be confused with the fair report privilege.").
\end{itemize}
governing society for information of fundamental importance to the people."  

Reiterating Cox Broadcasting’s powerful public supervisory and agency rationales, the court emphasized that the press conference that the defendants accurately reported involved an open and available to the public setting and an official event and function. The court expressly distinguished “private conversations” between and among media, victims and/or police officers; unlike a press conference by a public official, these three classes of persons were not “by anyone’s count officially speaking for a public office.” In other words, private conversations between such persons were not entitled to the absolute privilege of fair report. Of course, these non-public conversations involving private individuals and government agents acting in an unofficial (and therefore private) fashion are typically “responsible, prominent sources” under neutral reportage. It is difficult to believe that a court so powerfully and persuasively rejecting fair report in this setting would then magically discover a sufficiently compelling value in the same information to justify “subordinating” the plaintiff’s reputational interest under the guise of neutral reportage.

Two recent Nevada cases appear on first glance to support adoption of neutral reportage. A close examination discloses that neither does. In an unpublished opinion, the Utah Court of

1089. Id. at 986.

1090. Id. Without coverage of such “official public events” by the media, it was “highly doubtful that the general public would be able to make informed decisions and participate intelligently in their governance . . . [or that] representatives of government [would] be able to perform their tasks effectively.” Id. The court also notes that English and American precedent was “replete with panegyrics on the value of openness and publicity in promoting confidence in the administration of a legal system.” Id. at 988 n.22.

1091. Id. at 985 n.1 (“[Fair report] rests on the notion that since the activity covered by the press was open to the public, the media functioned as a mere substitute for the public eye and ear . . . the public’s agent.”); see also id. at 986-92.

1092. Id. at 986-92.

1093. Id.

1094. Id. at 992.

1095. Id. at 991-92.

1096. The court emphasized “neutral reportage’s” protection of coverage of private person/source accounts as “going beyond the sweep” of fair report. Id. at 990 n.30.

1097. See infra text accompanying notes 1570-1579.

1098. Wright, 873 P.2d at 986-87 (“The damage by reputational harm . . . unredressed because of . . . fair report . . . must be subordinated to the larger societal interests in the values the privilege protects”—“publishing information released by governmental officials to the public at official functions.”).

Appeals cryptically analyzed and applied neutral reportage to critical opinions (primarily the “FOIA terrorist” statement) about a frequent FOIA applicant, which the media defendant had accurately recounted. The neutral reportage analysis is dicta in light of the court’s alternative and more defensible ground—fair comment. Moreover, it was undoubtedly absolutely privileged on First Amendment grounds as “rhetorical hyperbole” or opinion. Accurately reporting privileged opinion is itself protected opinion, a far cry from republication of a falsehood with “serious doubts” as to its falsity. The second opinion by a federal district judge is similarly indefensible as supporting authority for neutral reportage on several grounds. First, the court misstated the Utah Court of Appeals’ decision as an adoption by the Utah Supreme Court. Neutral reportage was also a seeming throw-in alternative after all the libel/media issues had been resolved on other grounds—i.e., non-defamatory, true, opinion or non-malicious. Accordingly, the

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1100. Plaintiff’s voluminous litigation history and the response of the executive and judicial branches, including the U.S. Supreme Court, is detailed in the allegedly defamatory article. The first reference to government workers denouncing plaintiff as a “FOIA Terrorist” followed a reference to a federal court complaint which involved litigation of 2,370 requested pages and 3,087 named defendants. The line following the “FOIA Terrorist” reference contained a reference to a new verb characterizing plaintiff’s interminable FOIA filings: “Have you been Schwarzed today?” See Christopher Smith, S.L. Woman’s Quest Strains Public Records System, SALT LAKE TRIB., May 11, 2003, at A1. Plaintiff’s extended litigation history would probably qualify her as a vortex public figure. See ELDER, DEFAMATION, supra note 647, § 5:15, at 5-115 to -16. To the extent the Utah Court of Appeals’ opinion has precedential value, it is limited to public persons.

1101. Schwarz, 2005 WL 1037843, at *2 (“Plaintiff’s arguments about the accuracy of the article center around several opinions contained within the article. In our view, these opinions were accurately reported and fall under the fair comment privilege.”).

1102. See supra note 654.

1103. See supra text accompanying notes 91-93, 174-178 and notes 294, 318.

1104. See supra text accompanying notes 319-326, 397-398.

1105. See supra text accompanying notes 77-85 and notes 649-650.

1106. Int’l Ass’n of United Mine Workers Union v. United Mine Workers of Am., No. 2:04cv00901, 2006 U.S. Dist. LEXIS 28048, at *82 (D. Utah May 1, 2006). It is exceptionally unlikely that a court that recently recognized the “strong state interest” in protecting defamation victims and restrictively and appropriately applied both the “limited purpose” and “all purpose” public figure concepts, Wayment v. Clear Channel Broad., Inc., 116 P.3d 271, 279-85 (Utah 2005), would adopt an absolutist doctrine, neutral reportage, eviscerating plaintiff’s right of redress for calculated falsehood.

1107. Int’l Ass’n of United Mine Workers Union, 2006 U.S. Dist LEXIS 28048 passim. The court repeatedly emphasized lack of “intent” to injure plaintiff’s reputation by publishing a third person’s or entity’s acts, views or perspectives, the importance of disclosing plaintiff’s perspective and/or allowing plaintiff to respond, and as negating defamatory content and malice. Id. passim. Note that the court seems somewhat confused as to the meaning of malice. Although it cited Linn v. Planted Guard Workers, 383 U.S. 53 (1966), see supra note 170, it seemed to equate erroneously “malice” with intent to injure
neutral reportage aspect was again *dicta.*\(^{1109}\) Most importantly, the court clearly did not adopt Edwards’ absolutist stance, viewing neutral reportage as defeasible by pleading and proof of malice.\(^{1110}\) This rendered neutral reportage duplicative and irrelevant\(^{1111}\) in light of the plaintiff’s public figure status.\(^{1112}\)

The California Supreme Court expressly left open the issue of neutral reportage in the public person setting in *Khawar v. Globe International, Inc.*\(^{1113}\) In a footnote,\(^{1114}\) the court mentioned that some published California appellate decisions had referenced neutral reportage as a doctrine “proposed or adopted”\(^{1115}\) elsewhere or had


1109. See supra note 654.

1110. *Int’l Ass’n of United Mine Workers,* 2006 U.S. Dist. LEXIS 28048, at *88 (finding that the “naked allegation” in the case before the court was “vague and completely discredited” by the articles’ content). On the court’s confusion on the nature of malice, see supra note 1107.

1111. Neutral reportage defeasible by constitutional malice is the same standard that applies to public persons in public interest cases and provides no additional protection. See supra note 1075 and infra note 1123.

1112. *Int’l Ass’n of United Mine Workers Union,* 2006 U.S. Dist. LEXIS 28048, at *86.

1113. 965 P.2d 696, 707 (Cal. 1998) (“[W]e do not decide or imply either that the neutral reportage privilege exists as to republished defamations about public figures or that Globe established other possible requirements of the privilege here.”).

1114. Id. at 705 n.2.

1115. Id. (citing Stockton Newspapers, Inc. v. Superior Court, 254 Cal. Rptr. 389 (Ct. App. 1988)). In *Stockton Newspapers,* the court infused the republication-of-rumor privilege of Section 602 of the RESTATEMENT (SECOND) OF TORTS (1977) into the statutory version of common law privilege found in CAL. CIV. CODE § 47(3). Although Section 47(3) was normally defeasible if defendant published a statement not believing such to be true or without “reasonable backing,” these limitations were inapplicable in the republication-of-rumor context. See *Stockton Newspapers,* 254 Cal. Rptr. at 397. Here, where the newspaper had not adopted the third party charge as its own and had reported it as “an unresolved controversy,” “the bare absence of a belief in the charge” or “mere skepticism” concerning its truth did not infer malice sufficient to defeat the privilege. *Id.* at 398. The court distinguished a situation where defendants were “convinced the charge was false.” *Id.* at 399 (emphases added). Apparently, a republication of a *known falsity* would have been actionable. In a footnote the court noted the suggestion “there is or should be a somewhat analogous doctrine” under the First Amendment, citing *Edwards.* *Id.* at 398 n.6. Note that the court of appeals in *Khawar* interpreted *Stockton Newspapers* as not adopting or in “anyway indicating” it was California law. *Khawar v. Globe Int’l Inc.*, 54 Cal. Rptr.2d 92, 103 n.7 (Ct. App. 1996).

In light of the California Supreme Court’s *Khawar* holding and note 2, California courts should be exceptionally cautious in placing undue reliance on *Stockton Newspapers.* This is particularly true in light of *Khawar’s* heavy reliance on *Brown v. Kelly Broadcasting Co.*, 771 P.2d 406 (Cal. 1989), in which the court rejected a Section 47(3)-based public interest privilege in cases involving private plaintiffs for matters of public concern as an unjustified attempt to revive *Rosenbloom v. Metromedia, Inc.* *Brown,* 771 P.2d at 410-11. Many of *Brown*’s legal policies and arguments have substantial significance for *Stockton’s* broad
quoted *Edwards* while deciding distinct issues. The court then stated that, to its knowledge, no appellate court in California had “held that the neutral reportage privilege is required” by either the California or U.S. Constitution, “or otherwise is recognized” in the

47(3) privilege or some other form of neutral reportage. First, 47(3)’s statutory background did not evidence any intent to create any “public interest” or other “special privilege for the media” (unlike, for example the fair report provision). *Id.* at 412. Second, the proposed newsworthiness privilege was so open-ended that it would be a “rare case” where media defendants would not claim its application. *Id.* at 413. Third, 47(3) applied only to a “narrow range of private interests” and, like the common law generally, was not intended to extend a “common interest” privilege to the news media. *Id.* at 414-16, 421. Fourth, the *Khawar* court specifically repudiated *Stockton* and other precedents in part, finding that California’s fair comment privilege operated independently of 47(3) and was not contained therein. *Id.* at 418 n.18. Fifth, fair comment was limited to those now held to be public officials and public figures. *Id.* at 419-22. Sixth, expansion of the public interest privilege would “raise serious public policy questions” about the need for limitations on the right to recover and other defamation law modifications. *Id.* at 423. The court raised but expressed no view on whether such restrictions would seem afoul of the “abuse” limitation on free speech under the California Constitution or pose constitutional problems by providing greater protection to the media than other defendants. *Id.* at 424 n.25. In following the “overwhelming weight of authority” adopting negligence, the court found no justification for denying Californians protection for reputation equivalent to that available elsewhere. *Id.* at 424-25. The court cited *Gertz’s* protection of reputation and rejection of absolutism, the California Constitution’s accommodation between reputation and speech in its “abuse” “responsibility” limitation, *id.,* and technology’s measurably enhanced capacity to do harm. *Id.* at 426. Thus, California’s Constitution weighed against a more media protective standard than required by the First Amendment, which had no “abuse” limitation, *id.* at 428, and where there was no “[c]onvincing assurance” justifying further diminution of a private person’s need for protection—a determination that, in any event, could be made only after “careful consideration” of empirical evidence by the California legislation. *Id.* Seventh, the California court noted 47(3)’s emphasis on common law malice—“arguably a much greater degree of fault than mere doubt as to accuracy.” *Id.* at 427. This standard might provide a type of neo-absolute privilege exceeding that of “fair comment” and its constitutional equivalent, immunizing the knowing or reckless falsehood not made with ill will or intent to injure. In sum, the Supreme Court’s “revolutionary” changes in the common law to eliminate strict liability in *Sullivan* and its progeny rendered expansion of common law privileges unnecessary, particularly in light of the concerns the law’s complexities had made it “unmanageable”—the court declined to add “yet another wrinkle to the already crumpled face of constitutional defamation law.” *Id.* at 428-29. Eighth, the court gave a compelling rebuttal to the media’s self-censorship argument, concluding that there was considerable evidence media defendants were “not unduly hampered” by libel liability. *Id.* at 430 (emphasis omitted). In fact, in light of *Sullivan* and its progeny the media were “presumably . . . now equally or more vigorous than before,” *id.* at 431, and should pay for the damage they do by their negligence, *id.* at 434-35.

1116. *Khawar*, 965 P.2d at 705 n.2 (citing Grillo v. Smith, 193 Cal.Rptr. 414, 417 (Cal. Ct. App. 1983) (citing *Edwards* after saying that a third party opinion quoted—referring to plaintiff/judge’s court as a “kangaroo court”—was “doubly protected”); Weingarten v. Block, 162 Cal.Rptr. 701, 715 (Cal. Ct. App. 1980) (quoting from *Edwards*, followed a conclusion by the court that no constitutional malice could be shown where the reporter had “no reason to disbelieve” his source).
state.\textsuperscript{1117} In light of the court’s holding and the aforementioned footnote, the status of \textit{Fisher v. Larsen},\textsuperscript{1118} not cited among the illustrative examples in the \textit{Khawar} footnote or discussed in the court of appeals opinion,\textsuperscript{1119} is unclear.

The \textit{Fisher} case involved campaign opponent defendants and media defendants sued for statements made and reported during a bitterly contested election campaign involving plaintiff/incumbent.\textsuperscript{1120} The first claim that raised a possible neutral reportage issue centered on the media defendants’ “fair and neutral reportage”\textsuperscript{1121} of a press conference campaign statement by the co-defendant opponent. Defendants’ report “allow[ed] no inference” that they were “giving credence” to the opponent’s question about the plaintiff’s alleged attendance at teacher union rallies and support for its negotiating demands or “undue emphasis” on the question in the context of the article as an entirety.\textsuperscript{1122} The court upheld the trial court’s summary judgment “[a]bsent an inference of malice.”\textsuperscript{1123} Apparently, had there been other evidence of constitutional malice, this reportage would have been actionable. In other words, in the only aspect of the case specifically referencing the term neutral reportage (but with no citation anywhere in the opinion to \textit{Edwards}),\textsuperscript{1124} no absolute privilege \textit{a la Edwards} was adopted.

The next claim is ambiguous but superficially stronger support for some unnamed version of neutral reportage. This claim was based on newspaper headlines that “accurately attribute[d]” co-defendant’s/opponent’s public charges (via a speech and press release) of charges

\begin{itemize}
\item \textsuperscript{1117} \textit{Khawar}, 965 P.2d at 705 n.2. A California trial court rejected neutral reportage in a public figure libel action, finding the doctrine “not persuasive” given the California Supreme Court’s “characterization of the existence of the privilege in \textit{Khawar} as uncertain.” Bennett v. Columbia Univ., 34 Media L. Rep. (BNA) 2202, 2205 (Cal. Super. Ct. 2006).
\item \textsuperscript{1118} 188 Cal. Rptr. 216 (Ct. App. 1982). Note that a subsequent California Supreme Court decision disapproved a single footnote in \textit{Fisher} dealing with an aspect of its constitutional malice analysis. Reader’s Digest Ass’n v. Superior Court, 690 P.2d 610, 619 n.11 (Cal. 1984).
\item \textsuperscript{1119} \textit{Khawar}, 54 Cal. Rptr. 2d at 103 n.7 (citing the three cases relied on by Globe and referenced in the California Supreme Court’s footnote 2 analysis discussed \textit{supra} notes 1114-1117).
\item \textsuperscript{1120} \textit{Fisher}, 188 Cal. Rptr. at 220-21.
\item \textsuperscript{1121} \textit{Id.} at 228.
\item \textsuperscript{1122} \textit{Id.}
\item \textsuperscript{1123} \textit{Id.} Of course, a neutral reportage privilege in cases of public persons defeasible by constitutional malice adds nothing to existing constitutional protection for the media. See \textit{infra} text accompanying notes 1448-1483.
\item \textsuperscript{1124} \textit{Fisher}, 188 Cal. Rptr. at 220-32.
\end{itemize}
of blackmail by the plaintiff. The court had already found these to be actionable as factual in nature as to the source. The court noted that the plaintiff had not claimed the statements to be "literally inaccurate" but only that in the context of the story as a whole the coverage was "unfair"—a criticism with which the newspaper itself had agreed and for which it had issued an "editorial mea culpa." The court concurred in the unfairness assessment and the defendants' admission, but then said that this accurate attribution to the source was "not false . . . even though elements of actual malice potentially lurk in this scenario." It is difficult to determine exactly what the court meant by this. However, the most reasonable interpretation is that the court found the plaintiff's tactical decision—to focus on the defendants' reportage of the accusations—to be legally deficient because it was not "false" (not inaccurate). In other words, the court dealt only with the plaintiff's particularized focus on facially accurate reportage, not the defendants' liability as publisher of a substratally false imputation of blackmail where constitutional malice "potentially lurk[ed]." The latter claim, where raised, would have had to focus on whether the defendant's reporter had "serious doubts" as to the truth of the blackmail imputation itself.

Other decisions cited by one of the Norton briefs do not in fact support adoption of an absolute constitutional privilege of neutral reportage. An appellate decision from South Carolina merely noted

1125. Id. at 228.
1126. Id. at 224-25.
1127. Plaintiff cited the following as illustrating defendants had "unfairly distort[ed] its coverage"—displaying unproved blackmail charges in headlines, featuring the campaign attack in its opening paragraph and "burying [plaintiff's] rebuttal." Id. at 228.
1128. Id. The court used the "same reasons" in rejecting a claim based on coverage of a press conference by defendant opponent, where the latter (with "similar accusations" by school board counsel) charged plaintiff with "breaking school privacy laws." Id. at 229. Although "the unfairness of its mode of presentation" had been "belatedly editorially admitted" by defendant, the "contents [were] factual." Id. This latter story would have posed additional hurdles for plaintiff had she challenged the falsity of the underlying charges. One, the concurrence by the school board attorney would have made it extraordinarily difficult, if not impossible, to prove constitutional malice. He was either a responsible source, see ELDER, DEFAMATION, supra note 647, § 7:2, at 7-27 to -32, or reliance on him was no more than negligence. Id. § 7:2, at 7-14 to -22. See also supra text accompanying notes 391-460. Second, the court had earlier found that the privacy law violations undisputedly not false and "well within the protected speech of a political campaign." Fisher, 188 Cal. Rptr. at 227.
1129. See supra text accompanying notes 79-85.
1130. For instance, the case of Martin v. Wilson Publishing Co., 497 A.2d 322, 330 (R.I. 1985), found neutral reportage "wholly inapplicable" to reportage of rumors. Although there is earlier dicta in the case concerning established privileges the press is entitled to raise—pure opinion, fair comment and neutral reportage—the latter reference, viewed in context, seems to have been confused with fair report. Id. at 327-30. The court's strong
its adoption by the trial court but explicitly did not reach this alternative ground and resolved the case on the basis that the matter in question was not defamatory.\textsuperscript{1131} In \textit{dicta}, a decision of the Alabama Supreme Court confusingly cited neutral reportage as having been adopted by the United States Supreme Court, while the court resolved the case under the state’s qualifiedly privileged (defeasible by common law malice) statutory and common law fair report doctrine.\textsuperscript{1132} An unreported federal district court decision from Wyoming adopted only a neutral reportage privilege defeasible by reaffirmation of the “long . . . recognized” republisher liability rule, \textit{id.} at 327, its detailed analysis of fair report and how participants in legal proceedings and public meetings have protection via rebuttal of defamatory remarks, its powerful critique of “enshrining [republished rumor] in print,” \textit{id.} at 329, its citation to \textit{Dickey} and its rejection of the “unique constitutional analysis” demanded by neutral reportage, \textit{id.}, its specific questioning of \textit{Edwards} (i.e., that the court was “not entirely convinced of the soundness” of \textit{Edwards}, that its “responsible organization” criterion made it “redundant” in light of \textit{Sullivan}, and noting that it was “questionable whether an additional layer” was required) underscore, at the very least, the court’s specific statement that it would wait for a case “squarely present[ing]” the issue, \textit{id.} at 330 n.5. Indeed the court’s overall analysis evidences strong indicators weighing against neutral reportage.

\textsuperscript{1131} Boone v. Sunbelt Newspapers, Inc., 556 S.E.2d 732, 736, 740 (S.C. Ct. App. 2001). In this case the court held that defendant’s reportage of an interview with a self-proclaimed alleged victim of abuse by plaintiff/police officer was not defamatory where defendant published a \textit{detailed refutation} of the mentally unstable interviewee’s charge, \textit{i.e.}, unequivocally demonstrating that he had misidentified plaintiff. \textit{id.} at 738-79. \textit{But see} Elder v. Gaffney Ledger, 533 S.E.2d 899, 904 n.9 (S.C. 2000) (in ambiguous \textit{dicta}, the court suggested a story’s form and content would be relevant regarding constitutional malice and neutral reportage). Compare the night-and-day differences in \textit{Hatfill v. New York Times}, \textit{see infra} Part VII.D, where defendants tried unsuccessfully to denude a heinous charge that plaintiff was the anthrax letter murderer by appending some tepid qualifying caveats.

\textsuperscript{1132} Wilson v. Birmingham Post Co., 482 So. 2d 1209, 1212-13 (Ala. 1986) (citing \textit{Edwards, Time Inc. v. Pape} and \textit{Greenbelt Publ’g Ass’n v. Bresler} as neutral reportage cases “arising from the First Amendment”). For a detailed analysis of this trio of decisions see \textit{supra} the text accompanying notes 645-728, 113-148, and 86-100, respectively. In fact, the more logical projection would posit Alabama in the anti-neutral reportage camp. In \textit{WKRG-TV, Inc. v. Wiley}, 495 So.2d 617, 619 (Ala. 1986), the court rejected Section 611 fair report absolutism for a report of a public meeting at a church to discuss a proposed landfill site and abuse of office allegations by county commissioners (including plaintiff). The court applied \textit{Sullivan} to plaintiff/public official, president of the county commission, and found substantial evidence of constitutional malice, including plaintiff’s denial, the fact that the charge was based on an anonymously disseminated rumor sheet, and that these rumors had been previously investigated by another of defendant’s reporters prior to an earlier broadcast. \textit{id.} at 621. Interestingly, the case was characterized in petitioner’s certiorari petition as a case of the right to “accurately and neutrally report” a “raging controversy.” 13 Media L. Rep. (BNA) #20, News Notes, Dec. 23, 1986 (containing excerpts from appellant’s petition). \textit{See ELDER, DEFAMATION, supra} note 647, § 3:11, at 3-36 (suggesting that the Court, “having repeatedly rejected newsworthiness as sufficient to precipitate application of the \textit{Sullivan} standard would be unlikely to sanction an \textit{absolute} fair report privilege for all public meetings involving matters of public concern”).
constitutional malice. A New Jersey federal district court found that the defendants’ non-neutrality eliminated any claim to either fair report or neutral reportage and “render[ed] unnecessary” any further discussion of the doctrine’s disputed status in the Third Circuit. A Maryland federal district court decision included supportive gratuitous dicta in a non-media defendant case resolved on constitutional malice and opinion grounds. An Arizona trial court opinion purported to rely in modest part on neutral reportage. On close examination, that analysis appears to be mostly dicta with the true grounds of the case being opinion or absence of constitutional malice. Lastly, as Appellants’ briefs acknowledge in Norton v. Glenn, appellate decisions from Texas and Iowa merely

1135. Freyd v. Whitfield, 972 F. Supp. 940, 943-46 (D. Md. 1997). Plaintiffs were vortex public figures and defendant was an academic participating in the national debate on repressed memory in alleged sexual abuse contexts. Id. This brief dicta relied almost exclusively on dubious federal appellate case law from other circuits. Id. at 946 n.11. The court opined that it “goes without saying” that defendant’s “neutral description” of the plaintiffs’ “family saga” was not actionable, citing to and primarily relying on the Eighth Circuit’s questionable precedents in Price and Janklow, see supra text accompanying notes 933-988, and the First Circuit’s decision in Medina, see supra text accompanying notes 670-697.
1136. In Godbehere v. Phoenix Newspapers, Inc., 15 Media L. Rep. (BNA) 2050, 2051-52 (Ariz. Super. Ct. 1988), the court found statements like “illegal” and “publicity stunt” in the first count to be opinionative and not actionable as such. The court then stated, assuming arguendo that underlying defamatory facts were undisclosed and implied, they were protected by neutral reportage. Id. at 2052. In any event, the ultimate sources accurately reported in the story were federal officials (including U.S. customs and DEA officers), sources who could be reasonably relied on. Indeed, the court then proceeded to so conclude—“[t]his is not the stuff out of which actual malice is made.” Id. Later, the court interpreted this analysis as giving protection to “accurately reported opinions.” Id. (emphasis added). As to count two (the specific language is not disclosed), the court concluded some had stronger bases in the opinion doctrine, others in the “record” privilege (fair report) and neutral reportage. Id. It then specifically relied on constitutional malice, rendering the earlier discussion dicta: “At bottom, however, we cannot say a reasonable jury could find it ‘highly probable’ that the exhibits were published with a ‘high degree of awareness of probably falsity’”—it then “[a]ccordingly” granted a directed verdict. Id. Lastly, in a tersely discussed count eight (involving a statement about flash funds), the court concluded that most of the article’s statements were protected by neutral reportage. Id. at 2053. As to anything not so immunized, no constitutional malice was shown. Id. Count eight was the only count in which neutral reportage was the primary ground for protection. See id.
1137. Brady v. Cox Enter., Inc., 782 S.W.2d 272, 275-76 (Tex. App. 1989) (resolved on statutory fair report grounds). If anything, the court hinted against the doctrine, quoting from Brasher v. Carr, 743 S.W.2d 674, 682 (Tex. App. 1987), rev’d on other grounds, 776 S.W.2d 567 (Tex. 1989), to the effect that: “A privilege of accurate re-publication has not, to
referenced neutral reportage but did not delve into its substantive merits.

A significant grouping\(^\text{1139}\) of open-ended pro-neutral reportage cases centers around and relies preeminently on \textit{Barry v. Time}.\(^\text{1140}\) This decision immunized the defendant/magazine for republishing a suspect source’s defamatory statements about the plaintiff/coach, a “key participant”\(^\text{1141}\) in a recruiting controversy. The court first held Time faultless under the strangely skewed interpretation of constitutional malice found in \textit{Barger v. Playboy Enterprises}, then doubly immunized the defendant under \textit{Barger}’s expansive version of neutral reportage.\(^\text{1142}\) Both opinions were written by the same judge.\(^\text{1143}\)

In \textit{Barry}’s view, a source’s known “disreputable character” was not “necessarily sufficient” to put a defendant on “notice of probable

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\(^{1138}.\) Jones v. Palmer Commc’ns, Inc., 440 N.W.2d 884, 893-94 (Iowa 1989) (noting that the record was insufficient to support a determination the broadcast was “neutral and accurate”). Occasional other cases have noted but not resolved the neutral reportage issue. See, e.g., Basilius v. Honolulu Publ’g Co., 711 F. Supp. 548, 550-552 (D. Haw. 1989) (resolving the case against plaintiff under an unconscionable application of the “truth” defense), aff’d without opinion, 888 F.2d 1394 (9th Cir. 1989); Roberts v. Dover, 525 F. Supp. 987, 994 n.5 (M.D. Tenn. 1981) (resolved on constitutional malice grounds).

\(^{1139}.\) Ward v. News Group Int’l, Ltd., 733 F. Supp. 83, 85 (C.D. Cal. 1990) (relying on \textit{Barry}, giving two media defendants neutral reportage protection for accurate republication of statements from a tabloid, \textit{News of the World}, and also holding that republication of the statements and plaintiff’s accurate denials were entitled to the First Amendment defense of truth—for criticisms of this bizarre truth doctrine, see infra note 1224, and for criticisms of other aspects of \textit{Ward} see supra text accompanying notes 800-808 and 889); Sunshine Sportswear & Elec. v. WSOC Television, Inc., 738 F. Supp. 1499, 1208-10, 1510 n.7 (D.S.C. 1989) (dismissing plaintiff’s claims for failure to show constitutional malice and stating in dicta that “neutral reportage” applied to one “responsible prominent organization”—the BBB—and to a competitor, whose views were deemed newsworthy); \textit{In re} United Press Int’l, 106 B.R. 323, 329-30 (D.D.C. 1989) (citing \textit{Barry}’s “carefully reasoned” analysis, the court applied neutral reportage in the face of a Hawaiian Supreme Court decision finding a \textit{jury issue} of constitutional malice, regardless of whether the sources were “prominent” or “responsible” (see supra text accompanying note 808), even though the controversy was not preexistent (see supra text accompanying notes 888 and 890-891), and despite the failure to elicit or report plaintiff’s version (see supra text accompanying notes 867-874)—the court also found that plaintiff could not show \textit{falsity} since the “physical events”—the statements made by the individual and newspaper source—had been accurately reported (see the criticism infra in Part VII.B)).

\(^{1140}.\) 584 F. Supp. 1110 (N.D. Cal. 1984).


falsity” under *St. Amant*. Moreover, the court held that a publisher “act[s] responsibly” when it discloses rather than conceals facts tending to attack source credibility. Thus, the defendant’s prominent disclosure of information impugning the story source—a plea of guilty to aggravated assault on a student on campus, failure of a lie detector test, and several quotations in the article from the source’s acquaintances that were highly critical of his conduct and character—was “responsible” journalism “plainly not in derogation of its duty to investigate” before publishing.

Note the gross anomaly. *Time* had republished information that a jury could justifiably have found was from a suspect source, but the court’s grant of summary judgment denied the jury that opportunity. Nor did the plaintiff’s denial help him meet his stringent burden of constitutional malice. According to the court, publication of the plaintiff’s denial “suggest[ed] responsible journalism . . . [in giving a] balanced, neutral picture” of the controversy. Without doubt, publication of the plaintiff’s denial is a sometimes

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1145. *Id.*
1146. *Id.* Normally, where information puts a media defendant on notice that subjective “serious doubts” exist under *St. Amant*, see *supra* text accompanying notes 77-85, the defendant is under a duty not to publish without further investigation or to pay damages if it decides to publish. Merely identifying the reasons why defendant’s source is or may be suspect and a liar, together with plaintiff’s denials, does not necessarily eliminate or mitigate the harm to individual reputation or the taint to public discourse. Indeed, as to the latter, it may promote the legitimacy of parroting lies, thereby furthering the deterioration of public discussion. When Judge Patel calls such “responsible” journalism, she revels in and adopts the bootstrapping weasely “logic” of journalists. That is not, and cannot be the law, and is a significant reason, among many, the author suspects, for the deteriorating image of the American media. See Elder, Johnson & Rischwain, *supra* note 763, at 438 (“The resultant blurring of the entertainment-news dichotomy and the downward spiral in the content and quality of television news makes the ‘vast wasteland’ of American television of four decades ago look like a Periclean Golden Age by comparison to the sensationalist drivel that permeates and largely dominates the television newsmagazines, much of network television and the media generally at the dawning of the new millennium.”).
1147. Judge Patel found it “[i]ronic[ ]” in both *Barger*, 564 F. Supp. at 1156, and *Barry*, 584 F. Supp. at 1122, that plaintiffs had asked her to assume that the discrediting disclosures by defendants about the sources were true in order to show that the defamation was published with constitutional malice. Duh. An accepted, time-honored way of showing constitutional malice is by showing there are “obvious reasons to doubt the veracity of the informant or the accuracy of his reports” under *St. Amant*. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); see also Elder, *Defamation*, *supra* note 647, § 7:2, at 7-36 to -43; *supra* text accompanying note 85. Under these precedents a jury was allowed to find constitutional malice under facts often much less compelling than those in *Barry*.
1149. *Id.*
probative but never controlling refutation of constitutional malice.\textsuperscript{1150} But the court went beyond that. It held that a media defendant \textit{always} acts “responsibly” in publishing what a jury could reasonably find to be a calculated falsehood emanating from a suspect source as long as the source’s warts are disclosed and the plaintiff’s denials are recorded.\textsuperscript{1151}

More stunning than this determination is Judge Patel’s conclusion that \textit{Barger} (of which she was the author, a fact which she disclosed\textsuperscript{1152}) “leads this court” to “adopt . . . neutral reportage”—and a very expansive version\textsuperscript{1153} that is applicable to prominent but irresponsible sources.\textsuperscript{1154} Judge Patel relied heavily on two cases: her opinion in \textit{Barger} and \textit{Oliver v. Village Voice},\textsuperscript{1155} an opinion she said “presage[ed]” \textit{Edwards}.\textsuperscript{1156} \textit{Oliver}’s interpretation of constitutional malice is, of course, totally indefensible, ignoring a plethora of indications that the defendant was relying indirectly on a suspect source.\textsuperscript{1157} All of these indications were trumped by newsworthiness:

\begin{itemize}
\item \textsuperscript{1150} Elder, Defamation, supra note 647, §§ 7:17, at 7-139, 7:18, at 7-142 to -143, 7:23, at 7-159 to -160. But see id. § 7:17, at 7-139 to -141 (deeming denials plus additional factors as “highly probative” of constitutional malice). For a case giving “far too much weight to reportage of the deficiencies” of a source, see McFarlane v. Esquire Magazine, 74 F.3d 1296, 1304 (D.C. Cir. 1996) and Elder, Defamation, supra note 647, § 7:23, at 7-159 to -160 n.19. The court seemed to ignore its own caveat—rejecting the argument “one may altogether shield a defamation simply by including the source’s reputation as a liar”—by detailing what the author has denominated a “laundry list of negatives,” Elder, Defamation, supra note 647, § 7:23, at 7-159 to -160 n.19, and concluding “full (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one.” For a more detailed criticism see supra the text accompanying notes 663-697.
\item \textsuperscript{1151} The court’s (il)logic parallels that in Konikoff v. Prudential Ins. Co. of America: publishing known lies becomes responsible journalism. See discussion infra Part IX.
\item \textsuperscript{1152} Barry, 584 F. Supp. at 1121.
\item \textsuperscript{1153} See supra text accompanying notes 800-830.
\item \textsuperscript{1154} Barry, 584 F. Supp. at 1122.
\item \textsuperscript{1155} 417 F. Supp. 235 (S.D.N.Y. 1976).
\item \textsuperscript{1156} Barry, 584 F. Supp. at 1126.
\item \textsuperscript{1157} Oliver, 417 F. Supp. at 237-38. Citing an unidentified “Watergate investigator,” defendants suggested that plaintiff—a young Democratic party activist and executive director of an association of state Democratic chairpersons—was involved with the CIA, an imputation the court conceded might be defamatory. Id. Defendant did not disclose what the “investigator” had disclosed to the author—that E. Howard Hunt was the sole source for the inculpatory matter in his testimony to the Ervin Committee. Id. Plaintiff contended constitutional malice could be shown by relying on Hunt, citing the following: Hunt’s “dubious reputation for reliability,” the “admittedly speculative nature” of the topic, indication parties were enhancing CIA involvement for self-protective reasons, and that plaintiff’s purported CIA involvement had been explicitly repudiated in sworn testimony before the same committee by his secretary and lawyer. Id at 238. The article itself also suggested Hunt had an acknowledged loose predisposition to view people as Communists—“I think he may have decided [plaintiff] was a Communist—you know Hunt.” Id. at 236.
“[a]lthough plaintiff emphasizes [E. Howard] Hunt’s alleged unreliability as a source, the mere fact of his making a statement, given his prominent position in the Watergate controversy, would be a legitimate news story.”

In other words, a suspect liar was allowed to publicize his lies through the complicit conduit of an immune media defendant in the media’s self-styled interest of not “impermissibly stif[ing] investigative reporting” in cases like Watergate where “fact and rumor tend to converge in the elusive search for the truth.”

Of course, a newsworthiness-based immunity trumping constitutional malice is, in essence, an absolute immunity totally inconsistent with *St. Amant* and, more specifically, with the Court’s later precedent, such as *Harte-Hanks Communications*. What, then is the precedential value of *Barger*, which Judge Patel bootstrapped from *dicta* (which she acknowledged in *Barry* had not been followed by the Ninth Circuit) to a basis for *Barry’s*

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1158 Oliver, 417 F. Supp. at 238; see also Barry, 584 F. Supp. at 1126. Judge Patel conceded that neutral reportage reached the “same result” as a *Medina* inquiry. *Barry*, 584 F. Supp. at 1123 n.15.

1159 Oliver, 417 F. Supp. at 238; see also Barry, 584 F. Supp. at 1126. Plaintiff’s proffered second basis for a finding of constitutional malice in *Oliver* was defendant’s knowing concealment of Hunt as sole source. *Oliver*, 417 F. Supp. at 237. The court rejected this, relying on *Time v. Pape*, interpreting *Pape* as involving a mere failure to provide a “secondary attribution.” *Id.* at 238-39. Judge Owen then noted that both defendant’s author and editor had submitted affidavits that they had absolutely no doubts about the accuracy of citing to a Watergate investigator. *Id.* at 238-39. Of course, a jury could alternatively have construed these responses as self-serving statements designed to conceal the identity of a suspect source and falsely depict the actual source as a credible governmental investigator for a well-esteemed committee—thereby enhancing the credibility of the article’s speculative conclusions. The court’s conclusory statement that defendants had no “ulterior motive” for the omission, *id.* at 239, is mind-bogglingly naive and at odds with common sense. This calculated media deception would have been highly probative evidence of constitutional malice. See ELDER, DEFAMATION, supra note 647, § 7:2, at 7-3 to -36 n.124, § 7:3, at 7-69 to -76 (detailing cases where common law malice, including motivation, can be probative of constitutional malice). One should not expect, one suspects, a particularly sophisticated analysis of constitutional malice from a judge who repeatedly equated *St. Amant*’s subjective standard with Justice Harlan’s *Curtis Publishing* “extreme departure from the standards . . . ordinarily adhered to by responsible publishers” standard. *Oliver*, 417 F. Supp. at 239. Of course, the Court majority in *Curtis Publishing* had specifically rejected the latter. See supra text accompanying notes 71-76.

1161 See supra text accompanying note 295-308, 499-506.

1162 See infra text accompanying notes 1169-1173.

1163 Judge Patel noted that *Barger* had been affirmed on other grounds, *Barry*, 584 F. Supp. at 1121, but not that her controversial constitutional malice analysis, *see* ELDER, DEFAMATION, supra note 647, § 7:23, had specifically been identified by the Ninth Circuit as *not* having been reached.
holding.1164 In *Barry* Judge Patel acknowledged that *Barger* “concerned the subjective awareness of falsity” issue.1165 Yet, she then proceeded to expansively reinterpret *Barger* in light of *Edwards*. The “critical” “principle” emerging from *Barger* then became neutrality with “the ultimate arbiter” of truth the anointed reader/viewer of the “accurate and neutral” account.1166 “Neutrality” included a published denial by plaintiff and disclosure of source-impugning facts regarding the suspect source for the story.1167 This was a purportedly independent1168 basis for summary judgment in *Barry*, although it was based on wholly gratuitous *dicta* in *Barger*.

Judge Patel’s bootstrapping efforts suffer from fatal defects other than those posed by the sheer indefiniteness and boundarylessness of the version of neutral reportage offered by her efforts.1169 First, *Barger* was preeminently an “of and concerning”/no liability for large group libel case, as the Ninth Circuit specifically held.1170 Indeed, Judge Patel admitted this; she dismissed on that ground alone1171 but then deemed it “appropriate” to rule on the constitutional malice issue because of self-styled “important First Amendment issues” raised by the lawsuit.1172 In other words, her *Barger* analysis was non-essential gratuitous *dicta*,1173 something she

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1164. In *Barry* Judge Patel specifically upgraded her *Barger* analysis as treating constitutional malice as *a—if not the—basis for dismissal of the complaint. *Barry*, 584 F. Supp. at 1121.
1165. *Id.* at 1127.
1166. *Id.*
1167. *Id.*
1168. *Id.* at 1113, 1128. One footnote in Judge Patel’s analysis discloses that it is not altogether clear she was aware of the difference between neutral reportage and fair report. She mentioned that the Supreme Court had never considered whether in *Time, Inc.* v. *Pape* defendant *Time* would have been liable “if the government commission had in fact charged *Pape* with policy [sic] brutality and *Time* had republished this charge . . . hence *Pape* cannot be read as supporting a constitutional privilege of neutral reportage.” *Id.* at 1123 n.15. Of course, the scenario she posed would have fallen within the accepted reach of “fair report,” a quite different and widely accepted doctrine. See *Elder, Defamation, supra* note 647, § 3:6 (detailing fair report cases for official proceedings and reports of administrative agencies and officers and of municipal corporations); *Elder, Fair Report, supra* note 657, § 1.06 (same).
1169. See *supra* text accompanying notes 1140-1168.
1170. *Barger* v. *Playboy Enter., Inc.*, 10 Media L. Rptr. (BNA) 1527, 1528 (9th Cir. 1984) (affirming on the basis of the large group defamation non-liability rule, the court *specifically emphasized* it did *not* need to resolve the constitutional malice issue).
1172. *Id.* at 1156.
1173. In light of the consensus view of non-liability under the large group defamation rule, see *Elder, Defamation, supra* note 647, §§ 1.31, 1:32, Judge Patel was correct in concluding that courts had “consistently held” that the “of and concerning” requirement could not be met in such cases. *Barger*, 564 F. Supp. at 1153.
did not acknowledge in Barry. Judge Patel also did not discuss an important set of distinguishing factors existing in Barger that gave it at least a colorable (but not especially persuasive\textsuperscript{1174}) claim to be a defensible constitutional malice determination. Significant explanatory factors gave perspective to facts impugning the source’s credibility.\textsuperscript{1175} Furthermore, the article itself depicted him as an “outstanding” agent whose grand jury testimony led to twenty-five convictions out of twenty-eight arrests.\textsuperscript{1176} No such parallel factors enhancing source credibility were present in Barry, where the source came across as a quintessential suspect source.\textsuperscript{1177}

VII. REPUBLISHER LIABILITY, THE CLASSICAL MEANING OF TRUTH, A RESTRICTIVE VIEW OF FAIR REPORT AND REAFFIRMATION OF A FEDERALIST VIEW OF WHAT IS DEFAMATORY: A DEFENSE OF TRADITIONAL VALUES

A. Republisher Liability

The debate reverberating in the briefs in Norton v. Glenn vividly reflects a broad-gauged, multi-pronged attack on the well

\begin{footnotesize}
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\item \textsuperscript{1174} Compare the listing of suspect sources allowing a case to go forward discussed in Elder, Defamation, supra note 647, § 7:2, at 7-36 to -43.
\item \textsuperscript{1175} The factors were his drug use ("speed"), commission of armed robberies, lying and mental instability. The article context, however, "chronicle[d] the stress and guilt engendered by [the source's] dangerous assignment as a highly effective" undercover narc compelled to assume a Hell's Angels' persona and how "tension" and a "desire to be punished" led to his mental breakdown, drug abuse and criminality. Barger, 564 F. Supp. at 1156-57.
\item \textsuperscript{1176} Id. at 1157. In light of these factors, the source’s revealed persona was deemed insufficient for defendant to be “on notice of probable falsity” and defendant “responsibly did not conceal” this from its readership. Id.
\item \textsuperscript{1177} See supra text accompanying notes 1144-1146. Judge Patel makes much of the argument that an advantage of neutral reportage over constitutional malice is the ready availability of summary judgment in the former but not the latter. Barry v. Time, Inc., 584 F. Supp. 1110, 1111 n.4, 1124 n.16. However, Judge Patel's analysis in Barger and replicated in Barry collapses such a distinction. When the subjective awareness"serious doubts" emphasis is trumped by accuracy and publication of plaintiff's denials in the interest of “responsible” journalism, summary judgment becomes readily available in both cases, as illustrated by Barger (where Judge Patel granted a motion to dismiss!) and Judge Patel's reliance in Barry on “independent” grounds of constitutional malice and neutral reportage, with Barger becoming post-Edwards a “principle” of “neutrality,” and Oliver interpreted as “presaging" Edwards and making source reliability (under St. Amant) "irrelevant." Id. at 1126-27. Similarly, Judge Patel's analysis of Medina v. Times, Inc., as a “same result” as neutral reportage case but framed in terms of a republishers’ constitutional malice/subjective awareness ignores the fact that Medina rejected the latter standard in favor of accurate reportage. See supra text accompanying notes 663-683.
\end{enumerate}
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ensconced common law rules on republisher liability and the truth defense. Under settled doctrine, a defendant is generally liable for republishing the statements of others and a defendant can plead defensive truth only by showing the substratal truth of the charge.


1179. Flowers, 310 F.3d at 1128 ("Liability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statements from somebody else"); Law Firm of Daniel P. Foster, 844 F.2d at 960 (stating that defendant "cannot escape liability for a false and defamatory statement simply because it repeated the statement of a third party," i.e. the FBI); Cianci, 639 F.2d at 60-61 (stating that “[a]ny different rule would permit the expansion of a defamatory private statement, actionable but without serious consequences, into an article reaching thousands of readers, without liability on the part of the republisher"); Dixson v. Newsweek, Inc., 562 S.W.2d 626, 631 (10th Cir. 1977); Olinger v. Am. Savings & Loan Ass’n, 409 F.2d 142, 144 (D.C. Cir. 1969) ("The law affords no protection to those who couch in the form of reports or repetition."); Condit v. Dunne, 317 F. Supp. 2d 344, 363 (S.D.N.Y. 2004) ("The reason for the rule is that republication of false facts threatens the target’s reputation as much as does the original publication"); WKRG-TV, Inc. v. Wiley, 495 So.2d 617, 619 (Ala. 1986) ("The repetition of a defamatory statement generally constitutes a new publication."); Hogan v. Herald Co., 146 N.Y.S.2d 836, 841 (App. Div. 1982) ("[O]ne who repeats a libel is normally responsible even through the republication consists only of a quotation."). See infra text accompanying notes 327-351 (discussing Masson v. New Yorker Magazine and RESTATEMENT (SECOND) OF TORTS § 578 cmt. b, § 581A cmt. e (1977).)

1180. Flowers, 310 F.3d at 1129 (finding that a statement that an expert said something—even if wrong—in one sense was "literally true" and had "some intuitive appeal" but ignored the republisher liability doctrine, which states: "[A] defamatory statement isn’t rendered nondefamatory merely because it relies on another defamatory statement"); finding that, since the underlying truth of the news reports on which defendant purportedly relied was disputed, defendants’ accusations that plaintiff engaged in tape-doctoring were actionable); Medico v. Time, Inc., 643 F.2d 134, 137 & n. 8 (3d Cir. 1981) (noting that, under the classic rule, “if J.S. publishes that he heard J.A. say that J.G. was a traitor or thief, then J.S. must prove that J.G. was a traitor or thief in order to make a complete defense”); Sunshine Sportswear & Elec. v. WSOC Television, 738 F. Supp. 1499, 1512 n.8 (D.S.C. 1989) (despite adopting neutral reportage, rejecting a “substantial truth” defense as meritless); Owens, 527 N.E.2d at 1308 (rejecting as “completely without merit”
not merely that a third party made it. Defendants’ identification of their source, non-concurrence with the source, and even their the suggestion truth could be shown by accurate republication. In a devastating critique, the court concluded that a republisher could not “evade liability merely by showing that he had repeated it with precision.” “Indeed, a faithful retelling of a defamatory statement may be the most damning kind”); McCormack v. Port Washington Union Free School Dist., 638 N.Y.S.2d 488, 489 (App. Div. 1996) (holding that a school board member could only rely on the truth that plaintiff/teacher had in fact hit a student, not merely that he was repeating the charge); Martin, 497 A.2d at 325-28 (in a powerful opinion, rejecting the trial court’s interpretation of falsity as to rumor, i.e., plaintiff had to prove “no such rumors” existed, admittedly a duty to “prove a negative . . . a difficult burden to sustain”; finding the proper inquiry for constitutional malice purposes to be whether the rumors were “based upon fact or whether they were false”); Elder, Defamation supra note 1179, § 2:4, at 2-21 to -26; W. Page Keeton et al., Prosser and Keeton on Law of Torts § 776 at 841 (5th ed. 1984) [hereinafter Prosser & Keeton]; Fowler v. Harper et al., 2 The Law of Torts § 5.20, at 168 (2d ed. 1986 & Supp. 2006); Katherine Sowle, Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. Rev. 469, 504 (1979) [hereinafter Sowle, Defamation] (“[U]nder common law defamation rules, when one repeats a defamation made by another, the republisher makes the charge his own. Thus, under libel law, Time had charged that Pape was guilty of a crime.”) (citation omitted). See supra text accompanying notes 113-148 and 213-215 in which the author explained the Court’s analysis in Time, Inc. v. Pape. See also Sowle, Defamation, supra, at 513-14 (engaging in a parallel analysis of the classic doctrine of truth in analyzing Time, Inc. v. Firestone). See Jones v. Taibbi, 512 N.E.2d 260, 265-66 (Mass. 1987) (stating that accurate attribution is insufficient; defendant must show the “truth of the underlying defamation,” i.e., plaintiff’s commission of multiple murders); Restatement (Second) of Torts § 581A cmt. e (1977) (“When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established”) (emphasis added). Indeed, the republisher can be liable even if the source was privileged. Restatement (Second) of Torts § 578 cmt. b.

1181. Flowers, 310 F.2d at 1128 (the customary newspaper evasion “it is alleged” did not preclude liability); Olinger, 409 F.2d at 144; Republic Tobacco, L.P. v. North Atlantic Trading Co., 254 F. Supp. 2d 985, 1002 (N.D. Ill. 2002) (rejecting the argument that an accurate summary equates to the truth, stating: “[I]t is evident that [defendant] was conveying the substance of the allegations to [plaintiff’s] customers, not the mere fact that the allegations had been made—and the substance is what (plaintiff) claims to be false. [Defendant] cannot preface defamatory statements with the words ‘the complaint alleges’ and then claim that the statements are literally true.”); Jones, 512 N.E.2d at 264-66; Fortenbaugh v. N.J. Press, Inc., 722 A.2d 568, 571-76 (N.J. Super. Ct. App. Div. 1999) (“A defendant cannot escape responsibility just because the alleged defamation was first uttered by another, perhaps an unreliable gossip.”) (emphasis added); Martin, 497 A.2d at 325-27; Hart v. Bennet, 672 N.W.2d 306, 318-19 (Wis. Ct. App. 2003) (adopting the section 578 republisher liability doctrine, the court rejected defendants’ allegation “accurately repeating” a source’s contentions equated to truth); Restatement (Second) of Torts § 581A cmt. e (1977); Elder, Defamation, supra note 1179, §§ 1:26, 2:4; Harper et al., supra note 1180, § 5:20, at 168; Lawrence Eldredge, The Law of Defamation 331 (1978) [hereinafter Eldredge]; Prosser & Keeton, supra note 1180, at 841.

1182. Olinger, 409 F.2d at 144; Snitowsky v. NBC Subsidiary (WMAQ-TV), 696 N.E.2d 761, 766 (Ill. Ct. App. 1998); Owens, 527 N.E.2d at 1307-08; Eldredge, supra note 1181, at 331-32; Prosser & Keeton, supra note 1180, § 113, at 799.

explicit statement of disbelief in the source’s truth provide no immunity to republisher liability. Undoubtedly, this has posed and continues to pose particular problems for the media. Over the last two plus centuries, voluminous case law has developed supporting an exemption for fair report by media (and other defendants) to publish accounts of certain types of governmental proceedings and official actions. Under fair report, underlying falsity is irrelevant.

1184. Olinger, 409 F.2d at 144; Snitowsky v. NBC Subsidiary (WMAQ-TV), 696 N.E.2d 761, 766 (Ill.Ct.App. 1998); Owens, 527 N.E.2d at 1307-08; McCall v. Courier-Journal, 623 S.W.2d 882, 894 (Ky. 1981) (Lukowsky, J., separate opinion); Hart, 672 N.W. 2d at 319; RESTATEMENT (SECOND) OF TORTS § 578 cmt. c (1977) (for example, identifying the matter as rumor is no defense to republisher liability); id., cmt. e (stating that republisher liability applies to defamation “even through he expressly states that he does not believe that the statement that he repeats to be true”); ELDERS, DEFAMATION, supra note 1179, § 1:26; PROSSER & KEETON, supra note 1180, § 113, at 799; ELDERIDGE, supra note 1181, at 331-32.


1186. See generally ELDERS, DEFAMATION supra note 1179, §§ 3:1-3:26; ELDERS, FAIR REPORT, supra note 1185; Reuber v. Food Chemical News, Inc., 925 F.2d 703, 713 (4th Cir. 1993) (stating that fair report is an exception to republisher liability “designed to mitigate its harsh effects”); White v. Fraternal Order of Police, 909 F.2d 512, 527 (D.C. Cir. 1990) (fair report is a “recognized exception” to republisher liability); Medico, 643 F.2d 137 (“To ameliorate the chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense the law has long recognized a privilege for the press to publish accounts of official proceedings or reports even when these contain defamatory statements. . . . ”).

1187. See ELDERS, DEFAMATION, supra note 1179, § 3:15; ELDERS, FAIR REPORT, supra note 1185, § 1:19(B). On the non-media issue in fair report and other republisher liability issues see text accompanying notes 361-64.

1188. Martin v. Wilson Publ’g Co., 497 A.2d, 322, 328-3 (R.I. 1985); ELDERS, DEFAMATION, supra note 1179, § 3:1, at 3:1; ELDERS, FAIR REPORT, supra note 1185, § 1:00, at 5. Unfortunately, confusion is sometimes created by statutory fair report terminology. See, e.g., the New York statute N.Y. CIV. RIGHTS LAW § 74 (West 1992), which requires that an account be “fair and true” (emphasis added). However, “true” is always equated to “accurate.” See, e.g., Doe v. Doe, 941 F.2d 280, 289 n.12 (5th Cir. 1991) (stating that a “fair and true” requirement that mandated defendant’s publication “not be false would eviscerate the privilege and run afoul of the [statute]’s admonition that a qualified privilege applies regardless of whether the publication is true or false”); Law Firm of Daniel P. Foster v. Turner Broad., 844 F.2d 955, 961 (2d Cir. 1988) (a “verbatim” quotation of an FBI Associate Director met the “truth” requirement). The corollary of this view is that the only method of breaching fair report is lack of fairness or accuracy. This is the view of the RESTATEMENT (SECOND) OF TORTS § 611 (1977), which relied in part on Cox Broadcasting v. Cohn. See supra text accompanying notes 187-207, which involved accurately reported true matter of public record.

The cases are all over the ballpark on the absolutism issue. For example, Pennsylvania has traditionally adopted the initial RESTATEMENT (SECOND) OF TORTS forfeiture
and the focus is on a defendant’s facial fairness and accuracy, i.e., whether the defendant has reported the essence of the official proceeding or action.\footnote{1189}

Fair report, with its dramatic protections for free expression under the common law\footnote{1190} (and its arguable constitutional underpinnings),\footnote{1191} does not suffice, however, in the view of the American media Jabberwock, with its seemingly unlimited resources and access to the most talented and expensive legal arsenal.\footnote{1192} Its dream, largely frustrated so far, is to immunize the media from any and all liability for accurate reportage of third party statements. This well financed media attack is at least four-fold.\footnote{1193} First, underlying truth must be redefined to mean the true fact that some third party, however unreliable, actually said it.\footnote{1194} Next, fair report must be redefined to cover all media reports of information from governmental sources, however non-public, informal and non-authoritative.\footnote{1195} Third, neutral reportage must be adopted to afford absolute immunity to republishing lies by non-governmental sources and governmental sources acting unofficially, however responsible or irresponsible, about

\begin{footnotes}
\item[1189] Elder, Defamation, supra note 1179, § 3:17; Elder, Fair Report, supra note 1185, § 3.02. Yet, the most detailed recent examination by a Pennsylvania court refused to find the “made solely” standard unconstitutional where it piggy-backed on top of a public figure plaintiff’s burden of showing knowing or reckless disregard of the underlying falsity of the matter reported. DeMary v. Latrobe Printing and Pub’g Co., 762 A.2d 758, 763-65 (Pa. Super. Ct. 2000). This was quoted with approval by Judge Montemuro’s concurrence at the Superior Court level, Norton v. Glenn, 797 A.2d 294, 299 (Pa. Super. Ct. 2002) (Montemuro, J., concurring), and also quoted with approval in Justice Castille’s concurrence in the Supreme Court. 860 A.2d 48, 62-63 (2004) (Castille, J., concurring). In any event, the “made solely” test is so demanding that it equates to near-absolute protection. See infra note 1416.


\item[1191] See supra text accompanying notes 1509-1521.

\item[1192] See, e.g., Brown v. Kelly Broad. Co., 771 P.2d 406, 435 & n.41 (Cal. 1989) (“[T]he news media amici curiae who have appeared in this action are entities of enormous financial resources.”); supra notes 310, 571, 638, 763.

\item[1193] An occasional fifth avenue is the usually unsuccessful (and totally indefensible) argument that neutrality necessary refutes constitutional malice. See supra text accompanying notes 625, 698-703.

\item[1194] See supra text accompanying note 622 and infra Part VII.B.

\item[1195] See supra text accompanying note 624 and infra Part VII.C.
\end{footnotes}
both public persons and private persons.\textsuperscript{1196} Lastly, reportage of accurate incriminatory information without endorsement the report must be viewed as non-defamatory.\textsuperscript{1197} All of these statements are supported by breast-thumping, self-serving platitudes about the right and need of the public to know.\textsuperscript{1198} Of course, it needs to be emphasized and reemphasized that the media is endeavoring to immunize the right to print even known lies with impunity.\textsuperscript{1199}

\section*{B. The Classical Meaning of “Truth”}

Some vigorous attempts, occasionally successful,\textsuperscript{1200} have been made to conflate truth and accuracy. This has not been limited to the media context. For instance, in one particularly outrageous recent case, the truth defense was allowed in an employment context to

\begin{itemize}
\item \textsuperscript{1196} See discussion supra Parts IV, V, VI.
\item \textsuperscript{1197} Occasionally, the suggestion has been made that source attribution negatives the defamatory nature of the false statement. See Hogan v. Herald Co., 446 N.Y.S.2d 836, 841-42 (App. Div. 1982), aff'd, 444 N.E.2d 1002 (1982) ("for the reasons stated" by Simons, J.), where the court rejected the argument and reaffirmed republisher liability. See also supra text accompanying note 623; analysis of Hatfill v. New York Times supra Part VII.D.
\item \textsuperscript{1198} See supra text accompanying notes 571-578, 582-583, 607-612, 618-625.
\item \textsuperscript{1199} The “revolutionary” nature of neutral reportage has been off-admitted. See Scott Saef, Neutral Reportage: The Case for a Statutory Privilege, 86 NW. L. REV. 417, 435 (1992). See also Pautler, supra note 1179, at 943 (Edwards was applauded by the author: “Never before has an American court granted the press a privilege as broad as that announced in Edwards . . . the right to repeat known, defamatory lies”).
\item \textsuperscript{1200} Gravitt v. Brown, 74 Fed. App. 700, 704-05 (9th Cir. 2003); Conwell v. Beatty, 667 N.E.2d 768, 774 (Ind. Ct. App. 1996) (finding that an accurate account of a sheriff's report about the status of an ongoing criminal investigation was not actionable because it stated the truth—the court concluded that “[w]hether falsities were later discovered as to those facts is immaterial”); Hupp v. Sasser, 490 S.E.2d 880, 886-87 (W. Va. 1997) (finding that republication of complaints by a journalism school's dean to another professor concerning that plaintiff's alleged "abusive" or "unprofessional" conduct were not actionable since true—such were “not fictional” and the dean's testimony "regarding their substance bears out his depiction of the complaints"). In Gravitt in a confusing opinion the court concluded that defendant's oral statement plaintiff was the “prime suspect” in a theft was not slander per se as it did not equate to imputing actual commission of the crime. Gravitt, 74 Fed. Appx. at 704-09. The court's analysis included a truth defense discussion and a conclusion the above statement was "not a false statement of fact." Id. at 705. It also noted plaintiff had not shown defendant's disbelief in truth. Of course, the latter is irrelevant to truth and relevant only to abuse of a qualified privilege, an issue not directly discussed. See ELDER, DEFAMATION, supra note 1179, §§ 2:32-2:33. See also the “false light” case of Wadman v. State, 510 N.W.2d 426, 432 (Neb. Ct. App. 1993) (following the libel truth defense and holding that plaintiff could not sue for a legislator's dissemination of uncorroborated investigatory information accusing plaintiff of child sexual and physical abuse—the court found it was true that plaintiff had been so accused). The sole citation relied on in Wadman was Mitchell v. Random House, Inc., 703 F. Supp. 1250, 1259 (S.D. Miss. 1988), aff'd, 865 F.2d 664 (5th Cir. 1989). However, that case involved a “false light” claim where “plaintiff [did] not contest the truthfulness of the statements themselves.” 703 F. Supp. at 1259. (emphasis added). Mitchell did not involve accuracy-pseudo-truth.
\end{itemize}
republications by the defendant’s employees merely because a complainant had in fact asserted sexual harassment. The ramifications of such a conception are “mind-bogglingly unfair.” Under this approach a single, uncorroborated and baseless charge (even one later held by an unemployment benefits referee to be unsubstantiated) could be repeated within the company or without with absolute impunity. Questions related to the underlying truth or falsity of the charge and whether any qualified privilege exists or is forfeited or abused are thus wholly irrelevant. Apparently, the same matter could also be republished to the media. Since it is “true,” the company would be immune under the common law absolute truth defense and any media republisher would likewise have a

1201. Compare Wilkinson’s v. Shoney’s, Inc., 4 P.3d 1149, 1169 (Kan. 2000), with Martin v. Wilson Publ’g Co., 497 A.2d 322, 327-28 (R.I. 1985). The Rhode Island Supreme Court undoubtedly had the correct view which rejected the trial court’s jury charge—which even the trial court admitted imposed a “difficult burden to sustain”—that plaintiff could only prove the falsity of rumors by proving they did not exist. Martin, 497 A.2d at 327-28. The court held that the correct focus for purpose of proving constitutional malice was not the mere existence of the rumors but “whether the rumors were based upon fact or whether they were false.” Id.

1202. ELDER, DEFAMATION, supra note 1179, § 2:4, at 2-24 n.16.

1203. Wilkinson’s, 4 P.3d at 1156.

1204. ELDER, DEFAMATION, supra note 1179, § 2:4, at 2-24, n.16. See also Crutcher v. Wendy’s of North America, Inc., 857 So.2d 82, 94-95 (Ala. 2003), where a sixteen year-old employee was questioned and searched, with consent apparently, by police at her place of employment. Plaintiff ultimately sued for slander. The court isolated the statement by the assistant manager to the police and held that the “speculative beliefs” of third parties regarding the defamatory implications “would not detract from the truth of what [the assistant manager] believed,” i.e., that $50 was missing and that plaintiff and a co-employee were the only individuals with access to the money. Id. (emphasis added). While a qualified privilege may have been available, see the court’s discussions of false imprisonment and intrusion, id. at 91-97, the court conceded this had not been raised as to the slander claim. Id. at 95. At the end the court noted that the “record essentially exonerates” plaintiff and indicated its disapproval of her mistreatment, “treatment naturally traumatic” to a teenager. Indeed, plaintiff deserved fair treatment, both by her employer and the court—that accorded by the common law: a defamation by implication analysis, delineation of any qualified privilege (if not waived by defendant), and defeasance due to actual malice. Any other conclusion would allow an employer to impliedly slander or libel a group of employees without any supporting grounds or evidence and denominate it “truth”—“a perverse result not required by or contemplated by the common law or common fairness.” ELDER, DEFAMATION, supra note 1179, 2006 Supp. at 40. Other courts achieve an equally bizarre and unfair result by treating intracorporate statements as not publications, thus barring a defamation claim for failure of plaintiff to prove a threshold element of a prima facie case. For a strong criticism see ELDER, DEFAMATION, supra note 1179, § 1:21.


1206. RESTATEMENT (SECOND) OF TORTS § 612(1) & cmt. c (1977) (making it clear it applies to media entities providing “the means of publication”); id. cmt. e (concluding that where the source is absolutely privileged the provider of means of publication “must likewise be absolutely privileged despite knowledge either of its falsity or defamatory nature”).
“truth” defense. This accuracy-pseudo-truth is a stunning concept that is not justified by “common sense, the common law, the needs of the media, or the First Amendment.”1207

For a modern media example of the perversion of classical truth, consider the incredible case where substantial truth (or the absence of plaintiff proof of falsity) was found where the defendant “truthfully reported” what “an eyewitness to the events . . . said happened,” together with a “video clip” of the same eyewitness—who was also the purported “victim.”1208 The story also included the media defendant’s “accurate characterization” of the eyewitness/“victim’s” comments.1209 The eyewitness/“victim” was a developmentally challenged and disabled adult with a five year-old’s capacity, who was incapable of understanding the criminal proceedings reported on by the defendant.1210 By any definition, this source was undoubtedly suspect.1211 By ignoring traditional doctrine, the court engaged in potentially “breathtaking . . . manifest unfairness.”1212

Another wonderfully unfair exemplar of media-generated, radically reformulated pseudo-truth is the case of In Re United Press Intern.1213 That decision involved litigation over defendant UPI’s reports implicating the plaintiff/public figure in underworld activity in Hawaii.1214 The Hawaii Supreme Court had remanded for trial, finding that the facts supported a possible jury finding of UPI’s knowing or reckless disregard of falsity.1215 Due to UPI’s bankruptcy

1209. Id.
1210. Id.
1211. See Elder, Defamation, supra note 1179, § 7:2, at 7-36 to -43.
1212. Elder, Defamation, supra note 1179, 2006 Supp. at 39. The court’s artificial construction of truth was mitigated by the remainder of its opinion, in which it concluded that defendant’s omission of mitigating factors known to the reporter and contained in a public record full of police reports provided plaintiffs with another basis for a claim. The summary judgment for defendants was reversed on that ground alone. Mohr, 68 P.3d at 1164-65. Unfortunately, the supreme court reversed on the latter ground, not reaching the accuracy-as-truth issue, which Mohr had not pursued on appeal. 33 Media L. Rep. (BNA) 1919, 1923 (Wash. 2005).
1214. Id. at 324-25.
1215. Mehau v. Gannett Pac. Corp., 658 P.2d 312, 322 (Haw. 1983) (“UPI’s treatment of the information gleaned from another source, the fact that the source was a new publication apparently given to sensationalizing the ‘news,’ and the anonymity of the authors of some of the crucial accusations published by the Valley Isle are a few of the factors we believe could lead to a finding by a jury that UPI’s republication of the charges of criminality was not ‘made only in good faith’ or they were such that ‘only a reckless man would have put them in circulation.’” (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968))); see also In re United Press Int’l, 106 B.R. 323, 326 n.7 (D.D.C. 1989).
petition, the case ended up in federal court in the District of Columbia, where the court followed the law of the case doctrine and upheld the constitutional malice finding by the Supreme Court of Hawaii. Incongruously, however, that doctrine did not preclude the court from whacking the plaintiff with a “double shot of [First Amendment] love”—the plaintiff’s inability to prove “falsity” and an extremely broad version of neutral reportage.

Relying on but grossly misinterpreting Philadelphia Newspapers v. Hepps, the court found that the plaintiff could not prove “falsity.” Why? The plaintiff could not show that the defendants’ accounts materially varied from what the originators wrote or said: one originator was a suspect local newspaper reporting hearsay, the other was UPI directly reporting hearsay from the brother of a purported whistle-blower who had disappeared. In the court’s view, the defendant needed only to report accurately what the third party said or wrote. Thus, the plaintiff’s inability to show a material deviation from that fact—i.e., that somebody else said or wrote it—immunized the defendant from potential liability for calculated falsehood. The court came to this bizarre conclusion—the equivalent of absolute immunity for accurate republication—after conceding the jury issue of calculated falsehood and noting it was “perfectly willing” to concede—as could a reasonable juror—that plaintiff was neither a mobster nor “Godfather” of the Hawaiian underworld!

1217. Id. at 326-27.
1218. SWINGING MEDALLIONS, A DOUBLE SHOT OF MY BABY’S LOVE (Ripete Records 1997). My apologies to the Swinging Medallions for literary license with their song.
1219. As to neutral reportage, see discussion supra Part V, VI.
1220. 475 U.S. 767 (1986). That case involved underlying truth and plaintiff’s burden as to underlying falsity. See supra text accompanying notes 254-293. Under Philadelphia Newspapers’ analysis, resolution of the constitutional malice issue would also resolve the issue of there being a factual issue of material falsity. However, the Hawaii decision predated Philadelphia Newspapers, and the two issues were not then inextricably entwined. See supra text accompanying notes 254-293.
1221. See supra note 1215.
1222. United Press Int’l, 106 B.R. at 327-28. Plaintiff’s attempted reliance on the non-media source’s retraction (during a meeting with him) of his statements and a further indication that the source said he was misquoted by the media source were irrelevant—neither “impugn[ed] . . . the accuracy” of defendant UPI’s story, which accurately reflected that supplied by the media source. Id. at 328 n.13.
1223. Id. at 328, 331.
Undoubtedly, the most stunningly Orwellian misuse of the substantial truth defense is the Seventh Circuit’s recent decision in *Global Relief Foundation v. New York Times*. That case involved a World article and also “truthfully related” plaintiff’s denials and data about plaintiff-actor’s post-Batman life. Compare notes 46, 203-207 and accompanying text. See also Basilius v. Honolulu Publ’g Co., 711 F. Supp. 548, 550-52 (D. Haw. 1989) aff’d w/o opinion, 888 F.2d 1394 (9th Cir. 1989). Misconstruing Philadelphia Newspapers and Garrison v. Louisiana and relying on *Janklow I*, the court provided a “truth” immunity to defendant’s accurate reportage of the contents of an anonymous letter implicating plaintiff in bribery and assassination of a foreign leader. Id. at 552. The letter was so suspect the Attorney General of Palau refused to investigate its allegations! Id. at 551. However, this suspect nature did not bar a “truth” defense—it rendered irrelevant issues of truth-falsity as to the “underlying charges” and issues of defendants’ “standard of care.” Id. at 552. Compare text accompanying notes 48-53, 159-207.

1225. *Global Relief Found., Inc. v. N.Y. Times Co.*, 390 F.3d 973 (7th Cir. 2004). Not surprisingly, Judge Sack endorses the idea of according protection to reportage of “underway investigations,” noting that such media reportage is “extremely common.” ROBERT SACK, SACK ON DEFAMATION, § 7.3.2.3 (PLI 2005) [hereinafter SACK]. He concedes as he must, that such may “arguably” be viewed by viewers or readers as “an implied allegation of the wrongdoing being leveled against the subject of the investigation . . . if there were no such allegation, presumably there would be no such investigation.” Id. In his treatment of fair report/reportage of investigation as truth, Judge Sack concludes, “[t]he law treats these accounts as reports of events not as republications of allegations of wrongdoing . . . if there is in fact an investigation, the report of its existence is ‘true.’” Id. (emphases added). As support for this extraordinary conclusion about “[t]he law,” he cites only four cases: *Global Relief Found., Inc. v. N.Y. Times Co.*, 390 F.3d 973 (7th Cir. 2004), see infra text accompanying notes 1225-1307; *Jackson v. Paramount Pictures Corp.*, 80 Cal. Rptr. 2d 1 (Ct. App. 1998), see infra this note; *Dolezefino v. Randolph*, 19 S.W.3d 906 (Tex. Ct. App. 2000), see infra text accompanying notes 1324-1344; and *Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir. 2002) see infra text accompanying notes 1345-1349. SACK, supra note 1225, § 3.4 nn.76.2-76.3. § 3.3.2.3 nn.138.1. Judge Sack does not purport to give this distorted view of the law any First Amendment substratum. His policy argument seems to be wholly based on the questionable assertion that allowing defamation for such accurate reportage “would threaten to black out significant news.” Id. § 7.3.2.3. He then quotes from Sibley v. Holyoke Transcript-Telegram Publ’g Co.: “Doubtlessly, it is painful to be cast before the public as the target of an investigation where later events point to baseless or vexatious charges. The greater wrong, however, would be to shroud the government’s scrutiny of its citizens.” Id. § 7.3.2.3 & n.140. (quoting Sibley v. Holyoke Transcript-Tele. Publ’g Co., 461 N.E.2d 823, 826 (Mass. 1984)). Sibley, as he acknowledged, involved an account of an affidavit filed in support of a search warrant—a scenario to which the modern consensus rule applies fair report. Id. § 7.3.2.3 n.140.

In *Jackson v. Paramount Pictures Corp.*, singer-entertainer Michael Jackson sued for defamation where a radio station and “Hard Copy” reported that local district attorneys were looking into whether an explicit video tape of Jackson with a young boy existed. 80 Cal. Rptr. 2d at 12. The court noted that “uncontroverted evidence” supported the fact that such investigative inquiry had in fact happened. Id. However, the value of the court’s opinion as precedence is limited—counsel for Jackson did not dispute the fact of the inquiry into the existence of the tapes—counsel merely alleged that inflammatory additions or indications of a revived investigation forfeited protected status. Id. at 12. The court then concluded that neither had rendered the account untruthful. Id. Anomalously and confusingly, on the separate issue of whether defendants were liable for republishing, i.e., “merely parroting” what sources had said, the court denied the truth defense, reaffirming that defendants could not defend a defamation suit by stating it was “merely accurately
suit by a charitable foundation providing humanitarian assistance in overseas Muslim areas against a host of media defendants. The defendants had reported investigations of, and contemplated (and later implemented post-publication), efforts to add persons and entities like the plaintiff to blocking orders and to designate them as organizations that supported terrorism. Avoiding its earlier determinations that it had not adopted neutral reportage and Illinois-based Seventh Circuit precedent that had properly declined to extend fair report to police investigation files, a panel of the Seventh Circuit applied Illinois’ substantial truth/common law repeating rumor or a statement made by a third party.” Id. at 9, 12. The court then proceeded to find lack of constitutional malice as to the latter, finding that the reporter had a past reliable source and other confirmation. Id. at 12-16.


1227. Id. at 979, 980, 983, 985-87, 990. Of course, the damages collected might be modest and time limited in light of fair report protection that would have been accorded to a fair and accurate account of the later public formal and official action. A month after the libel complaint was filed on December 14, 2001, the Office of Foreign Assets Control blocked plaintiff’s assets pending additional investigation. Id. On October 18, 2002, the government designated plaintiff as a “specifically designated global terrorist.” Id. at 980. The government’s formal blocking and designation actions would have been executive actions entitled to fair report. See Elder, Defamation, supra note 1179, at §§ 3.6, 3.7; Elder, Fair Report, supra note 1185, at § 1.06-1.07. Appellant only claimed damages from defendant’s defamatory publications until the government’s blocking order on December 14, 2001, which Appellants argued was a matter of “hundreds of thousands in [lost] donations.” Reply Brief of Appellant at 9, Global Relief Found. v. N.Y. Times, 390 F.3d 973 (7th Cir. 2004) (No. 03-1767).

1228. Global Relief, 390 F.3d at 980, 983, 985-87, 990.

1229. See supra text accompanying notes 927-932. The Seventh Circuit mentioned neutral reportage once, listing it as a doctrine plaintiff wished the court to reject. Global Relief, 390 F.3d at 980. From appellant’s brief it appears that neutral reportage may have been commingled with fair report (erroneously denominated “fair comment”). Brief of Appellant at 9-15, Global Relief Found. v. N.Y. Times, 390 F.3d 973 (7th Cir. 2004) (No. 03-1767).

1230. See supra note 169; infra note 1502. Illinois law is not totally clear on this issue. See Tunney v. Am. Broad. Co., 441 N.E.2d 86, 90-91 (III. Ct. App. 1982) (stating in dicta that the court saw “no reason to distinguish” the end result of an official investigation and the “investigatory process” but then specifically finding defendants did not accurately report comments made by building inspectors). But compare the clear holding on point in Windsor Lake, Inc. v. WROK, 236 N.E.2d 913, 915-17 (III. Ct. App. 1968) (refusing fair report as to an investigation to be conducted into complaints to the health department). See also Snitowsky v. NBC Subsidiary (WMAQ-TV), 696 N.E.2d 761, 768 (III. Ct. App. 1998) (citing section 611 cmt. h of the Restatement (Second) of Torts in dicta, noting, “in general charges made to the police are not rendered official acts by the officer’s act of recording the charge”) (referencing Pittsburgh Courier Pub. Co. v. Lubore, 200 F.2d 355 (D.C. Cir. 1952), see infra note 1503). See also infra note 1261.
absolute defense to the defendants’ accurate reportage of non-public investigations prior to any formal official action.

Although admitting that the plaintiff had properly alleged a prima facie case (including a factual issue of whether the plaintiff...
had ever funded a terrorist act\textsuperscript{1235}, the court nonetheless held that the latter was irrelevant to the issue of plaintiff proof of falsity\textsuperscript{1236} and the Illinois substantial truth\textsuperscript{1237} doctrine. The sole issue was not whether the plaintiff was culpable of such an imputation,\textsuperscript{1238} which would have been the focus under the common law.\textsuperscript{1239} Rather, the issue was whether the defendant reported its revised version of politically correct truth,\textsuperscript{1240} meaning whether the defendants “truthfully” (equate with “accurately”) reported the “gist” or story” of the governmental investigation,\textsuperscript{1241} whatever the \textit{truth} of the underlying charges\textsuperscript{1242} or 

\footnotesize{(emphasis added). This innocent, peculiarly Illinois, construction analysis is an additional reason why courts should reject this radically-reasoned decision.} 

\textsuperscript{1235} Global Relief, 390 F.3d at 983, 987. Appellant made substantial arguments for discovery of defendants’ government investigator sources and for deposing the government affiants relied on, whose affidavits had been substantially redacted. Brief of Appellant, supra note 1229, at 20-23. Appellant had been barred from all discovery by government obstructionism. Indeed, its motion to compel remained pending. Appellant indicated that the blocking order was merely a “prophylactic measure,” that there was good reason to believe the affidavits were not accurate, that the government had “no admissible evidence” of appellant’s alleged links to terrorists, and that any such evidence government did have could be innocently construed. Id. at 21-22. Appellant also argued that its case against the government was substantially related to and should be joined with the libel case. Id. at 20-23. 

\textsuperscript{1236} Falsity was equated to inaccuracy regarding reportage of the investigation/contemplated action. Global Relief, 390 F.3d at 983, 987. The burden of proof issue was inextricably linked to the court’s view of “substantial truth.” Appellant could not fulfill its burden because of the trial court’s skewed interpretation of “substantial truth.” Brief of Appellant, supra note 1229, at 6. 

\textsuperscript{1237} Global Relief, 390 F.3d at 981. 

\textsuperscript{1238} The media’s denigration of objective truth in favor of the right to print falsehoods, even calculated ones, parallels and reflects the politically correct nature of what passes as “truth” on and off college and university campuses in the post-modernist world. \textit{See} JERRY CAMPBELL, THE LIAR’S TALE 12 (Norton 2001) (“[T]he idea that truth is a pigmy, a midget, a dullard, and a bore in contrast to the scintillating and extraordinary inventions of falsehood is more fashionable now than it has ever been”); \textit{id.} at 314 (“A history of falsehood . . . ends with the triumph of culture; of language, art, politics, social theory, all now regarded as fonts of meaning, as vehicles for multiplying possibilities, for sustaining and justifying beneficial untruths, for making life more interesting by removing the traditional anchors, dissolving the foundations. Society is not simple enough for its members to survive by always telling the truth, but one result in the doctrine of truth has been to make the culture more complex than ever, which in turn promotes the sort of falsehood an in-fashion critic can dignify by calling it ‘a curious, backhanded way of telling some larger truth’”); David Barnhizer, \textit{A Chilling of Discourse}, 50 ST. LOUIS U. L.J. 361, 362 (2006) (noting that “[f]ew would dispute that American society is increasingly trapped in a culture of spin, lies, and propaganda,” and stating that it was “telling” that most of the criticism of this phenomenon was from \textit{outside} the university). 

\textsuperscript{1239} \textit{See supra} text accompanying note 1142. 

\textsuperscript{1240} \textit{See supra} note 1238. 

\textsuperscript{1241} Global Relief, 390 F.3d at 987-90. See the recent journalistic critique of a need for “national debate” by Associate Dean Martin Kaplan, director of the Norman Lear Center at the Annenberg School of the University of Southern California:
the defendants’ justification for believing them.\textsuperscript{1243} In other words, the media defendants were never required to show their cards but were absolved under the shabby veneer of accuracy-pseudo-truth.

The Seventh Circuit seems to have adopted the media defendants’ newest version of its breast-beating mantra for rationalizing its voracious proclivity to consume reputation. Requiring media defendants to demonstrate “actual and ultimate guilt of the subject of a government investigation would dramatically and improperly chill the ability of the press to report on the actions of government and deny the public information about matters of vital concern.”\textsuperscript{1244} Ignoring the Supreme Court’s focus on underlying

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So why, despite all appearances of actually having a national debate right now, do people keep insisting that we mount one? Perhaps it’s because the mainstream media are too timid to declare the difference between right and wrong. Imagine if journalism consisted of more than a collage of conflicting talking points. Imagine the difference it would make if more brand-name reporters broke from the bizarre straightjacket of ‘balance’, which equates fairness with putting all disputants on equal epistemological footing, no matter how deceitful or moronic they may be . . . National debates nicely fulfill the circus part of the bread-and-circuses formula of modern public life. Like psychoanalysis, national debates are basically interminable. And in our postmodern era, they do a nice job substituting for the hard work of actually figuring out what’s true and what’s good.

Martin Kaplan, *We’re Already Debating*, CINCINNATI POST, Dec. 21, 2006, at 12A.

1242. The court does in fact cite in detail affidavits (“heavily redacted”) that may have been substantial evidence of the underlying truth of the matter reported, demonstrating that truth in the classical sense could possibly have been proved. *Global Relief*, 390 F.3d at 983-83. Note that even its stalwart defenders admit that the Seventh Circuit “essentially ignored the fundamental precept of defamation law”—i.e., the focus on underlying truth. Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237-38 (2005). Mr. Donellan is Senior Counsel to the Hearst Corporation. Id. at 237. Mr. Peacock is a First Amendment Fellow with the Hearst Corporation. Id.

1243. See supra note 1242 (providing evidence that would have been relevant concerning fault in publishing the matter at issue). Note that accuracy-pseudo-truth absolves defendant of any fault regarding falsity and negatives any assessment of plaintiff’s status, and the constitutionally mandated level of culpability based on plaintiff’s status (constitutional malice if plaintiff is a public figure, or negligence if plaintiff is a private person). See supra Part I.B. Note that the court’s characterization of defendants’ reports as (in large part) “recitations of the government’s suspicions,” seems to tacitly concede that substantial doubt may have existed as to underlying falsity. *Global Relief*, 390 F.3d at 986 (emphasis added). See ELDER, DEFAMATION, supra note 1179, § 7.2; supra text accompanying notes 77-85.

1244. *Global Relief*, 390 F.3d at 984-85. Not surprisingly, this quotation was taken almost verbatim from the defendant-appellees’ brief. See Brief of Appellees, supra note 1232, at 13. The court hints at a possible First Amendment grounding for its conclusion. This constitutional basis was developed at length in defendants’ brief as part of their characterization of plaintiff’s position—i.e., plaintiff’s argument that the truth defense related to “underlying truth of the government’s suspicions” was “extraordinary.” Id. at 12-13, 18 (emphases added). Appellant’s position was disparaged as “baseless” and, if allowed, would “substantially undermine important First Amendment principles and contravene
falsity,\textsuperscript{1245} the Seventh Circuit opined that the defendants’ “only inaccuracy” was their timing in forecasting subsequent official actions.\textsuperscript{1246} The court applied the substantial truth defense even to the story that concluded the plaintiff had provided funds to Osama bin Laden—\textsuperscript{1247}a story that ABC retracted and apologized for printing. The court found the defendants’ accounts to be prescient, not inaccurate.\textsuperscript{1248}

By its effusive adoption of an expansive substantial truth doctrine under state law, the court circumvented restrictions that would have forfeited fair report: the preexistence requirement\textsuperscript{1249}; the public, official act/report proceeding requirement\textsuperscript{1250}; the strong settled law.” \textit{Id.} at 19 (emphases added). The defendant/appellees then bolstered this very questionable assertion with a policy argument that under appellant’s view the press could not report accurately about any identifiable subject of an investigation, or a personally observed felony arrest, or a person “secretly detained” by government, or that a law enforcement entity was conducting a “manhunt” and the reasons therefore. In a powerful response appellants excoriated this “parade of horribles” as hyperbolic. See \textit{Reply Brief of Appellant, supra} note 1227, at 2-3. Appellants correctly noted that an observed arrest would be entitled to fair report, and that a media defendant would be similarly allowed to specifically identify a manhunt’s intended subject where such was initiated via “some official action.” \textit{Id. See Elder, Defamation, supra} note 1179, § 3:8; \textit{Elder, Fair Report, supra} note 1185, § 1.09. For compelling public policy reasons a secret arrest or detention would also qualify as an arrest subject to fair report. \textit{Elder, Defamation, supra} note 1179, § 3:8 (suggesting that a detention during an investigation should be covered by fair report: “[T]he unfortunately too commonplace instances of disappearances and brutality both in democratic and other political regimes evidence the necessity of encouraging publicization of all arrests”). \textit{See also} Bell v. Associated Press, 584 F. Supp. 128, 130 (D.D.C. 1984) (“Where there is no such [public] scrutiny—as is true in some totalitarian countries—individuals sometimes disappear without a trace and without public knowledge or accountability.”).

\textsuperscript{1245} \textit{See supra} Part I.A-D.

\textsuperscript{1246} \textit{Global Relief}, 390 F.3d at 985, 987.

\textsuperscript{1247} \textit{Id.} at 975.

\textsuperscript{1248} \textit{Id.} at 985. Although plaintiff had not been so accused (but was merely being investigated for ties to terrorists), and such an accusation was thus “not technically true,” the “gist” was. \textit{Id.} The court repeated its “timing” comments in its summary analysis of all the claims: “The only inaccuracy is the timing of the government’s official action against” plaintiff. \textit{Id.} at 987.

\textsuperscript{1249} \textit{See Elder, Defamation, supra} note 1179, § 3.2 n.1; \textit{Elder, Fair Report, supra} note 1185, § 1.18. Indeed, the court’s radical posture even deviates from the common law truth defense. \textit{Restatement (Second) of Torts} § 581A cmt. g (1977) (“The truth of the defamatory imputation of fact must be determined as of the time of the defamatory publication. Facts alleged to exist by the defamer may subsequently occur but his foresight or luck in anticipating them will not protect him from liability for stating their preexistence.”) (emphases added). Even if this preexistence rule is not defensible in underlying truth cases, the sense used by Judge Posner in \textit{Haynes}, it makes no logical sense to circumvent it in the accuracy-pseudo-truth context. \textit{See infra} note 1255.

\textsuperscript{1250} \textit{See Elder, Defamation, supra} note 1179, § 3:12; \textit{Elder, Fair Report, supra} note 1185, § 1.15. \textit{See also} Donnellan & Peacock, \textit{supra} note 1242, at 237-38 (conceding that fair report would not have been a “viable defense, as there was no ‘official’ report or
proceeding to cite nor any on-the-record government source to point to’"); id. at 240, 243 (stating that cases not falling within fair report “fell through the cracks:” “Times have changed. We live in an era which formal charges and proceedings are not the corollary to government pronouncements they once were, secrets abound and off-the-record statements have become the norm. At the same time the targets of government focus on the war on terror are a matter of intense public concern and, inevitably, greater press scrutiny.”); id. at 268 (Global Relief and like precedent “vindicate important First Amendment and public policy principles . . . in order to allow the media to accurately report on newsworthy accusations and investigations which may not otherwise be protected”). As the Appellants correctly noted—while mischaracterizing fair report as “fair comment”—fair report is generally inapplicable as to non-public reports of government (citing Wynn v. Smith and Schiavone Const. Co. v. Time Inc., see infra text accompanying notes 1430-1445, 1442-1445), where neither the victim, public nor other journalists have access to the “secret record” and an opportunity to challenge the verity of the “secret evidence” used by the journalist. Brief of Appellant, supra note 1229, at 11-14. Such an approach “harmed the public interest by immunizing” the media defendants’ reportage about “secret government suspicions and unfairly favoring defendants’ First Amendment rights over [plaintiff-appellant’s] reputation rights.” Id. at 14. Indeed, in such cases defendants were dependent on leaked information which lacks the “indicia of reliability” enveloping public proceedings and investigations. Appellees gave a compelling rationale for the common law’s great majoritarian (see infra text accompanying notes 1563-65) rejection of extending fair report to such secret or confidential proceedings or investigations:

When the government takes an official and public position about a governmental investigation, charge or proceeding, it is clear to the public that the government endorses its accusations. On the other hand, when the government refuses to publicly report about an investigation, it is likely that it has not publicized the investigation or proceedings because it does not have sufficient information to substantiate an accusation. Accordingly, it would be contradictory to privilege journalists to report about confidential government investigations when the government itself is unwilling to release the information publicly for fear of slandering a person’s good reputation.

Reply Brief of Appellants, supra note 1227, at 3 (emphases added).

1251. See ELDER, DEFAMATION, supra note 1179, § 3:10; ELDER, FAIR REPORT, supra note 1185, § 1.10; infra Part VII.C.

1252. See ELDER, DEFAMATION, supra note 1179, § 3:14. Note that a leading Fourth Circuit decision refused to apply even a qualified privilege to reports of official foreign reports. See supra text accompanying notes 910-915. Global Relief cited to accusations by “Israel . . . security experts” and accorded absolute protection to media reportage thereof. Global Relief, 390 F.3d at 976. It is not clear whether the foreign and American “security experts” were governmental officers, although they possibly were. Under the Seventh Circuit’s “truth” analysis such status is irrelevant. See infra notes 1253.

1253. See ELDER, DEFAMATION, supra note 1179, § 3:1 (noting that the press’s “pivotal” “public supervision” function as to “[c]overing of and reportage of governmental proceedings, reports and actions allows the popular sovereigns, the citizenry, to ‘monitor the conduct of its government and its personnel’”) (citations omitted). Some of the cited and identified sources were clearly non-governmental. See, e.g., the citation to the Chicago Tribune for inculpatory matter. Global Relief, 390 F.3d at 978. See also the references to “duped contributors,” id. at 978-79, and a detailed analysis of the views of an identified American private “security consultant.” Id. at 979.
attribution\textsuperscript{1254} and reliance\textsuperscript{1255} requirements. Similarly, the Seventh Circuit circumvented both discussion of neutral reportage in general\textsuperscript{1256} and the doctrine’s general requirements of a public plaintiff,\textsuperscript{1257} a “responsible, prominent” source,\textsuperscript{1258} and a neutral account\textsuperscript{1259}—with neutrality negated by inculpatory additions or embellishments.\textsuperscript{1260} In sum, the carefully calibrated limitations

\textsuperscript{1254} See the references to “accused by . . . American security experts,” “intense federal scrutiny,” id. at 976, “two government sources” involved in the “close federal scrutiny,” who spoke only if not identified, id. at 977, “federal investigators,” “federal scrutiny,” “government officials.” Id. at 978. On the “source attribution” issue, see infra note 1603.

\textsuperscript{1255} For fair report to apply generally defendant must in fact rely on it either directly or derivatively. There is no public policy justification for allowing defendant to bootstrap itself from liability by a frantic post-publication search of official public records not in fact used. See ELDER, DEFAMATION, supra note 1179, § 3:2; ELDER, FAIR REPORT, supra note 1185, § 1.18. See also infra text accompanying notes 1420-1421. Proponents of Global Relief and like precedent avoid the “legal and ethical considerations” of source identification in confidential source cases—of course, absent identification, the “source reliance” requirement could not be met. By contrast, a Global Relief-styled truth defense “avoids these problems by permitting truth to be shown through the fruits of discovery, whereby one can establish the fact of the investigation or accusation through persons other than the source.” Donnellan & Peacock, supra note 1242, at 241. Note that the common law truth defense contains a parallel limitation to material true at the time of publication. RESTATEMENT (SECOND) OF TORTS § 581A cmt. g (1977). See supra note 1249. In Global Relief, 390 F.2d at 989, the Seventh Circuit quoted from its earlier opinion in Haynes v. Alford A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993), on this issue in rejecting a “public”-“secret” proceedings distinction. Citing RESTATEMENT (SECOND) OF TORTS § 581A cmt. h (1977), and the absence of any protectable interest in reputation from “the concealment of truth,” the court followed the common law rule “that truth—not just known truth . . . is a complete defense.” Id. Of course, this rule makes sense where the facts reflect underlying truth, the meaning intended by Judge Posner in Haynes, see infra note 1307, but not where such is contested and all defendant offers is accuracy-pseudo-truth.

\textsuperscript{1256} See discussion supra Parts V, VI.

\textsuperscript{1257} See supra Part V.B. This would be a huge hurdle in most reportage of investigation scenarios. See also Donnellan & Peacock, supra note 1242, at 249, 255-57 (noting neutral reportage is of “limited usefulness” in such cases since “targets typically are not public figures”). Although it is not altogether clear, the court seemed to view plaintiff Global Relief Corporation as a private person for First Amendment purposes. Global Relief, 390 F.3d at 982. Of course, given the court’s analysis, status is irrelevant—the resolution of accuracy-as-pseudo-“substantial truth” and plaintiff’s correlative inability to prove falsity would be the same even if the court had found plaintiff to be a vortex public figure based on its fundraising activities. See supra text accompanying notes 268-293. On the public figure issue see also ELDER, DEFAMATION, supra note 1179, at §§ 5:18-19.

\textsuperscript{1258} See supra Part V.C.

\textsuperscript{1259} See supra Part V.D. Although, as the court noted, many accounts quoted or cited to plaintiff’s response or denials, there is no indication the court viewed such as mandatory. Global Relief, 390 F.3d at 987. But see supra neutral reportage in text accompanying 838, 858-876. Of course, under a proper new of truth, only the “essences” or “gist” need be true. There is no obligation to report plaintiff’s denials. See supra text accompanying notes 858-876.

\textsuperscript{1260} See supra text accompanying notes 848-853; see also infra text accompanying notes 1268-1271.
developed for fair report over two plus centuries were blithely ignored, as were the modest modern limitations of neutral reportage, all in the interest of avoiding self-censorship as to reportage of investigations by government.\footnote{1261}

Assuming that any accurate mere recitation of a non-final, non-public governmental investigation should be protected (a point this author specifically rejects\footnote{1262}), the Seventh Circuit did much more than that. Although it specifically concluded that no defendant had stated or concluded that the plaintiff had funded or aided a terrorist organization, this conclusion is at odds with the court’s own factual recitations.\footnote{1263} For example, the court’s excerpt from \textit{The Boston Globe} report demonstrated more than that a mere accurate report of an “investigation” and “contemplated” action was at issue.\footnote{1264} The report, \textit{Charity Probe: Muslim Relief Agency Eyed in Terror Link}, started out with a statement that the plaintiff “may also be a clandestine agent of terror.”\footnote{1265} It cited federal investigators and stated that the plaintiff had been “under federal scrutiny for sometime.”\footnote{1266} The report then noted that the plaintiff had been on a federal list of agencies with “alleged ties to terrorism” two years
earlier, and then related that it was “expected to be added” to an updated version.1267

The stage had been set. The defendant then added the following supportive, highly inculpatory evidence: investigators “matching” the plaintiff to fourteen million dollars in questionable foreign and domestic transactions; the fleeing of the plaintiff’s co-founder/former director after the FBI tried to interrogate him about links to a mosque that raised funds for the plaintiff; the plaintiff’s inability to account for millions of dollars sent abroad and its “vague . . . IRS filings” as to how money had been disposed of; the plaintiff’s lawyer’s refusal to name vouching agencies or to allow “full” access (apparently to the media!) to the plaintiff’s financial records “despite numerous requests” (apparently also by the media!).1268 The newspaper then introduced its final zinger: several “legitimate” international relief or humanitarian agencies were not familiar with plaintiff.1269 Viewing the above in totality, The Boston Globe created the clear impression that the plaintiff was culpably involved in terrorism1270 and in an insidious indirect way that becomes more damingly effective than a direct charge.1271

1267. Id.
1268. Id.
1269. Id. at 978. The court’s terse analysis held the entire article “substantially true.” Id. at 986.
1270. Compare Hatfill v. New York Times, discussed infra Part VII.D, infra. On libel-by-implication see ELDER, DEFAMATION, supra note 1179, at § 1:7, 1-28-1-36. See supra text accompanying notes 985-988, and the discussion in Toney v. WCCO Television, which has rendered the Eighth Circuit’s broad “neutrality” standard very questionable. For other examples of Global Relief defendants engaging in highly inculpatory reports of “investigations,” see the discussion of the article by the New York Daily News about the Council on American-Islamic Relations (“CAIR”), cited in Global Relief, 390 F.3d at 975, which the author said was “in bed with at least two philanthropic groups suspected of being fronts” for Hamas, “one of the Middle East’s most legally anti-American, anti-Jewish jihadists.” The author noted that CAIR had refused to concede connection of September 11 to Osama Bin Laden and an Islamic jihad and noted CAIR’s very specific recommendation as to “how the public should respond to the attacks on American”—send donations to one of three organizations. The last listed, plaintiff, was said to have been “accused by Israel and American security experts of funneling money and support to Hamas.” Like the second of the three mentioned, the Holy Land Foundation, plaintiff was “currently under intense scrutiny.” The author acknowledged that the two implicated (one was plaintiff) are “[f]or now “legal American corporations” and that President Bush was correct in refusing to bar all Islamic groups as “support[ing] holy warriors such as Hamas.” Id. But then the author ended with an implication that can be reasonably construed as strongly tainting plaintiff: “But as [President Bush’s] staff ought to know by now some have and still do.” Id. at 975-76 (emphasis added). The court conceded that plaintiff had not been “accused publicly of funneling money to Hamas” at the time of publication. But the only issue was “timing.” Id. at 985. “In short order, the accusations were made public and the report proved to be substantially true. . . .” Id. See also the Hearst Communications report on Bay Area donors. Id. at 978-79. Entitled “2 Muslim Charities Probed for Terror Link; Bay Donors
Luckily, the Seventh Circuit’s opinion reflects Illinois law, at best.\textsuperscript{1272} It is not based on First Amendment law, and could not be after \textit{Masson},\textsuperscript{1273} a decision unsurprisingly never cited by the appellate court.\textsuperscript{1274} No doubt victorious defendants will endeavor to rely on \textit{Global Relief’s} reputation-devouring contours elsewhere. But other courts should view this radical decision with decided wariness. Consider its ramifications. Assume, \textit{arguendo}, that a mentally unstable felon on death row (having exhausted all her appeals) makes ranting, vitriolic charges to the state bar that Judge Rovner, the

\begin{quote}
Chip in to Chicago Groups,” the report was in substantial part an investigative piece citing to sources \textit{other than} an official investigation. For example, in the context of listing plaintiff as one of two organizations being scrutinized, the article cited to duped “contributors” claims (\textit{i.e.}, that no mention had been made of Al Qaeda, Osama Bin Laden and the Taliban) and quoted at length highly damning statements from an identified D.C. “security consultant” expert:

[D]onors to . . . [plaintiff] get only part of the truth about the ways their contributions are used.

“They won’t tell you the money is going to Hamas,” . . . the principal Palestinian terrorist organization. “They will tell you the money is going to humanitarian activities, which isn’t wrong. . . . But their fundraising literature says nothing about Al Qaeda or jihad.”

\textit{Id.} at 979 (quoting a Washington D.C. security consultant). The article also quoted plaintiff’s denials and responses. \textit{Id.} at 978-79. The court’s brief comments said the latter additions were “consistent with” the governments’ actions and “added nothing . . . to the . . . true recounting” of the investigation. \textit{Id.} at 986 (emphases added). Only a court implicitly applying a specie of innocent construction, see supra note 1234, could view the latter highly inculpatory comment as “adding nothing” to a report about an “investigation.”

\textit{See} \textit{ELDER, DEFAMATION, supra} note 1179, § 1:7, at 1-28 (“[The common law] recognizes the creative, imaginative, sometimes devious, mentality of the defamer and the potentiality of words or conduct to defame in innumerable ways . . .”); \textit{RESTATEMENT (SECOND) OF TORTS} § 563 cmt. c (1977) (“The defamatory imputation may be made by innuendo, by figure of speech, by expressions of belief, by allusion or by irony or satire. So too, it may be by words spoken in jest if not so understood.”); \textit{ELDREDGE, supra} note 1181, at 48 (“The defendant may produce a defamatory meaning by sly phrasing, by figure of speech, by expressions of belief, by allusion or by irony or satire. In the case of spoken words . . . the speaker’s tone of voice, his expression, his gesture or unpraised eyebrow or knowing wink, may color the ‘living thought’ which the word symbol itself does not alone convey.”). \textit{See also infra} text accompanying notes 1593-1594.

\textit{1271.} \textit{See} \textit{ELDER, DEFAMATION, supra} note 1179, § 1:7, at 1-28 (“[The common law] recognizes the creative, imaginative, sometimes devious, mentality of the defamer and the potentiality of words or conduct to defame in innumerable ways . . .”); \textit{RESTATEMENT (SECOND) OF TORTS} § 563 cmt. c (1977) (“The defamatory imputation may be made by innuendo, by figure of speech, by expressions of belief, by allusion or by irony or satire. So too, it may be by words spoken in jest if not so understood.”); \textit{ELDREDGE, supra} note 1181, at 48 (“The defendant may produce a defamatory meaning by sly phrasing, by figure of speech, by expressions of belief, by allusion or by irony or satire. In the case of spoken words . . . the speaker’s tone of voice, his expression, his gesture or unpraised eyebrow or knowing wink, may color the ‘living thought’ which the word symbol itself does not alone convey.”). \textit{See also infra} text accompanying notes 1593-1594.

\textit{1272.} \textit{Global Relief}, 390 F.3d at 981-82. Although there are occasional references to a plaintiff requirement of proof of “falsity,” \textit{id.} at 982, 985, 987, including one reference to \textit{Philadelphia Newspapers, Inc. v. Hepps}, \textit{id.} at 982 (see \textit{supra} text accompanying notes 254-293), it is clear the court almost exclusively relied on the Illinois “substantial truth” doctrine. \textit{See id.} at 985, 987-89. \textit{See also infra} text accompanying notes 1280-1307. As to this seeming conflict, the court “reconciled” it by saying plaintiff might meet its burden by proof of “technically false” matter—then defendant could rely on “substantial truth.” The court, of course, is clearly wrong. As a reading of \textit{Masson}, see \textit{supra} text accompanying notes 327-351, discloses, \textit{Philadelphia Newspapers’s} burden is one of \textit{material} falsity, not “technical falsity.”

\textit{1273.} \textit{See supra} text accompanying notes 327-351.

\textit{1274.} \textit{Global Relief}, 390 F.3d at 974-90.
author of *Global Relief*,\textsuperscript{1275} engaged in corrupt behavior (she took bribes from the dead victim's family) in reviewing the felon's earlier appeals. The bar gives these facially outrageous accusations at least minimal review as required by its rules. The inmate also releases a copy to the press. Media defendants confirm that the bar is in fact investigating the charges and reports that fact, including the allegations being investigated. Think about what the court countenances: incredibly damning charges; a non-public, highly confidential and very preliminary proceeding not entitled to fair report\textsuperscript{1276}; an undeniably suspect source\textsuperscript{1277}; a likely fabrication\textsuperscript{1278}; a judge of high repute. Yet, defendants are allowed to give this issue national and even global coverage in the interest of providing supposed "information about matters of vital public concern."\textsuperscript{1279}

Letting loose as absolutely protected accuracy-pseudo-truth the content (sometimes innocent, sometimes damning) of non-public governmental records or investigations at all levels of government effectively atomizes the law of libel in such cases. This ignores the Supreme Court's careful weighing of competing interests,\textsuperscript{1280} causes horrific damage to reputation,\textsuperscript{1281} and corrupts public discourse.\textsuperscript{1282} No limitations exist to deter media defendants from meeting the voracious appetite for sensationalism by tapping governmental troughs for reportage of any and all kinds of tentative, preliminary, suspect, uncorroborated or speculative accusations and/or investigations, which in some cases are no doubt released for

\begin{footnotes}
\item 1275. *Id.* at 974.
\item 1276. See \textsc{elder}, \textit{defamation}, \textit{supra}, note 1179, §§ 3:10, 3:12; \textsc{elder}, \textit{fair report}, \textit{supra}, note 1185, §1.10, 1.15. See also Part VII.C.
\item 1277. See \textsc{elder}, \textit{defamation}, \textit{supra} note 1179, § 7:2, at 7-36 to -43. See also \textit{supra} notes 692-703, 1139-1147, 1154-1159, 1175-1177 and accompanying text.
\item 1278. Obviously, such are not protected by the First Amendment. See \textsc{elder}, \textit{defamation}, \textit{supra}, note 1179, § 7:2, at 7-5 to -7 n. 5; \textit{supra} notes 76, 183-186.
\item 1279. *Global Relief*, 390 F.3d at 984-85.
\item 1280. See \textit{supra} text accompanying notes 458-574.
\item 1281. See \textit{supra} text accompanying notes 461-464 and \textit{infra} text accompanying 1609-1610, 1618-1620. Proponents of this revised truth doctrine concede "there will be occasions when law enforcement is wrong and reputations damaged, but victims of errors originating with the government should seek remedy from the government." Donnellan & Peacock, \textit{supra} note 1242, at 250. Of course, the authors do not discuss exactly how such redress is to be sought and received.
\item 1282. See \textit{supra} text accompanying notes 475-481. Indeed, in light of the rumor mill in prisons, such a charge of judicial corruption might precipitate attempts by other prisoners to make pro se collateral attacks on their convictions, a serious and disruptive impact on a judicial system already hugely over-taxed. More importantly, it might precipitate present or former prisoners in whose cases the judge was involved to feel aggrieved and seek retribution against the judge directly or through minions or surrogates—a prisoners' version of the "where there's smoke, there must be fire" doctrine.
\end{footnotes}
malevolent, unprofessional or retributory reasons. But that is just what Global Relief contemplates, promotes and sanctions!

An analysis of the trilogy of primary Illinois precedents relied on clearly provides evidence for the dubiousness of this precedent elsewhere. The first case discussed, *Gist v. Macon County Sheriff’s Department*, involved only the claims of media defendants who had

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1283. Of course, proponents of the Global Relief approach seek to divorce defamation law and its remedies and limitations from issues of deterring governmental misbehavior: “[S]uch reporting would not undermine legitimate law enforcement goals or the government’s need for secrecy in certain instances. Those interests simply have no place in defamation cases, in which the concern is compensation for private parties for reputational damage.” Donnellan & Peacock, supra note 1242, at 249-50. Such interests come into play only as to access to government information or attempts to block publication, “not private parties’ post-publication libel suits.” *Id.* at 250. For a strong critique of this exceptionally skewed balance of competing interests see infra Parts VII.C-D, X. And of course, such accuracy-pseudo-truth could not be contained to governmental investigations. Judge Sack suggests as much. While “not clear,” such an extension “should depend on the circumstances.” At one end of the spectrum, an insider trading investigation of a stock exchange or major corporate entity should be deemed an “event” with accurate reportage deemed “true.” It is “rather less clear” that accurate reportage should be deemed “true” where it involved “an individual [who] hired a private detective to investigate a rival for murders there is no reason whatsoever to believe she committed would be immune; whatever argument might be made to that effect would lose its persuasiveness if it was clear at the time of publication that the sole purpose of the investigation was to cast a shadow on the woman’s reputation.” *SACK, DEFAMATION*, supra note 1225, § 7.3.2.3, at 7-38 n.139. Judge Sack’s exemplars of what should and what might not be covered aptly and wonderfully demonstrate the “law”-without-walls of accuracy-pseudo-truth. See also *Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir. 2002), infra text accompanying notes 1345-1349.

1284. 671 N.E.2d 1154 (Ill. Ct. App. 1996). The court ignored and made no attempt to distinguish several Illinois precedents at odds with its analysis which were developed in Brief of Appellant, supra note 1229, at 7-9. As appellant’s brief specifically noted, this trilogy—*Gist, Sivulich, Vachet v. Central Newspapers, Inc.*—all involved accurate reportage of pending public proceedings. Appellant also correctly noted that the substantial truth and substantial accuracy tests were similar—but that substantial truth related to the underlying charge whereas in fair report (erroneously called “fair comment”) the prevailing test applied to whether defendant had accurately reported that plaintiff was “the subject of a pending public proceeding…” The latter cases (*Gist, Sivulich, Vachet*) were, however inapplicable to the scenario before the court, as they involved no public proceeding. *Id.* at 14 (emphasis added). Appellant’s view was clearly correct. See infra text accompanying notes 1284-1307. The Seventh Circuit not only misapplied this trio of cases, it also disregarded other Illinois cases specifically contradicting the notion that the substantial truth defense applied to facial accuracy rather than underlying truth. See Cianci v. Pettibone Corp., 698 N.E.2d 674, 678-80 (Ill. Ct. App. 1998) (the “substantial truth” defense was applied to the underlying charges); Windsor Lake, Inc. v. WROK, 236 N.E.2d 913, 916-17 (Ill. Ct. App. 1968) (finding an absence of “any governmental ‘proceedings’” covered by fair report based on defendant’s statement an investigation that “may [be] touch(ed) off” as the result of public health complaints to public officials”; reaffirming Illinois’ adoption of the common law, i.e., “it is no defense to the publisher of a libel that he is merely reporting the statement of another person…”; refusing to immunize the publisher/broadcaster for republishing a story prepared by a linked newspaper). Another case cited by the Seventh Circuit (but then ignored), *Parker v. House O’Life Corp.*, 756 N.E.2d 286, 296-97 (Ill. Ct. App. 2001), also involved disputed issues of fact as to substratal truth of defendant’s charge
accurately reported the contents of an official quarterly publication issued by the county sheriff’s department.\textsuperscript{1285} Of course, under the fair report privilege, which the court correctly relied on as an alternative ground, this reportage was absolutely privileged\textsuperscript{1286} even if the information accurately reported was itself deficient (purportedly the charges had been dismissed on October 26th, prior to defendants’ publication on October 31st\textsuperscript{1287}). Fair report would have and should have ended the matter. However, the court espoused the need to protect media defendants against the mere specter of libel litigation.\textsuperscript{1288} Accordingly, it also relied on three other very controversial grounds: substantial truth; a purported common law- "public interest" privilege\textsuperscript{1289}; and neutral reportage.\textsuperscript{1290}

of “bid-rigging.” Most directly on point, repeatedly cited by Appellant, see Brief of Appellant, supra note 1229, at 7, 9, 11, 27, and specifically ignored by the Seventh Circuit is Owens v. CBS, Inc., 527 N.E.2d 1296, 1308 (Ill. Ct. App. 1988), where the court gave a devastating defeat to the suggestion of a truth defense based on accurate reportage of questioned suspects’ defamatory charges and a confidential Secret Service investigation. In reaffirming republisher liability, the court rejected defendant’s truth defense as “completely without merit:”

[The law in Illinois remains that the republisher of a defamatory statement made by another is himself liable for defamation even though he gives the originator’s name. In light of this rule, we fail to see how a person who republishes a defamatory statement can evade liability merely by showing that he has repeated it with precision. Indeed, a faithful retelling of a defamatory statement may be the most damning kind.

\textit{Owens, 527 N.E.2d at 1308} (emphasis added).

1285. The sheriff’s department was not before the court. \textit{Gist, 671 N.E. at 1156.}

1286. The court adopted \textit{RESTATEMENT (SECOND) OF TORTS} Section 611’s absolute privilege after carefully analyzing Illinois precedent, which was ambiguous as to whether either the \textit{RESTATEMENT OF TORTS} § 611 (1938) “made solely for” form of malice or constitutional malice regarding underlying falsity would forfeit privilege for fair report. For further explanation about the “made solely for” limitation, see references \textit{infra} note 1416.

1287. \textit{Gist, 671 N.E. at 1156.}

1288. \textit{Id. at 1163.}

1289. \textit{Id. at 1158-59.} Ignoring or unaware of the fact that the “public interest” (apparently, the court meant “common interest”) privilege is a \textit{limited dissemination} privilege \textit{generally unavailable} to the media, see \textit{ELDER, DEFAMATION}, supra note 1179, § 2-24, at 2-175, § 2-34, at 2-228 to -229, § 6-2, at 6-19 to -20 & n.65, the court concluded that \textit{media} dissemination of the flier and its contents was privileged, as these sheriff department crimestoppers’ publications were dependent on “the \textit{widest possible} circulation.” \textit{Gist, 671 N.E.2d at 1159} (emphasis added).

1290. While noting the division in Illinois, it “renewed our acceptance” in the case before it. Note that it was reaffirming a broad version applicable to “information relating to public issues, personalities, or programs.” \textit{Gist, 671 N.E.2d at 1162-63} (reaffirming Krauss v. Champaign News Gazette, Inc., 375 N.E.2d 1362, 1363 (Ill. Ct. App. 1978)). On the status of Illinois neutral reportage, see \textit{supra} text accompanying notes 1038-1049. On the status of the small, open-ended minority view adopted by Krauss, see \textit{supra} text accompanying notes 1039-1041.
In analyzing substantial truth, the *Gist* court went beyond the facial accuracy issue and found that as of the date cited in the flier, the plaintiff was in fact wanted on an arrest warrant. In the court’s view, this was entirely true. The court’s reasoning is specious and fallacious. Under such a theory any defendant, media or non-media, could pick a prior point in time when charges were extant and publish them without reporting plaintiff’s subsequent absolution. In other words, a defendant could *knowingly* omit that the charges had been dismissed or that the plaintiff had been acquitted. Under consensus doctrine, this account would not be entitled to fair report, neutral reportage, or any public interest privilege, but such calculated falsehood would be substantially true.

The other Illinois cases cited by the Seventh Circuit are similarly vulnerable. *Sivulich v. Howard Publications* involved a media defendant’s accurate reportage of the contents of a civil pleading. Although the court’s abbreviated analysis cited the substantial truth defense, the only issue was whether the language used, “charges” of “aggravated battery,” connoted criminality. The court properly held that this was not a material inaccuracy in light of the allegations in the pleading and the defendant’s reportage, which made it clear that a civil action was being reported. The court should have and could have relied on the modern majority rule for fair report in cases of civil pleadings. Either way the resolution would have been the same.

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1292. *Id.* This did not occur, at least as to the media. There is no indication they had such knowledge. Indeed, under the court’s fair report analysis such knowledge should have been irrelevant—it sufficed that defendant accurately recounted the sheriff’s department quarterly publication. The court seems very confused on the difference between fair report and “substantial truth.” Note, e.g., the court’s analysis—even if the flier was not “complete and accurate” as of October 6, it was “beyond a doubt substantially true” under the “substantial truth” analysis. It then went on to equate “substantial truth” with a “substantially correct account” under *RESTATEMENT (SECOND) OF TORTS* § 611 cmt. f (1977).

1293. See ELDER, DEFAMATION, supra note 1179, at § 3:23; ELDER, FAIR REPORT, supra note 1185, at § 2.01.

1294. See supra text accompanying note 846.

1295. Even the *Gist* court conceded that this controversial extension of common law would be forfeited (“abused”) by constitutional malice or common law malice. *Gist*, 671 N.E.2d at 1159. See also ELDER, DEFAMATION, supra note 1179, at §§ 2:32–2:33.


1297. *Id.*

1298. *Id.* at 1220.

1299. ELDER, DEFAMATION, supra note 1179, § 3:4, at 3-18 to -20 (listing the view reflected in the “wealth of modern cases”); ELDER, FAIR REPORT, supra note 1185, at § 1.04

B. Illinois follows this modern rule. Indeed, a leading case nationally is *Newell v. Field*
The Seventh Circuit also relied on *Vachet v. Central Newspapers*, its own similarly inapplicable substantial truth precedent interpreting and purporting to apply Illinois law.\(^{1301}\) Although a report of an arrest is the quintessential example of an official government act\(^{1302}\) to which fair report undoubtedly extends,\(^{1303}\) the court erroneously applied the substantial truth doctrine. Yet again, as in *Sivulich*, the only issue was whether the defendant engaged in accurate reportage of the arrest. The court properly found that only “inoffensive details” of “secondary importance” were at issue.\(^{1304}\) This resolution would have been identical under fair report.\(^{1305}\) Finally, the Seventh Circuit’s reliance on its opinion in *Haynes v. Alfred A. Knopf*\(^{1306}\) was similarly misplaced. That case involved the issue of whether the substratal defamatory facts were essentially true,\(^{1307}\) not whether substantially false substratal facts were accurately reported.

Confusion concerning the meaning of the common law truth defense, how it may waylay resolution of other pivotal issues in

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\(^{1300}\) See Elder, *Defamation*, supra note 1179, at § 3:18; Elder, *Fair Report*, supra note 1185, at § 1:21 (discussing the general criteria for non-verbatim reports involving immaterial inaccuracies).

\(^{1301}\) 816 F.2d 313, 316-37 (7th Cir. 1987).

\(^{1302}\) See Elder, *Defamation*, supra note 1179, at § 3:8; Elder, *Fair Report*, supra note 1185, at § 1.09. See also supra text accompanying note 1244.


\(^{1304}\) *Vachet*, 816 F.2d at 316.

\(^{1305}\) See supra text accompanying notes 1286-1288. Note that an analysis of the *Vachet* opinion also suggests there was substantial evidence of underlying truth—the charge of harboring a fugitive was based on plaintiff’s earlier contact with police in which he told police he knew where a third party fugitive (with whom he had been traveling) could be found. When an attempt through plaintiff to facilitate the third party’s surrender was unsuccessful, police decided to pursue plaintiff under a “harboring” charge. *Vachet*, 816 F.2d at 315.

\(^{1306}\) 8 F.3d 1222 (7th Cir. 1993).

\(^{1307}\) Id. at 1227-28. After listing co-plaintiff’s admissions and other noncontroverted facts, Judge Posner applied the “substantial truth” defense “based on a recognition that falsehoods which do no incremental damage to the plaintiff’s reputation” are not actionable. Judge Posner noted that the “substantial truth and constitutional limitations in defamation” coincide, and correctly concluded that *Philadelphia Newspapers Inc. v. Hepps* imposed a burden of falsity on plaintiff. Id. at 1228. Note that *Haynes’ underlying truth* emphasis is clear from the newsworthiness protection accorded to plaintiffs’ primary claim of public disclosure of private facts, id. at 1229-35, a claim that assumes such facts are true by definition. See supra notes 188-194, 417-420, 430 and accompanying text.
defamation litigation and create the potential for abusive media practices, is further exemplified by modern Texas precedent. The pivotal litigation on this issue involved the defendants’ broadcast that the Houston Police Department Public Integrity Review Group (PIRG) was investigating private use of city employees to care for a parent of the co-plaintiff/water maintenance manager.1308 The story reported statements of unnamed employees who said they had to put in overtime to perform their jobs as a result.1309 The story ended with co-defendant reporter concluding that “the alleged theft of city time may be turned over to a grand jury.”1310 The court of appeals correctly applied the common law and concluded that summary judgment proof had not demonstrated that the underlying charges were true.1311 The court rejected the defendants’ argument that “the essence of the broadcast was that the charges had been made” and that journalists should be permitted to “report the very fact of government self-scrutiny” with impunity.1312 The court stated that “[m]erely alleging that an investigation was in progress does not entitle a journalist to publish free-standing allegations . . . legally immune from examination under the law of libel.”1313 Relying on traditional republisher liability, the court rejected summary judgment based on truth and the plaintiff’s inability to prove falsity.1314 A dissenter sided with the defendants’ custom-and-usage relativism argument and its negation of republisher liability: “Allegations of governmental wrongdoing are the daily diet of the press. If common sense does not suggest the garden variety nature of this story, then common sense must not read the papers.”1315

On review of the case before the Supreme Court of Texas, the official findings of the investigating bodies were available and relied on heavily.1316 The high court reversed the court of appeals and decided that the plaintiffs did in fact engage in “theft of city time.”1317

1309. Id.
1310. Id.
1311. Id. at 469.
1312. Id.
1313. Id.
1314. Id.
1315. Id. at 470 (Ellis, J., dissenting).
1316. McIlvain v. Jacobs, 794 S.W.2d 14, 15-16 (Tex. 1990) (analyzing in detail the “findings” of the PIRG “report” including a report by the city legal department).
1317. McIlvain, 794 S.W.2d at 16 (detailing the “ undisputed facts” in the findings of the PIRG report, which included the report of the legal division, sworn statements and references to official payroll records). The allegedly defamatory story also included a statement that “police investigators . . . were looking for a gun” but found only “liquor
bottles.” Id. at 15. The story negated any defamatory import from the gun reference and the official report included uncontested statements that plaintiffs were seen drinking in a co-plaintiff’s office. Id. at 16.

1318. Id. at 16. That the Texas Supreme Court will ultimately unequivocally reject the accurate reportage of allegations as pseudo-truth doctrine seems ineluctably clear from its later decision in Turner v. KTRK Television, Inc., 38 S.W.3d 105 (Tex. 2000), where the court indicated that even a public figure has a right to a fair shake where defendant juxtaposes true facts or omitted facts to create a knowingly or recklessly false impression. The court cited McIlvain repeatedly, id. at 115, 118, 123, terming its Turner holding the “converse” of McIlvain’s “substantial truth doctrine,” 794 S.W.2d at 115, and refused to either “impose an additional barrier to recovery” not mandated by the U.S. Constitution or to accord more expansive protection under the state constitution—the court cited its specific protection of reputation (including its “open courts” provision guaranteeing court access to remedy a person’s right to reputation “by due course of law”) and its liability for abuse limitation on free expression. Id. at 116-17. Indeed, a partial dissenter criticized the court majority for “lower[ing] the bar” of McIlvain in libel by juxtaposition or omission cases. Id. at 133 (Hecht, J., concurring in part and dissenting in part, and concurring in the judgment).

1319. Jacobs, 759 S.W.2d at 470 (declining to find on the record that plaintiff-Jacobs, the city water maintenance manager, was a “public official” under Rosenblatt v. Baer, 383 U.S. 75, 84, 86 (1966)). The co-employee, Moore, was not discussed. Id. Apparently, it was conceded he was a low-ranking employee, not a public official. See id.

1320. Jacobs, 759 S.W.2d at 470 (finding an issue of constitutional malice). Compare Mullens v. N.Y. Times Co., Civ. A. No. 3-95-CV-0368-R, 1996 WL 787413 (N.D. Tex. July 30, 1996), where the court matched defendant’s article against the non-public affidavit. The court found the gist of the story substantially “true,” i.e., it “accurately summarized” the FBI’s investigation and plaintiff’s “alleged involvement,” despite its telling description of the quality of the information in the affidavit—“witnesses speculat[ing]” that plaintiff was “possibly involved” in this criminal activity.” Id. at *1-*5 (emphasis added).

1321. Jacobs, 759 S.W.2d at 469. The court found a question of “reckless disregard for the truth” sufficient to lose the privilege provided by the TEXAS CIV. PRAC. & REM. § 73.002(a) (Vernon 2005). Id. (stating that reporting privilege is lost when a statement is “republished with actual malice after it ceased to be public concern”). See also Mullens, 1996 WL 787413, at *3, *5 nn.16 & 22 (exemplifying another instance in which pseudo-truth circumvented § 73.002(a); holding that issues related to how a reporter had received information in affidavits supporting a search warrant sealed by court order was irrelevant, as was any discovery thereon; finding that, while such concerns would have been “germane” to § 73.002(a)’s “fair report,” an issue the court did not reach, they were “irrelevant” to pseudo-truth).

Unfortunately, the Texas Supreme Court’s opinion has been grossly misinterpreted as standing for the proposition that the substantial truth defense is met by proof of mere accurate reportage of the pendency of an investigation, which creates huge confusion as to the state of the truth defense in Texas and the protection it accords reputation. This confusion and unfairness is well-evidenced in

1323. The court did reference affidavits to the effect that the investigation was indeed occurring at the time of publication and stated broadly that “a comparison of the broadcast and the [PIRG] report demonstrates that the broadcast was substantially correct, accurate and not misleading.” McIlvain, 794 S.W.2d at 16 (emphases added). In light of the court’s reference to the PIRG report and its detailed analysis of the “undisputed” facts in it (see the discussion supra note 1317), the “correct” and “accurate” can only reasonably be interpreted as accurate reportage of substantially true facts. Consequently, the case is no different from the Supreme Court’s conclusion in Cox Broadcasting Co. v. Cohn. See supra text accompanying notes 187-201. Unfortunately, some Texas precedent has misinterpreted the above language in McIlvain as repudiating the court of appeals. Indeed, in KTRK v. Felder, 950 S.W.2d 100, 106 (Tex. Ct. App. 1997), counsel for plaintiff/appellee correctly interpreted McIlvain as involving both accurate reportage of the fact of the investigation and that “the allegations be proven true.” The court rejected this argument, expansively interpreting McIlvain and ignoring the case’s factual findings for reasons of perceived public policy:

McIlvain only requires proof that allegations were in fact made and under investigation . . . to prove substantial truth. Otherwise, the media would be subject to potential liability every time [sic] it reported an investigation of alleged misconduct or wrongdoing . . . such allegations would never be reported . . . for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation . . . [T]he volume of litigation and concomitant chilling effect on the media would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today. Id. at 106. McIlvain involved allegations the court specifically found to be true. Felder involved “allegations” (defendants’ characterization—the parents quoted made specific charges) of physical threats and verbal abuse of children. The truth as to the charges was in substantial doubt. There was no indication any parent witnessed any specific incident of abuse. Apparently, the parents relied on their children, who were enrolled as “resource students” who required special assistance because of either learning or behavioral problems. Id. at 102. A subsequent investigation found all but one of the incidents uncorroborated. Id. at 104. “Common sense” requires the reportage of such dubious “truths”? Felder was cited later in dicta by the same court in Dolcefino v. Turner, 987 S.W.2d 100, 109 (Tex. Ct. App. 1998), but the court then resolved the case on grounds of lack of constitutional malice, id. at 111-24, emphasizing that there was no evidence the reporter did not “believe the statements were true or . . . entertained serious doubts about the truth of the statements,” Id. at 124. Of course, the court’s latter analysis involved underlying truth/falsity, a focus totally at odds with its accurate reportage of investigation as pseudo-truth anomaly. The Supreme Court affirmed on parallel grounds, while disavowing any suggestion therein that libel arising from juxtaposition or omission was not actionable. Turner v. KTRK Television, Inc., 38 S.W.3d 105, 115-16 (Tex. 2000). See supra note 1318. The Felder approach has been accurately characterized as deviating from the “generally accepted approach,” which applies the republication liability-underlying truth rules even where statements are prefaced by “believes,” “suspects,” or “charges.” See MARC FRANKLIN, ET AL., MASS MEDIA LAW: CASES AND MATERIALS 355-56 (7th ed. 2005) [hereinafter FRANKLIN, ET AL.].
Dolcefino v. Randolph,1324 involving litigation emanating from the defendants’ reportage about a PIRG investigation centering on plaintiff/city controller’s bestowal of city contracts on his former campaign treasurer. The plaintiff contended that the defendants did not just “learn” of the investigation as they reported, they “instigated” it.1325 The plaintiff cited the PIRG report’s denomination of the defendant’s reporter as the complainant.1326 According to the court, however, the reporter had talked to PIRG but had requested that it not investigate until a certain date when a return by the contract recipient that was pivotal to the reporter’s investigation was to be submitted.1327 The reporter had learned the day before that PIRG had already begun its investigation, and he reported on it during the broadcast the following day.1328 The court held that this report was not false but was instead an “accurate representation.”1329 The court

1324. 19 S.W.3d 906, 918, 919, 922 (Tex. Ct. App. 2000). The court stated its radically revised “substantial truth” doctrine thusly: “When, as here, a case involves media defendants, the defendants need only prove that third party allegations reported in a broadcast were, in fact, made and under investigation; they need not demonstrate the allegations themselves are substantially true.” Id. at 918. The court repeatedly cited McIlvain as supporting authority. Id. at 918-19, 921, 928, 931. The quote above appears to suggest that a different standard might apply to non-media defendants. See also Grotti v. Belo Corp., 188 S.W.3d 768, 773 (Tex. Ct. App. 2006). This would be difficult to justify as, at least in cases involving New York Times, no such media-non-media dichotomy could or should be drawn. See supra text accompanying notes 39, 78, 247, 271, 320. But see supra text accompanying notes 507-533. The Court’s analyses of private person-public interest litigation are marginally more ambiguous. See id. However, the only defensible view is that no such distinction can be drawn. Imagine a suit by both public and private person plaintiffs jointly against media defendants and non-media (source and subsequent non-media republishers) defendants in a case involving a matter of public interest. An application of an accuracy-pseudo-truth defense to media defendants and a traditional (substratal) truth defense to all non-media defendants exercising rights of free expression would assuredly raise equal protection concerns. Note that the Court has explicitly expressed concern about artificial distinctions based on the nature of media entities subject to sanction and between the mass media and the “small time distributor” in the lawfully obtaining truth cases. Recently, in Bartnicki v. Vopper, the Court applied the same First Amendment privilege to true information passively received by both media and non-media defendants despite awareness it was tainted. See supra notes 271.

1325. Dolcefino, 19 S.W.3d at 919.

1326. Id.

1327. Id.

1328. Id.

1329. Id. at 914, 919. Part of the court’s analysis applying the accurate republication of investigation as pseudo-truth doctrine does not actually support such but rather involves reliance on the traditional emphasis on underlying truth. The broadcast at issue involved new information to the effect that PIRG officials were “still looking into the ethics” of the subcontract. Id. at 922 (emphasis added). Under the traditional rule this statement could be justified only by showing that an ethical breach had occurred. The court analyzed the PIRG report in depth, including data based on preliminary audit billing records indicating that the contractor had billed for thirty-three hours for which the contractor provided no
did not seem at all concerned by the instigation charge or by the at least foreseeable result of the reporter’s complaint that, once notified, the PIRG might not feel bound by the reporter’s timing request.

Undoubtedly, either of the latter scenarios provides any reporter in Texas (or elsewhere following this extraordinarily questionable precedent) a self-serving temptation to initiate a criminal investigation and then report on it under the protection of the accurate-reportage-of-investigation-as-pseudo-truth doctrine. Supporting data. Although, as the PIRG report concluded (and defendant had broadcast the previous day), the district attorney had found no criminal wrongdoing but viewed it as a contractual matter, no city entity had absolved plaintiff of “wrongdoing.” As the court concluded, “given the lack of support for [the contractor’s] billing, one could reasonably infer that [he] may have acted improperly in charging the City for his services.” Id. at 922.

1330. Compare the discussion of Hatfill v. New York Times, infra Part VII.D. Note that neutral reportage has been held not to apply to journalist-induced or manufactured charges. See supra text accompanying notes 877-885. It is not difficult to imagine how a future reporter could use this reformulated “truth” defense in an extortionate fashion. For example, a reporter wishing to interview an unwilling public official might casually suggest that his or her alternative would be to take the matter to the police or the local version of PIRG and that the public official risked coverage of the fact of such investigation by the reporter’s employer or other media made aware of the investigation. Given the all too prevalent “end justifies the means” ethics among journalists enveloping themselves in the First Amendment flag, this or other equivalent unconscionable and manipulative use could easily occur as a predictable inducement from the court’s opinion. See David A. Elder, Neville L. Johnson & Brian A. Rischwain, Establishing Constitutional Malice For Defamation and Privacy/False Light Claims When Hidden Cameras and Deception Are Used By The Newsgetter, 22 Loy. L.A. Ent. L. Rev. 327, 328-38, 347-76, 432-41 (2002). For an example of such coercive abuses in the newsgathering context, see Wolfson v. Lewis, 924 F. Supp. 1413, 1432-35 (E.D. Pa. 1996) (enjoining the activities of broadcast journalists for the television program Inside Edition who engaged in “harassing, hounding, following, intruding, frightening, terrorizing or ambushing” plaintiffs, family of a corporate executive, for the purpose of coercing him to consent to an interview with defendants). See also supra notes 845-846, 853 (discussing the allegations made in Cianci v. New Times Publ’g Co., 639 F.2d 54 (2d Cir. 1980)).

1331. See supra note 1330. In addition to the flagrant unfairness of the doctrine in general, it has two other insidious qualities—a Texas defendant can rely on this exceptional weapon to devastate plaintiff’s claim through the interlocutory appeal allowed in denial of summary judgment cases under TEX. CIV. PRAC. & REM. § 51.014(a)(6) (Vernon 1997), Texas’ version of an anti-SLAPP statute. Additionally, defendants could then report, as could other media, that a plaintiff had “lost” her or his libel claim based on a judicial finding of “truth.” This judicial decision would be covered by the doctrine of “fair report,” see ELDER, DEFAMATION, supra note 1179, § 3:4, ELDER, FAIR REPORT, supra note 1185, § 1.01, and the media would have no duty to explain that truth was used in such a skewed, if not freakish, fashion. Imagine the corrupting influence on elections, where media or opponent (fair report applies to non-media types too—see ELDER, DEFAMATION, supra note 1179, at § 3:15, ELDER, FAIR REPORT, supra note 1185, § 1.19), gleefully and devastatingly confront a public official/candidate with the taunt that a court found charges of corruption to be true! Those, like the author, who are concerned by the deterrent impact Sullivan may have on the willingness of our best and brightest to run for public office or participate in public affairs should be particularly concerned by the reputation-savaging effect of accurate reportage of investigation as pseudo-truth.
The reporter thereby absolves himself from having to answer fault-based issues in libel litigation, such as whether he had reasonably investigated the actual truth of the charges (in private person cases), or had subjective “serious doubts” as to them (in public person cases). Ultimately, the Dolcefino court did not have to rely solely on this potential ethical quagmire because it also found that the reference to the PIRG investigation did not affect the “gist” of the news account. Think of the truly breathtaking doctrine the court has conjured up: supply true facts subject to varying (including innocuous interpretations), add a professional integrity (code word for malfeasance/corruption) investigation, and the taint from the latter becomes irremediable!

However, the story gets even better—or worse, if you are a defamation plaintiff. The plaintiff also sued the defendants for statements the reporter made to other reporters to the effect that he was doing “a series of stories on malfeasance.” But, the court did not require him to prove malfeasance in fact. It sufficed that he was in the process of doing and later finished the broadcasts at issue on the subject of the public official’s misconduct. The court took a

1332. See supra text accompanying notes 165-169. Co-plaintiff was a private individual. Dolcefino, 19 S.W.3d at 917, 923.

1333. See supra text accompanying notes 77-85. Plaintiff/elected controller was a public official. Dolcefino, 19 S.W.3d at 917.

1334. The author has indicated elsewhere his general concerns about journalistic “ethics” in the newsgathering process. See Elder, Johnson & Rischwain, supra note 1330, at 424-31 (noting that some critics have “viewed press ethics as a contradiction in terms, oxymoronic, or irredeemably vague” but suggesting that there was “strong support” among journalistic critics for “some controls on the end-justifies-the-means auto determination of appropriateness” of use of hidden cameras by journalists and suggesting deviation therefrom was probative evidence of constitutional malice).

1335. Dolcefino, 19 S.W.3d at 919 (the court said it was of “secondary importance,” citing McIlvain, supra text accompanying notes 1316-1322).

1336. The substratally true facts stated in the broadcast were synthesized by the court—plaintiff helped his former campaign treasurer get a subcontract with the city, plaintiff had offered only “scant documentation” to support the monies received, and the direct contractor had slight, if any, control over or involvement in the subcontract. Dolcefino, 19 S.W.3d at 918-19.

1337. Other defamation claims discussed supra involved defendant reporter’s characterization of the in-progress series as one of “malfeasance” in plaintiff’s office. See infra note 1338.

1338. Dolcefino, 19 S.W.3d at 924 & n.13, 927 (court’s characterization). The court quoted a dictionary definition for “malfeasance” as “wrongdoing or misconduct by a public official.” Id. at 927.

1339. Id. at 924 & n.13, 927-28. Of course, this “truth” defense would also protect another media defendant republishing the reporter’s “malfeasance” statement. Indeed, although not separately sued (probably because of the voluminous precedent immunizing a media defendant relying on a reputable media defendant or reporter—see Elder, Defamation, supra note 1179, at § 7:2, at 7-25 to -27), other media defendants may have
parallel approach to the claims based on the reporter’s conversations with PIRG officers and the mayor in which he discussed his belief (and that he was doing a story on the subject) that funds under a consulting contract were being “funneled” back into the plaintiff/public official’s campaign fund. Again, the court did not require the reporter to prove the underlying truth of the funneling charges. Rather, it sufficed that he was restating what others had said and that he had done such a story containing funneling as a possibility. The common law republisher liability rule had been supplanted by absolute republisher immunity under the iron mask of accuracy-pseudo-truth!

In light of the above detailed intrigue of Felder and Randolph, the Fifth Circuit opinion in Green v. CBS, relied on by the petitioners in Troy Publishing Co. v. Norton, cannot be considered done just this. Dolcefino, 19 S.W.3d at 724 & n.13, 927-28. Plaintiff apparently sought damages for these republications under the doctrine of liability for foreseeable republication. See ELD ER, DEFAMATION, supra note 1179, § 1:27. See also supra note 1179. The court applied its pseudo-truth doctrine to the reporter’s statements. See infra text accompanying notes 1338-1339.

1340. Dolcefino, 19 S.W.3d at 928.

1341. Id. at 931. The overwhelming majority of jurisdictions accord only a qualified privilege to defamatory statements made to police and higher ranking supervisory officials. See ELD ER, DEFAMATION, supra note 1179, §§ 2:10, 2:26. Where a public official plaintiff is involved, the Sullivan standard would constitute the ground for forfeiture. See id. § 2:26, at 2-184 to -185 nn.3, 4, 8, § 2:33, 2-222, n.22.

1342. Dolcefino, 19 S.W.3d at 928 n.19, 930-31.

1343. Id. at 928. Additionally, the court found a lack of proof of constitutional malice. Id. at 928-30. However, it is not entirely clear from the court’s analysis whether it used the same defendant-protective standard of accuracy and looked only at whether the reporter knowingly or recklessly misstated the information or whether it looked at the issue of the reporter’s subjective awareness of probable falsity of the underlying statements. There is no discussion of the veracity of reporter’s sources. Id. at 929. A footnote in the court’s analysis of the knowing/reckless disregard of falsity issue, id. at n.20, suggests that the court was applying the same defendant protective accuracy-as-pseudo-truth standard. Plaintiff had argued that the “funneling” comment was false for such purposes because defendants could reference only one person, not “people,” as noting this “funneling” comment to the reporter. The court found such of “secondary importance” and true, not false. Id. If, as appears possible, the court applied this defendant protective standard, it was clearly at odds with United States Supreme Court precedent, which has generally looked at reckless disregard of inaccuracy only in abuse of “fair record” cases. See supra notes 148, 208-216, 385-391 and accompanying text. If the court did mean to refer to the reporter’s belief in his source’s veracity, it applied a different standard of truth-falsity than it had in its “substantial truth” analysis, a confusing anomaly at best, since Masson clearly holds there is only a single view on “the issue of falsity. See supra text accompanying notes 327-333.

1344. Dolcefino, 19 S.W.3d at 928, 931.

1345. 286 F.3d 281 (5th Cir. 2002).

good law in Texas or elsewhere. Moreover, the references appear to be *dicta*. That is for the better, because the court purports to honor *Felder's/Randolph's* natural progression to any and all third party statements. That is a development that, if followed, would portend the effective demise of the defamation remedy. Fortunately, the court referenced only two illustrative examples as covered by the *Felder/Randolph* accurate-reportage-as-truth rule:*

1347 a quotation from the estranged husband that the plaintiff was keeping her daughter from him until he paid her additional money and quotations from him and his lawyer that the plaintiff “fabricated the charges” to get more money from him. 1348 The court then concluded, apparently inclusively after reviewing the transcript, that “the reported statements reveal only the opinion of the speaker, and are not defamatory.” 1349

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1347. *Green*, 286 F.3d at 284. (“In cases involving media defendants . . . the defendant . . . must only demonstrate that the allegations were made and accurately reported”). On the apparent preferential rule for media defendants, see the critique in note 1324, *supra*. Two more recent cases that cite to and rely on *Randolph and/or Felder* would be more appropriately treated as fair report cases and would have the same effect if they had been analyzed thereunder. The first case, *Associated Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369, 1-3 (Tex. App. Ct. May 16, 2005), involved a suit against a wire service and a newspaper synthesizing the wire service’s report of an opening statement in a federal lawsuit filed against plaintiff by the SEC. Of course, this case would have been covered by the fair report privilege. Associated Press’ reporter attended the opening session and filed the report. The newspaper defendant which relied on the Associated Press wire report would likewise be entitled to fair report under the doctrine of “indirect” or “secondary” “source reliance.” See the discussion of the leading case, *Bufalino v. Associated Press*, 692 F.2d 266 (2d Cir. 1982), *infra* text accompanying notes 1420-1421. *See also Elder, Defamation, supra* note 1179, § 3:2, at 3-8 (stating that “secondary” or “indirect” “reliance applies where defendant “relies on a responsible, presumably knowledgeable, intermediary of general trustworthiness who was in attendance at the proceeding or a participant therein or an authoritative spokesperson thereof”; noting that the case law on point “collectively reflects the accepted and justified custom and usage of the mass media and the undoubted necessities of modern journalism in a free and open society”); *Elder, Fair Report, supra* note 1185, § 1:18, at 163-64 (same). The second case, *Basic Capital Management v. Dow Jones & Co.*, 96 S.W.3d 475, 480-83 (Tex. App. 2002), involved Wall Street Journal’s reportage about a federal indictment. The parties agreed that the only issue was the accuracy of defendant’s characterization of the indictment’s allegations—defendant had not “purport[ed] to portray the underlying events.” Accordingly, the court’s analysis was limited to whether defendant accurately synthesized the charges. *Id.* at 480. This is, of course, the identical inquiry in fair report under a facial accuracy/fairness/“four corners” analysis. *See also Elder, Defamation, supra* note 1179, §§ 3:1, at 3-5 to -6, 3:18, at 3:61-63, 3:19, at 3:68; *Elder, Fair Report*, §§ 1:00, at 1185, 1.21, at 193-95, 3:04, at 335-36. The court’s dictum reliance on *Masson v. New Yorker Magazine*, see *Basic Capital*, 96 S.W.3d at 480, is misplaced. *See supra* text accompanying notes 327-351.

1348. *Green*, 286 F.3d at 284.

1349. *Id.* (emphasis added). Compare however, *Grotti v. Belo Corp.*, 188 S.W.3d 768 (Tex. Ct. App. 2006), where the court analyzed a series of telecasts involving investigations into suspicious deaths at a public hospital where plaintiff-doctor was head of ICU. The court repeatedly concluded that its detailed recitation of ongoing investigations and third party “allegations” (including statements of a former doctor at the hospital unequivocally
C. A Restrictive View of Fair Report

The classic concept of truth rejected the above endemic unfairness of the accuracy-as-pseudo-truth perversion but posed particular difficulties for those wishing to quote off-the-record police sources with impunity. For example, in *Kelley v. Hearst Corporation*, the court rejected a truth defense, stating that “[t]he plea of truth . . . must be deemed to relate to the underlying fact, and not whether ‘police said’ what the underlying fact was or what ‘allegedly’ the fact was.” Even after *Sullivan-Gertz-Philadelphia Newspapers*, portraying plaintiff as engaged in euthanasia was mere reportage of allegations and ongoing investigations—the media defendants did not themselves accuse plaintiff of euthanasia. Of course, this is bunk and directly at odds with, if not a direct repudiation of republisher liability. By applying the Felder-Randolph rule, the court did not have to resolve issues related to the Texas fair report statute and forfeit thereof and plaintiff's status as public official or public person or private person and the appropriate level of fault.

What strikes a reader from a careful reading of *Grotti* is the sheer unnecessariness of the Felder-Randolph “rule” on the record. Every defamatory statement (and they were extensive) appears to have been documented by a detailed investigation of government records, interviews with government officials, and consultations and interviews with doctors and medical personnel within the hospital. The reports (in light of the supporting documentation adduced by the court) would seem to clearly negative any constitutional malice (if plaintiff were held to be a public person) or negligence (if plaintiff were deemed a private person). An actual substantial truth defense would seem also to have been available as to claims resulting from plaintiff’s admitted (in a statement to the state board of medical examiners) occlusion of a breathing tube. Other stories were in part likely covered in whole or in large part by fair report (e.g., the reference to negligence based wrongful death actions and the medical board's suspension of plaintiff's license after an open public hearing attended by the media). In sum, the court’s rendition of the supporting documentation and investigation portrays defendants’ stories as hard-hitting but responsible and professional—refuting any suggestion for a need for Felder-Randolph. The latter will merely provide cover for and an inducement to other less diligent reporters and media entities to take the easy way out—not engage in the serious digging that is the essence of responsible journalism.

1350. *See Elder, Defamation, supra* note 1179, § 3:10; *Elder, Fair Report, supra* note 1185, § 1:10.

which placed the burden of proving both fault and falsity on the plaintiffs, this was and is unacceptable to the media.1352 Under the requirements of this classic approach, the media Jabberwock is appalled by the thought that it might not be able to recount an unofficial police source's statements with impunity if there are good reasons to not rely on them. The media's response is an attempt to reformulate truth, expand fair report, adopt neutral reportage, or use a combination of the three.

The media defendants took this aggressive tripartite tactic in the famous Medico v. Time litigation, endeavoring to entice the district court to adopt this radical reformulation of truth.1353 In Medico, the defendants tried to convince the court that there was sufficient evidence for the truth defense because the defamatory excerpt was taken from a wire tap and FBI agents did in fact record the defamatory statement.1354 Under this view, the media would not have had to prove the “underlying assertion” that the plaintiff was a Mafia “capo.”1355 Neither the district court nor the Third Circuit dealt with the issue directly; they “wisely left the traditional doctrine unrevised.”1356 However, the Third Circuit was able to resolve the issue favorably to the media by an equally radical extension of fair

1352. See supra text accompanying notes 165-166, 268-271.
1354. Id. at 135-36, 146. The statement published said, “agents tape-recorded Bufalino's description of Phillip [the plaintiff] as a capo (chief) in a Mafia family.” Id. at 135.
1355. Id. at 136, 147 (issue not reached). The court had earlier noted the traditional common law view, which would have focused on “the truth of the underlying assertion.” Id. at 136-37. See also supra text accompanying note 1351.
1356. ELDER, DEFAMATION, supra note 1179, § 2:4, at 2-24 (discussing Medico, 643 F.2d at 136, noting that the district court had “expressed doubt” about its earlier determination that truth would be met by (2) rather than (1)). See also Medico, 643 F.2d at 147 & n.42; Medico, 509 F. Supp. at 270. The court did not have to decide whether the truth defense would be met by proof (1) “Medico is a capo” (the traditional, common law rule), plaintiff’s position, or (2) “Government agents overheard Bufalino describe Medico is a Mafia capo, defendant’s position.” Id. In a later decision the same tribunal suggested that the “truth” of an ambiguous defamatory reference—i.e., that plaintiff company’s name appeared multiple times in FBI reports on the disappearance of Teamster president Jimmy Hoffa—could involve a “range of answers”—the presence of the name generally in mob files; the presence in the particular file cited to by defendants; plaintiff’s mob involvement; plaintiff’s link to the Hoffa disappearance-murder. Before the truth-falsity issue could be resolved, the “sting” had to be determined, since reasonable individuals could disagree thereon. If the “gist” or “sting” was association with mob figures or appearance of the name in FBI files, the truth-falsity focus would be measurably different from an involvement in the Hoffa murder. Schiavone Const. Co. v. Times, Inc., 847 F.2d 1069, 1084 (3d Cir. 1988).
report and, at the same time, cast mild doubt on the validity of the Third Circuit’s powerful rejection of neutral reportage.\[1357\]

The Third Circuit’s opinion in *Medico*, which purported to interpret Pennsylvania fair report precedent, was a favorite in the briefs of Appellants and *amicus curiae* in *Norton v. Glenn*, as were *Medico’s* illicit progeny.\[1358\] The Pennsylvania Supreme Court’s non-recital of or reliance on *Medico* in *Norton* was wholly appropriate and wise. It would have been at odds with the thoughtful and nuanced analysis of the competing interests evidenced in the court’s excellent opinion. A brief discussion of the facts in *Norton* shows how *Medico* and its progeny were unsuccessfully used to bolster the defendants’ neutral reportage argument. The borough council member/source in *Norton* had discussed the charges that he was homosexual with co-defendant’s reporter after a special meeting, which had adjourned without affording him an opportunity to speak.\[1359\] He issued his “defense” to the contemplated actions against him by talking with and giving his written statement to the reporter in a borough council conference room.\[1360\]

As discussed above, the opinion by Chief Justice Cappy rejected fair report.\[1361\] Justice Castille believed that the concept remained viable on remand and that an expanded fair report test infused with neutral reportage policies might support it.\[1362\] The court correctly rejected that argument, and lower courts should not reopen it.

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\[1357\] *Medico*, 643 F.2d at 145 & n.38 (terming its earlier rejection of neutral reportage as *dicta*); *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225-26 (3d Cir. 1980). *See supra* text accompanying notes 916-926.


\[1361\] *See supra* text accompanying notes 561-565.

\[1362\] *Norton*, 860 A.2d at 63-64 (Castille, J., concurring). Although concededly outside the “classic expression” of “fair report,” the latter’s rationale “comports with the concerns” he had expressed favorable to neutral reportage—i.e., protecting reportage of matters relating to “core democratic values,” such as statements reflecting on an official’s fitness for office. He also opined that the source’s self-defensive statements to the reporter might constitute a “report” of “any action taken” by any officer under the Section 611 formulation. *Id.* at 63.
court’s own prior opinion in Curran v. Philadelphia Newspapers illustrates the attitude courts have taken and should continue to take.\textsuperscript{1363} In one of the stories at issue in that case, the defendant relied on the second in rank within the criminal division of the U.S. Department of Justice for a story\textsuperscript{1364} charging that the plaintiff, then a U.S. attorney, would have been asked to resign had he not voluntarily resigned.\textsuperscript{1365} The court found reliance on this credible source to be “wholly the antithesis of publication with knowledge that the information is false.”\textsuperscript{1366} Importantly, it stated that no constitutional malice could be shown since no “requisite doubt as to the veracity” of the source had been shown.\textsuperscript{1367} In other words, accurate reliance on a creditable source’s statements sufficed to negate fault under Sullivan. There is not a hint of a suggestion in the opinion that fair report could have or should have been an alternate basis. This is clear from the court’s handling of the second defamatory story, where it accorded a later U.S. attorney’s press conference commentary on a grand jury indictment fair report protection if the story were found fair and accurate rather than embellished.\textsuperscript{1368}

Of course, the defamation source in Norton was more akin to the source for the first Curran story than to a public official holding a press conference about an important step in the criminal process. The public official source in Norton was acting outside borough chambers and the “the gavel to gavel” portion of the meeting.\textsuperscript{1369} The statements were “not made in the course of official proceedings.”\textsuperscript{1370} In the words of counsel, fair report under Pennsylvania precedent was “a far cry from the backroom rantings of a disgruntled minor functionary with an axe to grind.”\textsuperscript{1371} No one disagreed with counsel’s statement that, had the reporter attended and limited himself to accurately recounting what had happened in the public meetings, the account

\begin{enumerate}
\item[1363.] 439 A.2d 652 (1982).
\item[1364.] Id. at 658-61.
\item[1365.] Id.
\item[1366.] Id. at 660. This is, of course, wholly consistent with a plethora of media-protective precedent. See ELDER, DEFAMATION, supra note 1179, § 7:2, at 7-25 to -32.
\item[1367.] Curran, 439 A.2d at 660.
\item[1368.] Id. at 661-62. This is accord with extensive precedent, See Curran, 439 A.2d at 661-62; ELDER, DEFAMATION, supra note 1179, § 3:7; ELDER, FAIR REPORT, supra note 1185, §1.07.
\item[1369.] Reply Brief of Appellants, supra note 1358, at 4; Brief of Amicus Curiae Committee of Seventy in Support of Appellants at 13, Norton, 860 A.2d 48 (Nos. 18, 19 MAP 2003) (noting that neutral reportage differed from fair report in that it was “made by government officials outside government walls”).
\item[1370.] Norton, 860 A.2d at 52-53 n.6.
\item[1371.] Brief of Appellee Norton, supra note 1360, at 33.
\end{enumerate}
would have been protected under fair report. Undoubtedly, the Norton case bears strong resemblance to DeMary v. Latrobe Printing and Publishing, where the court appropriately denied fair reportage to statements emanating from a “spontaneous congregation of citizens” during a recess of a township board of supervisors.

The Norton opinion’s rejection of fair report is correct and follows the policies reflected in Section 611 of the Restatement (Second) of Torts. Section 611 expressly provides that “statements made by police or by the complainant or by witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged.”

The cases collectively suggest that no compelling justification exists for extending fair report status “to the myriad types of informal reports and official and unofficial investigations, contacts, and communications of law enforcement personnel at all levels of the state and federal bureaucracy with the local regional and national media.” This information does not carry the requisite “dignity and authoritative weight” of proceedings deemed “official” and does not involve “official agency action” justifying exemption from republisher liability.

Importantly, an authoritative Second Circuit decision, which refused to apply fair report to unnamed officials of the Pennsylvania Crime Commission, concluded that “[o]nly reports of official statements or reports made or released by a public agency” qualify for fair report status. Consequently, “[s]tatements made by lower-level employees that do not reflect official agency action cannot

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1375. Id. cmt. h. See also the cases analyzed in detail in ELDER, FAIR REPORT, supra note 1185, § 1:10.
1376. ELDER, FAIR REPORT, supra note 1185, § 1:10, at 87-88 (citing the Comment h position as the “clear majority” view and suggesting these precedents and the RESTATEMENT (SECOND) OF TORTS view “the equities [as] weigh[ing] heavily” in the plaintiff’s favor). See also discussion infra Part VII.C.
1377. Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 88-89 (D.C. Ct. App. 1980) (“Mere inaccurate business records of some sort, even if the hot line log could gain that status, will not suffice to create an official record to which the reporting privilege will attach. In fact, the log represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime.” (emphasis added)).
1379. Id. at 272. See also infra notes 1507-1508 and accompanying text.
support the privilege.” In *Gertz*, the Seventh Circuit opined that “[a] secret police file hardly qualifies as a report of a public proceeding,” and repetition of the information by a public official or police officer did not elevate it to “public proceeding” stature.

The Third Circuit disagreed with this approach in *Medico v. Time*, holding that the reference to the FBI tape was protected under fair report, which the court extended to “summaries of criminal investigatory files.” Judge Adams, writing for the court, found this conclusion to be justified under Pennsylvania fair report precedent. The court expressly limited its holding to the discrete fact situation in the case—“information compiled by an enforcement agency [that] may help shed light on a Congressman’s alleged criminal or unethical behavior”—and appended a caveat as to whether its holding would cover “every republication” of FBI file documents. Appellants sought rehearing and petitioned for a writ of certiorari, posing the issue of whether the Third Circuit had erroneously adopted “a constitutional privilege of neutral reportage of newsworthy events” in private person libel cases under *Edwards*. This would allow a defendant to circumvent *Gertz* and resurrect the Court’s “previously abandoned doctrine” in *Rosenbloom*. Time, opposing the writ,  

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1380. Bufferino, 692 F.2d at 272.  
1381. See also *supra* note 173, and *infra* note 1502.  
1382. 643 F.2d 134, 139 (3d Cir. 1981). The court also characterized the matter at issue as “the proceedings and records of criminal investigatory agencies.” Id. at 141. When fairness and accuracy forfeiture of fair report arguments were raised about failure to include the file’s legend (i.e., that this document “contains neither recommendations nor conclusions”), the court replied that no such qualifying caveat applied to the FBI’s “personal file card” regarding plaintiff. Id. at 146. Appellants correctly and reasonably made much of this omitted legend in their briefs to the Third Circuit. Brief of Appellant, *Medico v. Time*, Inc. 643 F.2d 134 (3d Cir. 1981) (No. 80-2077) (arguing that the legend made users aware of government officials’ intended “limited internal use” and that such “contained information and conclusions . . . expressly disclaimed by the agency”). Compare *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1085-93 (3rd Cir. 1988), where the court found a jury issue of constitutional malice where defendant omitted a caveat—“none of these [references in the Hoffa files] suggested any criminality or organized crime associations.”  
1383. 639 F.2d at 139-40. For a detailed critique see *ELDER, FAIR REPORT*, supra note 1185, § 1:10 at 90.  
1384. *Medico*, 643 F.2d at 141-42.  
1386. Petition for Writ of Certiorari at (i), *Medico*, 643 F.2d 134 (No. 80-2168) (“questions presented for review”). See also id. at 9 (Medico’s “only reasonable and meaningful interpretation . . . raises the important question as to the existence of neutral reportage of newsworthy events in libel actions where the common law constitutional privilege of fair reporting is manifestly inapplicable”).  
1387. Petition for Writ of Certiorari, supra note 1386, at (i).
contended that Medico was “squarely based” on Pennsylvania common law and presented “[n]o question of constitutional magnitude.” Any suggestion that Medico was based on Edwards’ neutral reportage doctrine involved “tortured” reasoning.

In light of Norton, petitioners in Medico were farsighted, if not prescient, in divining the import of Medico’s radical fair report analysis as an incestuous, expansive, country cousin of neutral reportage. This is made clear by a close examination of Medico and its profligate progeny. Medico involved the defendants’ reportage of what were no more than “tentative and preliminary conclusions” from FBI files. Judge Adams delved in detail into the three rationales for fair report. First, he cryptically discussed the “agency” rationale, noting that on appeal appellants had not challenged the district court’s rejection of the agency rationale as insufficient to preclude “official status.” The Third Circuit correctly conceded the undoubted and obvious: that the “agency” rationale could not justify or explain extension of “fair report to reports or proceedings” not open to public inspection. The court then minimized this rationale, noting

1388. On Petition for Writ of Certiorari at 1, 6, Medico v. Time, Inc., 643 F.2d 134 (No. 80-2168).
1389. Id. at 6.
1390. See discussion supra Part III.
1391. See generally discussion Part VII.C.
1392. Medico, 643 F.2d at 139-40. This description by counsel and court was based in part on the title page to the major FBI report: “This document contains neither recommendations nor conclusions of the FBI. . . .” Id. (emphasis added). Appellant Medico contended this rendered the FBI report “so tentative and inclusive as to be “unofficial in nature and totally outside” Section 611’s scope. Brief of Appellant, supra note 1382, at 16.
1393. Medico, 643 F.2d at 139-40.
1394. Id. Appellant’s conciliatory posture was that it was “inclined to agree” that a non-public report should not be outside fair report “merely because it is unavailable to the general public or even because it had been secretly or improperly obtained.” However, its unavailability to the general public, its intended limited internal use and manner of compilation were facts to be considered as to its official or unofficial status. Brief of Appellant, supra note 1382, at 19. This tactical concession “substantially weakened” plaintiff/appellant’s position on appeal and “afforded the court significant room for maneuver.” ELDERS, FAIR REPORT, supra note 1185, at 106 n.55. It also significantly undermines Medico as a viable precedent.
1395. Id. at 140-41. The district court assumed the defamatory file matter had not been “intentionally released to the press or public” but had come into defendant’s hands through “an unauthorized leak or some unlawful act.” Medico v. Time Inc., 509 F. Supp. 268, 273 (E.D. Pa. 1980) (emphasis added). The court also assumed for summary judgment purposes that the matter at issue was not available to the public under the Freedom of Information Act exception for “investigatory files compiled for law enforcement purposes.” See 5 U.S.C. § 552(b)(7) (West 1990). Medico, 509 F. Supp. at 274 n.4. Medico’s radical nature is well-evidenced by comparing the later famous FOIA case involving attempts to get federally compiled rap sheet information about a member of the Medico family. Although most of the information contained therein the rap sheet was available by diligent
its infrequent modern invocation. The court also pointed out the Restatement (Second) of Torts’ opinion that it was unclear whether fair report applied to a proceeding or report “not public or available to the public under the law.” In fact, as this author has demonstrated...
elsewhere, the latter was a gratuitous, arbitrary addition by the rapporteur based on a single inquiry during discussions. This view was not found in the original Restatement of Torts or any preliminary draft to the Restatement (Second) of Torts, and it did not reflect the “nearly unanimous view” of the common law decisions.

statute to secret grand jury proceedings, and Gardiner v. Poughkeepsie News Papers, Inc., 326 N.Y.S.2d 913, 914 (Sup. Ct. 1971), which extended the same statutory protection to sealed youthful offender records under a statute that had been specifically modified in 1956 to delete the word “public.” Keogh, 274 N.Y.S.2d at 305. The federal district court acknowledged that the pre-1956 New York consensus was that only “public and official” judicial proceedings were covered. The court specifically cited to Shiles v. News Syndicate Co., 261 N.E.2d 251 (N.Y. 1970). However, that decision made it clear that it was reaffirming the broad common law view of Stevenson v. News Syndicate Co., 96 N.Y.S.2d 751, (App. Div. 1950), aff’d on other grounds, 96 N.E.2d 187 (N.Y. 1951), that it was “illogical to hold that the defendant had the right to publish to its millions of readers information which not one of the readers could personally obtain.” 96 N.Y.S. 2d at 756. The Shiles court found no legislative intent in deleting the “public” language to change the existing law as to matrimonial proceedings. Shiles, 261 N.E.2d 253-56. The three dissenters said that the legislative intent behind the bill, earlier vetoed by a prior Governor, was expressly intended to overturn Stevenson and that three newspapers or newspaper chains were the “real sponsors” of the change. Id. at 257-58 (Breitel, J., with Scileppi, J. and Jasen, J., concurring, dissenting). For a more detailed analysis of New York’s deletion of “public” from its fair report statue see infra note 1535. The federal district court in Medico also cited as in “[ac]cord McCurdy v. Hughes, 248 N.W. 512 (N.D. 1933), which denied fair report to nonpublic lawyer disciplinary proceedings. Medico, 509 F. Supp. at 275. Thus, the court apparently conceded that the pre-1956 statute reflected and incorporated the general rule of the common law. See also Stuart v. Press Pub. Co., 82 N.Y.S. 401, 406-08 (App. Div. 1903). For the Medico court to opt for New York’s legislative abrogation—a change lobbied for and effectuated by the New York media—is a daunting Kangaroo leap in logic. But the court reached the desired result, a statute “substantially similar” to Section 611. Medico, 509 F. Supp. at 275.

1398. ELDERS, DEFAMATION, supra note 1179, § 3:12, at 3-38 (updating the earlier analysis as to this “ill-reasoned caveat”); ELDERS, FAIR REPORT, supra note 1185, § 1.15, at 139-40. Dean Carl Auerbach asked whether the “greatly expanded” term “judicial proceeding” (he was apparently referring to “judicial proceeding” in the context of parties, lawyers and other parties parts—see note 1497, infra) would extend to “an official proceeding or official action, which is itself not public, which could not, for example, be reached under the Freedom of Information Act but which is nevertheless leaked to a newspaper or TV station?” 52 A.L.I. PROC. 196 (1976) (recounting the 1975 annual meeting of the American Law Institute). Dean John Wade responded nebulously that this was a “good question”—his “guess is that it really depends upon whether it is subject to being published.” Id. He also said it had not been considered but would be dealt with in the Section 611 commentary. Id. This was the sum total of the public discussion for the Comment d caveat.

1399. ELDERS, FAIR REPORT, supra note 1185, § 1.15 at 139; see also RESTATEMENT (SECOND) OF TORTS § 611 (Tentative Draft No. 21, 1975); RESTATEMENT (SECOND) OF TORTS § 611 (Tentative Draft No. 20, 1974); RESTATEMENT (SECOND) OF TORTS § 611 (1938). For modern examples emphasizing the limitation of fair report to public proceedings and reports, see, e.g., Gertz v. Robert Welch, Inc., 680 F.2d 527, 535 n.12 (7th Cir. 1982) (“The interest served by the privilege is the public’s right to know and be informed of public proceedings.”) (emphasis added); Wynn v. Smith, 16 P.3d 424, 429-30 (Nev. 1994) (see infra text accompanying notes 1442-1445); Fortenbaugh v. N.J. Press,
In Medico, Judge Adams relied preeminently on the common law’s “public supervision” rationale, expansively suggesting that “public scrutiny” of investigations and files of criminal investigatory agencies might “often have the equally salutary effect of fostering among those who enforce the laws ‘the sense of public responsibility,’” for example, by “help[ing] ensure impartial enforcement of the laws.”

Perhaps wary of the open-ended nature of this “public supervision” application, the court then took a significant step back after proffering this broader application and appended a caveat regarding republication of documents in every FBI (or apparently every other government) file.

More narrowly, this “general supervisory concern” had “heightened” impetus because of the public interest in assessing the conduct of a former elected public official linked to the plaintiff, despite its “arguable . . . tarnish[ing]” of the plaintiff’s/private individual’s reputation. As this author has said elsewhere, this “public supervision” rationale “seems perverse.”

Inc., 722 A.2d 568, 573-75 (N.J. App. Div. 1999) (noting that the rationale for fair report “is that members of the public, had they been present, would have seen and heard the same statements; the publisher is merely an interlocutor to the public at large”; rejecting fair report where plaintiff’s identity was protected by an order of confidentiality: noting “the public policy underlying the fair report privilege is to foster the public’s awareness of what actually happens at public proceedings”) (see supra note 1535); Wright v. Grove Sun Newspaper Co., Inc., 873 P.2d 983 (Okla. 1994) (see supra notes 1083-1110); Justin H. Wertman, The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern, 65 FORDHAM L. REV. 789, 797 (1996) (noting that “almost all courts” refuse it as to non-public proceedings). This historic limitation to public proceedings was used to distinguish non-public New York (matrimonial) proceedings from civil pleadings entitled to fair report even without any judicial action thereon. See Stevenson v. News Syndicate Co., 96 N.Y.S.2d 751, 754-56 (App. Div. 1951), aff’d on other grounds, 96 N.E.2d 187 (N.Y. 1951) (distinguishing the leading national decision favoring fair report in mere pleading cases); Campbell v. N.Y. Evening Post, 157 N.E. 153, 156 (N.Y. 1927). These public and official civil filings were different from non-public proceedings. As the court said, it would be “illogical to hold that the defendant had the right to publish to its millions of readers information which not one of those readers could personally obtain.” Stevenson, 96 N.Y.S.2d at 756 (emphasis added).

1400. Medico, 643 F.2d at 141-42.
1401. Compare id. at 141 (emphasis added) with the Court’s debilitating critique of this argument in a later FOIA case. See supra note 1395.
1402. Medico, 643 F.2d at 141.
1403. Id. The court gave little, if any, significance to plaintiff’s involuntary involvement in Time’s exposé, limiting itself to noting the public’s “lively interest” in such liaisons with elected public officials. Id. at 142. Judge Adams’ grudging “arguably” characterization is surprising, if not farcical, in light of the fact that defendant correctly did not dispute the defamatory nature of the statements. Id. at 136 n.2. See also Bufalino v. Associated Press, 692 F.2d 266, 269 (2d Cir. 1982) (reports identifying plaintiff as an individual “with alleged mob ties” were defamatory); Wynn v. Smith, 16 P.3d 424, 426-27, 431 (Nev. 1994) (finding that a defendant’s statement that a confidential Scotland Yard report “called [plaintiff] a front man for the Genovese family” was defamatory) (see infra
How is public responsibility of public agents in performance of their public functions fostered by court sanctioning of unauthorized governmental leaks resulting in public vilification of presumably innocent individuals? Law enforcement personnel generally (including prosecutors and local and national police investigative agencies) have a duty to protect the citizenry from unfounded or scurrilous charges not warranting formal prosecution or other public official action—by filtering out bonafide from frivolous or speculative allegations of criminality. Is such a professional sense of public responsibility not totally undermined by the lesson emanating from the [Medico] court’s conclusion—that investigative officers may publicly convict in the public mind any individual linked to any investigation into allegations of corruption of a public official regardless of whether said information is sufficient for or could or will be used in a public forum with a direct or indirect right of replication by the victim of the vilification? 1405 . . . Such an impetus to unprofessional disclosure of non-public information regardless of the factual truth or reliability of the information contained therein is an unfortunate but clear lesson emanating from [Medico’s] fair report conclusion and seems to run afoul of fundamental values—that is, the presumption of innocence and the quasi-constitutional interest in reputation—and run counter to cherished democratic ideals. 1406

Judge Adams tried to bolster the opinion’s shaky fair report conclusion by citing the “somewhat tautological” subset of “public supervision:” the “legitimate public concern” in activities of elected officials. 1407 Implicitly ignoring the stated rationale of “impartial enforcement” of the law, 1408 he found “especially relevant” the defendant’s focus on organized crime and the practical necessity of relying on governmentally acquired information due to the difficulties of independently corroborating such information. 1409 Although he said text accompanying notes 1441-1445). The court accepted the plaintiff’s characterization as a private individual. It did not have to resolve this issue in light of defendant’s withdrawal of an argument plaintiff was a public figure. Medico, 643 F.2d at 141-42 n.25.

1404. Elder, Fair Report, supra note 1185, § 1:10, at 90-91 (citations omitted).
1405. Id.
1406. Id. at 91 (citations omitted).
1407. Medico, 643 F.2d at 142 (citing the “same reasons” given for the “public supervision” rationale).
1408. Id. at 141. Judge Adams seems to all but say that the normal rules need to be waived in reporting about organized crime and the concomitant need for the media to rely on governmental sources. Of course, this proposed cozy, incestuous relationship undermines the “public supervisory” rationale and “checking” function of the media in controlling governmental abuses and makes the media easily manipulable tools—conduits for whatever shaded or distorted view of the facts government wishes to issue. Moreover, if there is an “organized crime” exception, what is the next so-called “necessary” exception? A new libel doctrine in reporting on terrorist acts and those the government wishes to pursue and punish outside the court system? See supra text accompanying notes 1225-1283, infra note 1618. Drug investigations because of drugs’ undoubted scourge on the land? Murder investigations in inner city neighborhoods because of the all too common problem of getting witnesses to cooperate with police? Others? The media “beat goes on” endlessly.

1409. Medico, 643 F.2d at 142. Defendant’s publication implemented the “legitimate public interest” in the citizenry’s self-education about organized crime. Id. This information was of “significant public interest” even if public officials were not involved. Id. The court
that “[p]ersonal interests in privacy” are “not to be taken lightly” or “overborne by mere invocation of a public need to know,” Judge Adams gave no serious consideration to balancing the important countervailing factors that veritably jump off the page. These factors include:

the incalculable harm to reputation . . . from implication in organized crime, the veil of authenticity and credibility that attends disclosure of a government ‘source’ . . . particularly where such [source] is shorn of its prefatory heading indicating the tentative nature of [its] conclusions, the questionable reliability of information that the . . . FBI . . . presumably [found] insufficiently persuasive to justify public disclosure or other official action, the unauthorized nature of the disclosure and the public interest in discouraging (or at least not encouraging) such lawless disclosures, the extremely limited interest of the public in inculpatory, defamatory matter disseminated outside normal judicial, legislative and executive channels, and the absence of an identifiable authoritative decision-maker taking legal and/or political responsibility for his or her ‘official action.’

Rather than analyzing these competing concerns and the compelling policy arguments underlying Comment h to Section 611, seemed to be hinting at a possible fair report argument even absent a “public supervision” rationale. Of course, a “public supervision” justification would almost invariably be present. See the district court’s discussion of a broad “informational” rationale supra note 1395. For instance, under parallel facts a media defendant could claim that such information is of legitimate use in raising questions about why particular investigative information has not resulted in a prosecution or more detailed investigation by the FBI, itself, the premier national law enforcement agency, all of whose agents—at all levels—would be “public officials” under the consensus rule. See the criticism of this “public official” designation in ELDER, DEFAMATION, supra note 1179, § 5:1, at 5-17 to -20 & n.120, 5-25 to -26 & nn.170-76, and David A. Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan, 33 BUFF. L. REV. 579, at 672-78 (1984) [hereinafter, Elder, Public Officialdom]. And, of course the same “public supervisory” argument could be made as to any local police officer or other individual engaged in comparable government investigatory functions who releases governmental file matter as self-styled whistleblower or because he/she perceives a supervisor or superior—almost invariably a public official—to not be doing his/her job. The potential for impairing legitimate law enforcement functions and/or judicial proceedings resulting from such media disclosures is substantial indeed.

1410. Medico, 643 F.2d at 142-43.
1411. ELDER, FAIR REPORT, supra note 1185, at 91 (citations omitted).
1412. Id. at 88. Among other arguments the author suggested:

Ex parte communications not “buttressed by judicial action” constitute a “grave hindrance to the administration of justice” by undermining the presumption of innocence and encouraging improper or unethical action by law enforcement personnel . . . these reports, which have the clear tendency and likely effect of “looking toward [the suspect’s] guilt, maximize the potential harm” to the suspect’s reputational interest without measurably advancing or enhancing the public’s interest in detection or reduction in crime. . . .

Id. at 88, 90 (citations omitted). Appellant Medico delved into this in detail in his brief, Brief of Appellant, supra note 1382, at 19-21, concluding that to apply fair report under the circumstances “would subvert the purpose of the privilege which is designed to permit the republication of reports made by government agencies but not to permit the distortion of facts set forth in those records that are labeled as preliminary or tentative or inconclusive.”
Judge Adams merely invoked the difficulty in reportage on organized crime; this is a breathtakingly one-sided calculus at odds with the Court’s carefully nuanced assessment of reputational and free expression values. The end result is that private person plaintiffs, like Medico, who are linked involuntarily to any elected official (or other non-elected public official) by any kind or manner of governmental investigation will likely encounter either an absolute Section 611 immunity or the nearly absolute version of it adopted in Medico. The resultant subject matter criterion in Medico is “only

Id. at 20 (emphasis added). See also Hyde v. City of Columbia, 637 S.W.2d 251, 260-261 (Mo. Ct. App. 1982) (holding that the city and media had a duty under negligence law not to divulge the identity and address of a victim of an assailant who was still at large). The Hyde court drew the following public policies from exemptions in state freedom of information laws and “sunshine laws” concerning records of the “criminal investigation process: “The text . . . as well as the decisions . . . determine the public interest, not only in terms of avoidance of impediment to the criminal process, but also in terms of protection of the privacy, the reputation, the person, and the lawful and constitutional prerogatives of those the criminal investigation process enmeshes.” Id. at 261 n.15. The court decided that “a persuasive judicial rationale exempts investigative files from disclosure because such records ‘are apt to consist of remarks, gossip, guesses, impressions, hearsay, irrelevant information, comments, surmises, data and facts.’” The court held that such police investigative or file information was not a public record and was not covered by Section 611. Id. at 267-69. On the federal FOIA, see supra note 1395. See also the detailed discussion of exemption 7 concerning “records or information compiled for law enforcement purposes” and protection from disclosure under 7(c) of “records or information” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” in JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS (2005) § 1:60, 1-564-65 [hereinafter FRANKLIN & BOUCHARD] (discussing Supreme Court precedent, and noting that “strong emphasis [has been placed] on the propriety of broadly protecting the interests of private citizens whose names or identifying information is in a record that the government ‘happens to be storing’”).

1413. See discussion supra Part II.

1414. No other than artificial distinctions could be drawn between a Congressman and a host of other elected officials at the state and local level. Indeed, the courts have adopted a consensus per se rule applying Sullivan to all elected officials. ELDREDGE, supra note 1179, § 5:1, at 5-5-5-6; Elder, Public Officialdom, supra note 1409, at 623, 626-68. See also infra text accompanying note at 1482.

1415. See text accompanying notes 787-790, 1409.

1416. Medico adopted the “made solely for” definition of malice adopted by “most jurisdictions” from the RESTATEMENT OF TORTS § 611 (1938). Medico, 643 F.2d at 138, 146. As the author has said elsewhere, this will give defendant a “quasi-absolute privilege” in most cases. ELDER, FAIR REPORT, supra note 1185, at 306 n.37. As one authoritative commentator has similarly concluded, “[a]s a practical matter, this gave the news media a complete immunity . . . because a newspaper, for example, would always have one purpose, informing the public.” ELDREDGE, supra note 1181, at 421. See also RESTATEMENT (SECOND) OF TORTS § 611, Reporter’s Note, Appendix Vol. 5, 134 (1981) (stating that there appeared to be no decisions forfeiting fair report under “the purpose to harm” criterion); PROSSER & KEETON, supra note 1180, § 115, at 838 (noting that under the “made solely for” test the defendant, “as a practical matter,” had immunity to report accurately despite lack of belief in its truth).
slightly less open-ended” than Rosenbloom’s newsworthiness standard, which was rejected in Gertz. Medico reached this outcome “because the source . . . was governmental file matter.” In light of “our increasingly bureaucratized, technocratic society with its push-button retrieval ability to recall information from innumerable governmental files” and the broad definition of “public official,” Medico should provoke “considerable food for thought” to civil liberties aficionados cherishing “fundamental values” other than freedom of expression.

Judge Adams’ analysis of Pennsylvania law is suspect on other counts as well. His superficial “source reliance”1420 analysis was clearly in error and was later rejected as overbroad.1421 Moreover, the

1417. Elder, Fair Report, supra note 1185, at 92. See supra text accompanying notes 159-169, infra note 1579 and accompanying text.

1418. Elder, Fair Report, supra note 1185, at 92.

1419. Id. See supra notes 787, 1409, and accompanying text. See also infra note 1515.

1420. Plaintiff Medico contended that there was a factual issue as to whether defendants actually relied on FBI files or materials and that fair report was inapplicable if defendants’ account mirrored such “merely by coincidence.” The court’s response was cryptic, quoting overly expansive language from Binder v. Triangle Publications, Inc., 275 A.2d 53, 58 (Pa. 1971) (“How a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question.”). In light of this language, the manner of Time’s knowledge was “irrelevant.” Medico, 643 F.2d at 147. In its Petition for Rehearing the petitioners correctly argued Binder was not applicable since actual reliance was not an issue: “Although the manner of gathering the information was at issue, the source of the statement in the Binder case was undisputed; on the other hand the source of the Time article published in the instant case is very much at issue.” Petition for Rehearing at A33-A34, Medico, 643 F.2d 134 (No. 80-2077). Appellants had raised this issue in detail in their original brief, Brief of Appellants, supra note 1382, at 21-24, contending that defendant’s defamatory statements might have been “based entirely on outside sources whose information was only coincidentally similar” to that in the FBI reports defendant had tendered as its purported source. Id. at 24 (emphasis added). Appellant’s argument was correct and prescient. See infra note 1421. Note that the dates of the two documents cited as “sources,” see supra note 1382, were compiled six years apart—1965 and 1971. Medico, 509 F. Supp. at 270 n.1.

1421. In Bufalino v. Associated Press, 692 F.2d 266, 270-71 (2d Cir. 1982), Judge Lombard clobbered Medico, concluding it overinflated Binder, which involved reliance on an “intermediary” who in fact attended the judicial proceeding. Medico’s interpretation of Binder as rejecting any reliance requirement would do nothing “to encourage the initial reporting of public proceedings and records but would promote “unattributed defamatory statements supported after-the-fact through a frantic search of official records”—as happened in the case before the court. Id. For a discussion of “source reliance” and “secondary source reliance” in cases like Binder, see Elder, Defamation, supra note 1179, § 3:2; Elder, Fair Report, supra note 1185, § 1:18. See also the court’s dubious handling of the omission of the important qualifying caveat printed on the report. See supra note 1382. Medico also approved a similarly broad approach to the “source attribution” requirement, concluding that a single prefatory reference to “[i]nvestigators say” sufficed. Medico, 643 F.2d at 135, 139 n.17. The court held that despite any reference to either the FBI report or the FBI’s personal file code (the official documents ostensibly relied on), defendant’s statements “taken in context, may reasonably be understood to inform the
grounds he cited for concluding that Pennsylvania would adopt Section 611 but reject Comment h are very weak. He cited *Sciandra v. Lynett*, involving a publicly issued report commissioned by the governor, as one of two precedents “strongly support[ing]” fair report. However, he also admitted that the case “bore stronger indicia” of “official” report status than criminal investigative files. Indeed, the *Medico* opinion relied primarily on *Hanish v. Westinghouse Broadcasting Co.*, which extended fair report status to a private party’s publicly filed civil complaints upon which *ex parte* judicial action had been taken in the form of a temporary restraining order. The court’s cited authority is “highly questionable.”

The reader that the story was based on FBI materials” and identify the article as “a summary of a purportedly ‘official’ government report.” Id. The court relied on *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978), concluding that the latter upheld applying Section 611 despite explicit identification of source. Id. The *Medico* court seemed to recognize that this is a questionable view, citing an earlier edition of Judge Sack’s treatise for the proposition that any publication that “does not inform the ready of the identity or nature of the governmental proceeding” “probably” does not qualify for fair report. *Medico*, 643 F.2d at 139 n.17.

1422. Judge Adams stated that Comment h “casts doubt” on fair report because the FBI file matter at issue “may be thought to stem from such an early stage of official proceedings” that such privilege “does not attach.” *Medico*, 643 F.2d at 139. However, stunningly, he did not analyze the extensive case law and compelling policy arguments underpinning Comment h. ÉLDER, FAIR REPORT, supra note 1185, at 90. By contrast, the district court mentioned the “considerable authority” supporting Comment h and listed many of the major cases. Then it strictly limited their application, finding that they “were not decided upon the issue of whether the investigative reports were available to the public or not. Rather, the determinative question was whether the reports were sufficiently a part of the judicial process to bring them within the privilege to report judicial proceedings. The above state cases concluded, fairly enough, that they were not.” *Medico*, 509 F. Supp. at 274. Finding that the more circumscribed judicial proceedings precedents were “older and more fully developed” than other parts of Section 611, the judge found that the case precedent excluding police investigatory reports and data were “not particularly helpful” since Section 611 “encompasses far more than just records of judicial proceedings.” *Id.* at 275. The district court’s analysis is superficial and its use of precedent decidedly strange. See supra note 1397. But see, e.g., *infra* text accompanying notes 1430-1445.

1423. 187 A.2d 586 (Pa. 1963). The case involved the famous “Reuters Report” about attendees at the infamous Apalachin meeting of purported organized crime figures. Judge Adams noted, “[i]nterestingly,” that one of the meeting participants identified, Russell Bufalino, was the same person plaintiff Medico had been linked to in the defamatory text at issue. *Medico*, 643 F.2d at 140 n.18.

1424. *Medico*, 643 F.2d at 139. Judges Adams noted several aspects of the “Reuters Report”—it had been publicly issued after being filed with the Governor of New York, involved a lengthy investigation by New York officials and did not have a prefatory caveat that it “reached only tentative conclusions.” These provided “some basis” for Section 611’s application but were probably not alone sufficient. *Id.* at 140.

1425. *Id.* at 140.

1426. 487 F. Supp. 397, 401-02 (E.D. Pa. 1980); *Medico*, 643 F.2d at 140. Civil complaints were filed by private parties, while the FBI materials were put together by FBI agents acting officially. Moreover, the specter of a civil plaintiff willfully or maliciously
involved “public action by authoritative governmental decision makers . . . assum[ing] public responsibility” for their decisions, not unauthorized dissemination of FBI file matter of questionable veracity.\textsuperscript{1428} Subsequent case law, culminating in Norton’s death blows to greatly expanded fair report and neutral reportage, have rendered Judge Adams’ prediction as to Pennsylvania law highly (if not fatally) suspect.\textsuperscript{1429}

The Third Circuit effectively recanted its decision in Medico in Schiavone Construction v. Time, which involved reportage of statements purportedly taken from an internal FBI memorandum implicating plaintiffs in the disappearance of Jimmy Hoffa.\textsuperscript{1430} Judge Becker took great pains to reexamine the “threshold question” of including defamatory matter seemed to be “at least as great” as the risk a law enforcement agency would “knowingly” add “false malicious” matter to its investigative files. Medico, 643 F.2d at 140.

\textsuperscript{1427} E LDER, FAIR REPORT, supra note 1185, § 1:10, at 90.

\textsuperscript{1428} Id. Subsequently, Pennsylvania joined the “wealth of modern cases” rejecting the RESTATEMENT (SECOND) OF TORTS § 611 cmt. e (1977) rule refusing to extend fair report to civil pleadings where no action has been taken by the court. E LDER, DEFAMATION, supra note 1179, § 3:4, at 3-19. See First Lehigh Bank v. Cowen, 700 A.2d 498, 500-02 (Pa. Super. Ct. 1997), where the court stated:

Pleadings are public records maintained in government buildings, open for review by the general populace. We find no sense to the argument that newspapers, or other media groups, cannot report on pleadings prior to judicial action without opening themselves to a libel action. It is the media’s job and business to keep the public informed of pending litigation and related matters conducted in taxpayer funded courthouses.

\textit{Id.} at 502 (emphases added). See also E LDER, DEFAMATION, supra note 1179, § 3:4, at 3-20 (noting the “increasingly sophisticated nature of information recipients” and approving the analysis in modern cases extending fair report to mere pleadings—this will fulfill a public supervisory function and “motivate the media to expose to public scrutiny the broad nature of important, societal controversies increasingly resolved by civil litigation”). See also E LDER, FAIR REPORT, supra note 1185, at § 1.04B for a detailed critique. In addition to compelling arguments for rejecting the judicial action requirement of Comment e, which the author has termed “essentially formalistic,” E LDER, DEFAMATION, supra note 1179 § 3:4, at 3-18, a refusal to apply fair report would also conflict with the First Amendment protection for public filings generally. Langston v. Eagle Publ’g Co., 719 S.W.2d 612, 623-24 (Tex. App. 1986). For a further brief analysis of reliance on civil pleadings to support a “threshold of reliability” standard as to non-public government records see infra note 1561.

\textsuperscript{1429} See the discussion of Bufalino v. Associated Press supra text accompanying note 1421 and infra note 1502. See also supra text accompanying notes 1363-1373, (discussing Curran v. Phila. Newspapers, Inc. and DeMary v. Latrobe Printing & Publ’g Co). Judge Adams repeatedly indicated he was interpreting Pennsylvania common law. Medico, 643 F.2d at 134, 136 n.2, 137-40, 143, 145 n.39, 146-47. See also supra text accompanying notes 1393-1419.

\textsuperscript{1430} 847 F.2d 1069, 1072 (3d Cir. 1988). Interestingly, but not surprisingly, there is no specific reference to this exceedingly important post-Medico development in the Norton v. Glenn briefs before the Pennsylvania Supreme Court or on certiorari to the United State Supreme Court.
whether fair report applied at all. 1431 He then detailed the court’s grounds for expressing “serious doubts” concerning fair report’s application to the case. 1432 Judge Becker noted that New Jersey precedent emphasized the “importance of open proceedings.” 1433 He also pointed out that the court’s Medico case had demonstrably shifted to an exclusive focus on “broad policies” underlying the privilege in order “to encourage the media to report on public affairs and to promote an informed public.” 1434 Judge Becker then adopted a scathing criticism of Medico by a “leading secondary authority” as “not in harmony with the mainstream of the common law.” 1435

While conceding the importance of investigative journalism and the danger of “chilling such a valuable watchdog,” Judge Becker referenced two “important countervailing policy considerations rais[ing] serious issues.” 1436 First, the “historical justification” for the fair report exception to republisher liability was that the matter was “already in the public domain,” with the media merely acting as the public’s alter ego, “permitting it to observe through the reporter’s eyes how the business of government is being conducted.” 1437 By contrast, the memorandum at issue was not public until the defendant’s

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1431. Schiavone Constr., 847 F.2d at 1086.
1432. Id. at 1086 n.26.
1433. Id.
1434. Id.
1435. Id. (quoting HARPER ET AL., supra note 1180, § 5.24, at 206-07 n.33). The authors’ powerful critique is worth quoting in more detail:

> These are, in fact, precisely the circumstances in which it would ordinarily be thought that the dissemination of falsehoods should not be privileged. There is nothing about the fact that a wiretapped criminal has lied about an honest person in a telephone conversation, or that a detective or Congressional investigator or similar minor functionary has erroneously (or maliciously) defamed someone in an unpublished memorandum that gives rise to such a public need for the reporting of these events (with the underlying defamation uncorrected) as to outweigh an innocent victim’s interest in the protection of his reputation. Apart from an independent public interest in the reporting of these other events, which is nonexistent, the publication of the imputation is at most an ordinary republication of the defamation. Neither an ordinary wiretap nor the composition of a routine working memorandum is an event of sufficient moment to qualify as such an “action or proceeding” for purposes of the fair report privilege.

1437. Id. (quoting RODNEY A. SMOLLA, THE LAW OF DEFAMATION, § 8:10[1], at 8-34 (1986)).
reporter discovered it and *Time* republished it.1438  Second, by republishing such confidential information, *Time* had given extensive publicity to “new and potentially defamatory information that the government had no intention of releasing, at least not in the form edited by *Time*.”1439  These unauthorized leaks “could become powerful tools for injuring citizens with impunity.”1440

The *Schiavone Construction* case “questioned the reasoning of”1441 *Medico*, and the decision was quoted at length and followed in the important decision of *Wynn v. Smith*.1442  In *Wynn*, the Nevada Supreme Court rejected *Medico*’s version of fair report when applied to the defendants’ defamatory account of a confidential Scotland Yard report, which “called [the plaintiff] a front man for the Genovese family.”1443  The court reasoned persuasively that the purpose of fair report is to “obviate any chilling effect on the reporting of statements already accessible to the public.”1444  Applying fair report to unofficial “substandard and unsubstantiated” matter would “directly conflict” with protections available under the law of defamation and “undermine the basis” for the fair report privilege.1445

1439. Id.
1440. Id.
1442. Id. at 430-31. The court reversed the total award for plaintiff, $3,339,096.74, id. at 426 n.1, for failure to insert the word “serious” between “entertained” and “doubt” in defining reckless disregard of falsity under *St. Amant v. Thompson*. Id. at 430-31. See *supra* text accompanying notes 77-85.
1443. *Wynn*, 16 P.3d 431. Furthermore, the court specifically held that “unauthorized or confidential investigatory reports do not qualify as an ‘official action or proceeding’ under fair report. *Id.* at 430 (emphases added).
1444. *Id.* at 430. Fair report is:

premised on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions. Access to information concerning the conduct of public representatives is critical to the citizenry’s supervision and evaluation of actions taken on its behalf. Obviously unable to monitor all official acts in person, citizens rely on third party accounts. . . . If accurate accounts of official actions were subject to defamation actions, reporters would be wrongly discouraged from publishing accounts of public proceedings. . . .

*Id.* at 429 (emphases added).
1445. *Id*.  An *amici curiae* brief was filed by *amici* self-described as “national and local newspapers, wire services, magazines, book publishers and the leading associations representing them.” Brief for The New York Times Co. et al. as Amici Curiae Supporting Appellants, *Wynn v. Smith*, 16 P.3d 424 (Nev. 2001) (No. 31221). *Amici* contended that the court’s decision “could fundamentally affect what Amici and every other news organization report, as a matter of routine, every day of the week”—official investigations that may not result in a public proceeding or action and confidential government reports, confidential grand jury proceedings and confidential legislative investigations. These included investigations by foreign governmental authorities in an increasingly global world. Refusal
Three years after Schiavone Construction’s about-face, the Fourth Circuit delved into a parallel issue in Reuber v. Food Chemical News,\textsuperscript{1446} the precedent relied on in Chapin v. Knight-Ridder and heavily relied on by the appellants in Norton.\textsuperscript{1447} In Reuber I, a panel opinion by Judge Winter doubted that a withering personal reprimand leaked to the defendants and published in an industry newspaper constituted reportage of an “official action,” as it was a “far cry” from a public trial or hearing.\textsuperscript{1448} However, the court did not have to decide that issue since fair report was, in any event, defeasible by constitutional malice.\textsuperscript{1449} The court did note that both state and federal statutes treated such personnel records of public employees as private (as did the defendant’s news editor), and the mere public interest in such private personnel file information did not forfeit the employee’s privacy interest under the state statute.\textsuperscript{1450} The court

to extend fair report protection to such “journalistic practices, at once commonplace but vital to an informed electorate in a democracy such as ours,” would make such “high-risk propositions.” \textit{Id.} at 1-2. The court took amici at their word and made such reportage “high risk.” And for compelling reasons. Defendant-book publisher’s catalogue advertisement was published in the face of voluminous information supplied by the author of the proposed book to the publisher demonstrating persuasively the falsity of the “front man” accusation and that the Scotland Yard “report” was prepared by hostile and biased persons. Respondent’s Answering Brief, \textit{Wynn,} 16 P.3d 424 (no. 31221), at 3-10. Yet, defendant made no attempt to verify the report’s accusations. Indeed, the publisher conceded at trial he had \textit{no} factual substratum for the “front man” accusation. \textit{Id.} at 6-7. Had he contacted the Scotland Yard commander, he would have told defendant that the report’s statements were “unattributed, unsubstantiated, prepared to serve a political purpose, and rejected as substandard” by Scotland Yard. \textit{Id.} at 8. The commander later testified at trial he rejected the report as “substandard” work containing only “unsubstantiated rumor and [multiple] hearsay evidence” by an unsupervised “independent ‘band of officers’” not operating at Scotland Yard. When the commander asked for supporting witness statements, he was informed no such statements existed. Because of its unreliability, the commander “archive[d]” the report, strictly limited access to it, and refused to forward it to the British Gaming Control Board, which had requested that Scotland Yard investigate Wynn during the pendency of a licensing application. The commander rejected any suggestion that the report constituted Scotland Yard’s “official position.” \textit{Id.} at 15-16. The court relieved heavily on the commander’s testimony in concluding that the report was not entitled to fair report protection. \textit{Wynn,} 16 P.3d at 430. Respondent’s Answering Brief thus persuasively demonstrated the incalculable harm that can arise from reportage of matter the court viewed as no more than the “spread[ing] of common innuendo.” \textit{Wynn,} 16 P.3d at 430.

\textsuperscript{1446} \textit{(Reuber I)} 899 F.2d 271 (4th Cir. 1990).

\textsuperscript{1447} \textit{See supra} text accompanying note 624. \textit{See also supra} the discussion of Chapin in text accompanying note 909, and \textit{infra} text accompanying notes 1472-1483.

\textsuperscript{1448} \textit{Reuber I,} 899 F.2d at 277-78 n.6; \textit{see also id.} at 280 n.17 (noting that it was “not clear” this was an “official action”); \textit{id.} at 281.

\textsuperscript{1449} \textit{Id.} at 280 n.17.

\textsuperscript{1450} \textit{Id.} at 277-78 n.6., 283, 285 (quoting Freedom of Information Act \textsection{552(b)(6), 5 U.S.C. \textsection{552} (1996) (statutory exception for personnel files)). \textit{See also} FRANKLIN & BOUCHARD, \textit{supra} note 1412, \textsection{1:56, at 481-83 ("[C]ourts generally have recognized the sensitivity of information contained in personnel-related files and have accorded protection}}
trenchantly suggested that most or all such personnel performed functions of public interest and their personnel records would inevitably “shed light” on their job performance.\textsuperscript{1451}

On rehearing \textit{en banc}, the Fourth Circuit reversed on the sole ground that the plaintiff, a “self-styled whistleblower” and public figure, had failed to prove constitutional malice regarding the falsity of the underlying charges contained in the reprimand letter.\textsuperscript{1452} The court’s analysis in this respect is unexceptional, and its use of fair report is indistinguishable from the myriad decisions allowing a defendant to rely on presumably reliable sources or those with a proven record of reliability with the reporter.\textsuperscript{1453} Judge Wilkinson’s analysis is important, nonetheless. After a defense of Medico’s rejection of the “agency” rationale where the “public supervision” and “public informational” rationales were present,\textsuperscript{1454} Judge Wilkinson merely (and narrowly) concluded that the constitutional malice inquiry is “informed by” the existence of fair report.\textsuperscript{1455} In light of fair report’s encouragement of “frequent and timely” reportage on governmental affairs, defamation law has “traditionally stopped short

to the personal details of a federal employee’s service . . . similarly, the courts customarily have extended protection to the identities of mid-and low-level federal employees accused of misconduct, as well as to the details and results of any internal investigations into such allegations of impropriety. . . .”

\textsuperscript{1451} \textit{Reuber I}, 899 F.2d at 285 n.30.

\textsuperscript{1452} \textit{Reuber v. Chem. Foods, Inc. (Reuber II), 925 F.2d 703, 706, 708-11, 714-18 (4th Cir. 1991). Six others joined the en banc majority. Id. at 703. Four members dissented. Id. at 721 (Wilkins, J., dissenting, with Ervin, C.J., Murnaghan, J., and Sprouse, J.).}

\textsuperscript{1453} \textit{Compare id. at 716 (noting that the letter was by a “presumably reliable author,” the director of a federally-funded research center and the source from whom the editor received it was one who had been reliable previously—accordingly there was “no reason to doubt” the accuracy of the sources), with \textsc{Elder, Defamation, supra} note 1179, § 7:2, at 7-27 to -32.}

\textsuperscript{1454} \textit{Reuber II, 925 F.2d at 713. The letter fulfilled the “public supervision” rationale by providing the citizenry information about how to assess carcinogenic qualities of chemicals and how to assess the functioning of an important governmental body’s effectiveness in the war on cancer. The “informational rationale” was met by throwing light on a controversy over a particular alleged carcinogen, an important matter of public welfare and safety facing an imminent governmental decision. Id. at 713. These were “plainly present” so the “agency” rationale was not dispositive. Judge Wilkinson then appended a pregnant caveat to the “agency” issue: “We need not decide . . . whether the agency rationale encompasses only those documents officially released and which the public would have immediate access to or whether it also encompasses other confidential documents which someone has placed in the public domain.” Id. (emphasis added). Unlike \textit{Reuber I}, which had deemed the letter a private reprimand by a private employer, \textit{Reuber I}, 899 F.2d at 281, \textit{en banc} the court deemed this letter an “official action” because Reuber’s employer, a private research firm under contract with the National Cancer Institute, invoked the latter’s prestige and authority, making such action governmental in nature. \textit{Reuber II, 925 F.2d at 713.}

\textsuperscript{1455} \textit{Reuber II, 925 F.2d at 712.}
of imposing extensive investigation requirements . . . on a defendant so reporting.” In other words, use of such a government report “diminishes the likelihood,” “reduces the chances of,” or “makes it more difficult to prove” knowing or reckless disregard of falsity.

As the above analysis shows, this use of fair report to dispel constitutional malice is unexceptional, mainstream constitutional jurisprudence, making the court’s fair report recognition almost, if not totally, superfluous. The court’s analysis is nonetheless fascinating for what it portends for cases where forfeiture by constitutional malice is not the focus. Judge Wilkinson was careful to note that the absolute (Section 611) versus qualified (Medico and Reuber II) fair report controversy was a “subject of debate” and that the court’s “narrowly” limited version provided defendants “at a minimum a qualified privilege” “relevant to” constitutional malice. However, he also soundly rejected the argument for a “broad judicial declaration” that reportage of whistleblower reprimands or other internal documents or memoranda were not protected by fair report, “no matter how important they were to public controversies or how essential they might be to public evaluations of a public agency.” The court “declined to depart in such fashion from the settled law of free expression.”

Settled law of free expression? It is not altogether clear what Judge Wilkinson is referring to, but apparently he is referring to Medico without so much as a glance at Comment h and its supporting precedent. In light of Medico’s emasculation by Schiavone Construction, its rejection by authoritative commentators, and its express or implicit rejection by most federal and state courts, this statement borders on the farcical. In Reuber II, Judge Wilkinson tried to craft a narrow rule and cautioned that the court was not authorizing all employers to leak personnel information or immunizing a reporting media from republisher liability vis-à-vis such leaked matters. Rather, its holding was limited to reportage of a reprimand “invoking the prestige of a government agency, attacking the conclusions of a well-known critic of that agency, and addressing a

1456. Id.
1457. Id. at 713-14.
1458. Id. at 714.
1459. Id.
1460. Id.
1461. See supra text accompanying notes 561-565, 1361-1373, 1430-1445. See also infra text accompanying notes 1502-1508, 1565-1579.
1462. Reuber II, 925 F.2d at 713-14.
controversy with significant implications for public health and for economic well-being.”

Imagine for a moment what the Reuber II court has loosed upon the land. A publicly self-identified whistleblower ruptures the bubble on government corruption, incompetence or prevarication. The chastised governmental entity can then search its files, or those of other cooperative governmental entities, for confidential, unexpurgated, conjectural and false matter, and release it to the press under the media privilege of fair report. The Reuber II rule is unexceptional where limited to true public figures and constitutional malice, because it adopts a ‘what’s good for the goose is good for the gander’ theory of reciprocity in promoting full and fair debate.

But what about Section 611’s absolute version of fair report or Medico’s near equivalent “made solely for” version? Or a low-level anonymous whistleblower fearful of her or his job who is “outed” and then media-savaged? Those are quite different, and appalling,
scenarios. A whistleblower pilloried and attacked by massive leaks would have no effective legal redress against the conduit and, at least in the case of the federal government, little against the employer/leaker.\footnote{1470} The potential for misuse is evident, as is the potential for the oppressive weight and resources of governments squashing and squelching their critics with impunity.\footnote{1471}

The Fourth Circuit later adopted just such an absolute, First Amendment based fair report in \textit{Chapin v. Knight-Ridder}.\footnote{1472} \textit{Chapin} was a 2-1 decision involving reportage of an \textit{unofficial} “off-hand slander”\footnote{1473} by a congressman. The majority emphasized that the statement, unlike the statement in \textit{Reuber}, was intended to be made public and that, “from the public’s viewpoint, a higher proportion of the ‘unofficial’ public statements of congressmen will be newsworthy and of concern than will be the countless ‘official’ documents generated by a quasi-public agencies.”\footnote{1474} Not surprisingly, the judges felt no need to “cast [their] lot” on Edwards’ “neutral reportage privilege” in light of their conclusion.\footnote{1475} A dissenter sharply criticized the court’s constitutionalization of fair report, thereby providing the source a “license to slander” and the media defendant a “license to libel” by republication.\footnote{1476}


\footnote{1471} Compare this with the Court’s conclusion that government as such has no First Amendment standing to initiate or pursue a defamation claim. \textit{See supra} text accompanying notes 43, 532-533.

\footnote{1472} \textit{993 F.2d} 1087 (4th Cir. 1993).

\footnote{1473} \textit{Id.} at 1107 (Widener, J., dissenting). The majority noted that plaintiff had not sued the Congressman quoted, and that he had no Speech and Debate Clause protection under \textit{Hutchinson v. Proxmire}. \textit{Id.} at 1097 n.10. For a discussion of \textit{Hutchinson see supra} text accompanying notes 535-539.

\footnote{1474} \textit{Chapin}, 993 F.2d at 1097. In other words, \textit{Chapin} shifts solely to an informational rationale.

\footnote{1475} \textit{Chapin}, 993 F.2d at 1097. A neutral reportage determination would await a scenario involving “a ‘prominent, responsible,’ but \textit{nongovernmental} speaker.” \textit{Id.} (emphasis added). Arguably, the panel all but adopts neutral reportage under the guise of fair report. \textit{See supra} text accompanying notes 909-915.

\footnote{1476} The dissenter correctly noted that the majority had \textit{not} followed Fourth Circuit precedent viewing fair report as an issue of \textit{state} law but had adopted a “\textit{federal} fair report
Of course, Chapin gives the defendant all the benefits of neutral reportage absolutism without the necessity of meeting the public person limitation\textsuperscript{1477} or other doctrinal requirements,\textsuperscript{1478} and without having to discuss the leading anti-neutral reportage case based on strikingly similar facts (Dickey v. CBS\textsuperscript{1479}) or defend neutral reportage’s extension to private plaintiffs.\textsuperscript{1480} In fact, the broadest possible application of Reuber had likely come to pass: a private party\textsuperscript{1481} barred absolutely from suing the conduit for publishing both the unofficial newsworthy comments of any elected or unelected official and all “the countless ‘official’ documents generated by quasi-public agencies.”\textsuperscript{1482} That the media privilege is in fact absolute is made undoubtedly clear by the Chapin court’s conclusion that the constitutional malice forfeiture standard would apply only in an endorsement scenario, not in cases of mere accurate reportage.\textsuperscript{1483}

\textsuperscript{1477} See supra note 747-794.

\textsuperscript{1478} See supra notes Part V.C-E.

\textsuperscript{1479} 583 F.2d 1221 (3d Cir. 1978).

\textsuperscript{1480} In Dickey, the incumbent Congressman-candidate for reelection was one of two candidates interviewed for defendant’s later broadcast. In response to a question about inflation, he delved into an unrelated attack on the “War Board” supporting his opponent, imputing “payoffs” to plaintiff, a member of the “War Board.” Id. at 1222-23. One could make the argument that Dickey involved a scenario that represents a stronger analogy to “fair report,” i.e., an interview between competitors and reports by opposing responses. Note that one of the more controversial aspects of Section 611, the “public meeting” language, draws in part on speeches of political candidates. See Elder, Defamation, supra note 1179, § 3:16; Elder, Fair Report, supra note 1185, § 1:11. Of course, all such common law precedents involved qualified privilege (absent statute) defeasible by some sort of malice, not the absolutism Section 611 adopts. See Elder, Defamation, supra, note 1179, § 3:11, at 3-3-36; see also supra note 1132.

\textsuperscript{1481} The Chapin court did find the plaintiff charitable fundraiser to be a public figure. Chapin, 993 F.2d at 1092 n.4, 1094-95, 1099. However, public figure or public official status is, of course, not required for fair report. Status as public or private person only becomes important in determining the fault standard in abuse of fair report cases. See also Restatement (Second) of Torts § 611 cmt. b & illus. 1 (1977). See supra the text accompanying notes 387-388.

\textsuperscript{1482} Chapin, 993 F.2d at 1097 (juxtaposing the documents which would be covered by Reuber II and, implicitly, Medico, but apparently without the latter’s “solely motivated for” or state law basis). The court has treated non-elected public officers meeting the Rosenblatt v. Baer criteria as “public officials” for Sullivan purposes, rejecting any suggestion that classification is limited to elected officials. See supra notes 787, 1414-1415 and accompanying text.

\textsuperscript{1483} Chapin, 993 F.2d at 1098. The Chapin court concluded that “the fair report privilege is not absolute, and can be lost where, with actual malice, the press plainly
To summarize, the expansive anti-Comment h approach follows two strains of precedent. One emanates from an exceptionally fragile Medico in the Third Circuit; Reuber II-Chapin in the Fourth Circuit; a Medico fellow traveler in the District of Columbia Circuit, White v. Fraternal Order of Police, again, with no reference to Schiavone Construction’s evisceration of Medico; and occasional lower court cases following one of the above. The second major source of expansive anti-Comment h case law comes from a long line

adopts the defamatory statement as its own.” Id. (emphasis added). However, here defendant “accurately attributed” the quote to the congressman, referenced his bias potential (i.e., he had previously been “sharply critical” of plaintiff), and followed the defamatory quote with a character reference from Art Linkletter. The court’s concluding comment made it ineluctably clear that fair report “protect[ed] these defendants from any actionable implications in [the Congressman]’s comments.” Id. The dissenter viewed the majority’s analysis as “nothing more than the old dodge of a contrived defense to slander by Jack saying to John, ‘Did you hear Paul robbed the grocery store?’ and when John said no, he hadn’t heard of it, Jack would say ‘Well, I haven’t heard of it either. Paul is a fine man.’” Id. at 1107 (Widener, J., dissenting). Note that Chapin’s analysis parallels that of Edwards-neutral reportage, where absolute protection is forfeited and constitutional malice enters the fray only where a public person sues a defendant as to a non-neutral (“concur[s]”/”espouses”) scenario. See supra text accompanying notes 834-836. Compare the curious use of “neutrality”-type factors (the “bias potential” and “character reference”), with supra text accompanying notes 842-857. Of course, these latter factors are irrelevant to a true fair report case.

1484. See supra text accompanying notes 1382-1429.
1485. See supra text accompanying notes 1446-1483.
1486. 909 F.2d 512, 527 (D.C. Cir. 1990) (citing Medico, it found of “no moment” the fact that the committee investigation of allegations in an FOP letter was “barred to the public”).
1487. See supra text accompanying notes 1430-1445.
1488. Wilson v. Slatatlla, 970 F. Supp. 405, 418-19 (E.D. Pa. 1997) (a federal probation department pre-sentencing report and letters from assistant U.S. attorneys (one with an attached appendix) were covered by fair report under Medico even if not part of the official, public record). See also Ingenere v. ABC, 11 Media L. Rep. (BNA) 1227, 1228-29 (D. Mass. 1984), where the trial court extended Medico broadly to any “reporting of confidential reports that reveal possible misconduct”—this included allegations the General Services Administration had not pursued allegations of “gross irresponsibility” in meeting contractual requirements and that the Boston director of GSA investigations had by letter said that “top federal, county and city law enforcement officials have voiced guarded positive opinions” that co-plaintiff was “alleged to have connection with organized crime.” Id. When the argument was made that no fair report should apply until the agency’s report was final and public, the court replied that under this view “this report would never have aired; the very point of the story was that GSA failed to act in the fact of serious unresolved allegations of misconduct.” Id. at 1229. Ingenere, like Medico, purported to apply state law. Id. at 1228. However, its prediction was erroneous. It did not discuss Haggerty v. Globe Newspaper Co., 419 N.E.2d 844, 845 (Mass. 1981), where a complaint stated a cause of action for violation of a right of privacy where the press reported “unsubstantiated and uncorroborated ‘raw investigative materials’” of the metropolitan district commission and the attorney general. And it did not discuss or distinguish Massachusetts precedent supporting Comment h. See infra text accompanying notes 1504, 1586.
of California decisions interpreting the state’s “comparatively broad” statutory *absolute* privilege. This statute, Section 47(4), provides protection for a “fair and true” report “in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding.”

Rejecting the logical implication justified by a plain reading of this statute, California appellate courts and federal courts applying California law have uniformly adopted an extremely broad interpretation of Section 47(4). This interpretation has been facilitated by a “without malice” limitation that was deleted during the case’s pendency.

California cases adopting the broad 47(4) qualified privilege rule have never discussed the appropriateness of adhering to such an open-ended rule where the net effect is to give such “history of the proceedings” or other nonpublic matter absolute immunity whatever its form and trustworthiness.

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1490. Interestingly, the 47(4) version of the statute at issue before the Glenn court had a “without malice” limitation. See the analysis in Glenn, 171 P.2d at 124-25. Importantly, Glenn was analyzed as a *defeasible* qualified privilege, following qualified privilege cases (McClure v. Review Publishing Co. and Kilgore v. Koen—see infra note 1501) from other jurisdictions. The law changed, however, during the case’s pendency. The “without malice” language was deleted—the “other public official proceedings” language qualifying “judicial” thereby became an *absolute* privilege. Green v. Cortez, 199 Cal. Rptr. 221, 224 (Ct. App. 1984) (*dicta*). California cases adopting the broad 47(4) qualified privilege rule have never discussed the *appropriateness* of adhering to such an open-ended rule where the net effect is to give such “history of the proceedings” or other nonpublic matter absolute immunity whatever its form and trustworthiness.


1492. Clearly, “judicial” in (1) was intended to be qualified and limited by the “other public” language in (3), so as to exclude *nonpublic* matters, that is, all matters not of public record. This interpretation is reinforced by later language—“verified complaint” “upon which . . . a warrant shall have been issued.” *Id.* The latter would suggest that the California legislature “intended only a limited addendum to the prior contours” of fair report, “not the open-ended construction” 47(4) has been given by California case law. See ELDER, FAIR REPORT, supra note 1185, at 99-100, n.26. For an example of this more logical interpretation, compare Seegmiller v. KSL, 626 P.2d 968, 978 (Utah 1981), where the court interpreted such statutory language limiting fair report to *official* charges of criminal charges as clearly implying that:

[M]ere allegations of conduct which might be violative of the criminal law should not be construed to fall within the privilege . . . the Legislature must have intended that allegations of criminal conduct *not buttressed by official action* should not be included within the privilege. Indeed, allegations of criminal conduct, being particularly damaging to a reputation, have historically been treated as slanderous per se under the common law.

*Id* (emphasis added).

1493. The leading federal case is Crane v. Arizona Republic, 972 F.2d 1511, 1517-19 (9th Cir. 1992), where a non-public Congressional committee’s investigation was held to be within 47(4). Adopting the policy that the public cannot “monitor their government when it conducts business behind closed doors,” *id.* at 1518, *e.g.*, Congress acting behind closed doors on some of “the most pressing issues of the day,” the Ninth Circuit gave the word “public” the rarefied equivalent “governmental”—as juxtaposed to “private.” “Official” apparently then equated to “formal,” as opposed to “informal, governmental proceedings,” although this distinction is refuted by the “history of the proceedings” case law. See *supra* note 1490 and *infra* note 1501 and accompanying text. This set of logical leaps was used to “reconcile” California precedent and the text of 47(4) in a way “most generously accommodat[ing] the public’s right to know about the inner-workings of its government.” *Crane*, 972 F.2d at 1518. This construction supposedly emulated the “public official”
interpretation by extending fair report to the “history of the proceedings” and other non-public matter\textsuperscript{1494} not allowed under the majoritarian view reflected in Comment h.\textsuperscript{1495}

The California Supreme Court has never ratified this broad anti-Comment h view. The considerable, but highly dubious, precedent supporting this view relies in major part on a confused coupling of “judicial proceeding” under the statutory limited dissemination privilege\textsuperscript{1496} in Section 47(2)\textsuperscript{1497} with the quite separate
criterion as defined in \cite{Rosenblatt v. Baer}. \textit{Id.} at 1518 n.6. On the latter see supra text accompanying note 787. \cite{Crane} also cited to the “open to the public” limitations in 47(5)(1)
and concluded that if “public” already meant “open to the public,” the latter “careful and conscious addition . . . was nothing more than an exercise in redundancy.” \textit{Crane}, 972 F.2d at 1519. See also \textit{Lence v. Hagadone Investment Co.}, 853 P.2d 1230, 1237 (Mont. 1993),
where statutory fair report with parallel language to 47(4) was extended to a preliminary, confidential proceeding of a bar disciplinary commission. The court cited the district court opinion in \textit{Crane} and broadly defined “judicial proceeding” in the same way California precedent does, i.e., “any proceeding to obtain such remedy as the law allows.” \textit{Id.} For other cases following California’s broad interpretation and rejecting the “other public” qualification of “judicial,” see \textit{Dorsey v. Nat’l Enquirer, Inc.}, 973 F.2d 1431, 1434 (9th Cir. 1992) (applying California law, the court rejected plaintiff’s correct assertion that New York family court proceedings were confidential, see supra text accompanying notes 1397, 1399 and infra notes 1494, 1535); \textit{Reeves v. Am. Broad. Cos.}, 719 F.2d 602, 605-06 (9th Cir. 1983) (opinion by Judge Kaufman, author of \textit{Edwards v. Nat’l Audubon Soc’y, Inc.}, 556 F.2d 113 (2d Cir. 1977), interpreting California law); \textit{Howard v. Oakland Tribune}, 245 Cal. Rptr. 449, 451 (Cal. Ct. App. 1988). Compare the interpretation of the New York statute, which contained the same language as 47(4). See \textit{Danziger v. Heart Corp.}, 107 N.E.2d 62, 64-65 (N.Y. 1952) (rejecting the argument that nonpublic proceedings were covered by the fair report statute, the court held that “the word ‘public’ refers to the words ‘judicial’ and legislative.”); \textit{Stevenson v. News Syndicate Co.}, 96 N.Y.S. 2d 751, 753 (N.Y. App. Div. 1950), \textit{aff’d on other grounds}, 96 N.E.2d 187 (N.Y. 1950).

\textsuperscript{1494} \textit{Dorsey}, 973 F.2d at 1433-34 (nonpublic New York child support proceedings) (these would not have been public under New York law even after its express deletion of the open-to-the public requirement—see infra note 1535); \textit{Reeves}, 719 F.2d at 603-07 (secret grand jury proceedings); Glenn v. Gibson, 171 P.2d 118, 119-26 (Cal. Dist. Ct. App. 1946) (including statements by the sheriff, district attorney, and a joint announcement by both about “ur[g]ing the strictest penalty,” a reference to “numerous complaints” by neighbors and government officials, disclosure in detail of evidence, and portrayal of plaintiff’s hotel as “a sort of drive-in house of prostitution”); Braun v. Chronicle Publ’g Co., 61 Cal. Rptr. 2d 58, 65 (Cal. Ct. App. 1997) (stating that an investigative audit by the state auditor was “an authorized, public proceeding” because statutorily authorized and governmentally sponsored despite its confidentiality and being “closed to the public”); \textit{Howard v. Oakland Tribune}, 245 Cal. Rptr. 449, 451 (Cal. Ct. App. 1988) (internal state administrative agency investigation and findings); Green v. Cortez, 199 Cal. Rptr. 221, 224 (Cal. Ct. App. 1984) (dictum) (police internal affairs investigation); \textit{Hayward v. Watsonville Register-Pajaronian & Sun}, 71 Cal. Rptr. 295, 295-99 (Cal. Ct. App. 1968) (police crime report and FBI “rap sheet”).

\textsuperscript{1495} See supra text accompanying notes 1358-1445. See infra text accompanying notes 1502-1508.

\textsuperscript{1496} See \textit{ELDER, DEFAMATION}, supra note 1179, § 2:5-11. This privilege is normally \textit{forfeited} where the privileged party shares the matter with the press. \textit{Id.}, § 2:12, at 2-87 to -90. See supra text accompanying notes 1115. See also infra note 1497.
issue of “official proceedings” in Section 47(4), with its fair report protection for disseminations to the public at large.\textsuperscript{1498} In light of the California Supreme Court’s scholarly and narrow interpretation of the Section 47(3) privilege in a leading post-\textit{Gertz} case, \textit{Brown v. Kelly Broadcasting}, it is extremely doubtful that the court will concur in the lower courts’ artificial and indefensible construction of Section 47(4).\textsuperscript{1499} \textit{Brown} specifically rejected statutory 47(3) protection extending beyond the common law privilege, noting that a “common interest” privilege involved limited dissemination.\textsuperscript{1500} \textit{Brown} also powerfully rejected a protection more expansive than the First

\begin{itemize}
\item \textsuperscript{1497} See Elder, \textit{Defamation}, supra note 1179, § 2:5-11. See also Reeves v. Amer. Broad. Cos., 719 F.2d 602, 605-06 (2d Cir. 1983) [citing Tiedeman and noting 47(4)’s adoption of 47(2)’s “broadly defined” notion of “judicial proceeding” as a matter of “simple logic”]; Hayward v. Watsonville Register-Pajaronian & Sun, 71 Cal. Rptr. 295, 298-99 (Ct. App. 1968). Note that the source of this broad 47(4) doctrine was \textit{Glenn v. Gibson}, which was a qualified privilege defeasible by malice case. The malice limitation was deleted during \textit{Glenn’s} pendency. See supra note 1490. The 47(2) analogy for 47(4) was first introduced by \textit{Hayward} in 1968, “The privilege applies to any publication . . . that is . . . permitted . . . by law in the course of a judicial proceeding to achieve the objects of the litigation, even through the publication is made outside the courtroom and no function of the court or its officers is invoked.” \textit{Hayward}, 71 Cal. Rptr. at 298 (quoting Albertson v. Raboff, 295 P.2d 405, 409 (Cal. 1956)). The \textit{Hayward} court referred to this quote as stating the “general policy” concerning the “scope of the matters” that come under 47(4) in reporting a “judicial” proceeding. This simplistic assumption of a false symmetry ignores the quite different functions justifying participants, parties, and witnesses receiving absolute privilege and the quite separate and distinct issue of 47(4) media reportage immunity. See Lee v. Brooklyn Union Publ’g Co., 103 N.E. 155, 156 (N.Y. 1913), where the New York Court of Appeals replied in unanswerable fashion that the absolute privilege for participants had “little or no relevancy” to fair report. See also Lykowski v. Bergman, 700 N.E.2d 1064, 1070-71 (Ill. Ct. App. 1998) (distinguishing a complainant’s absolute judicial privilege to file a bar complaint from his or her right to disseminate it outside the disciplinary system or claim fair report protection) (see infra note 1535); Stevenson v. News Syndicate Co, 96 N.Y.S.2d 751 (App. Div. 1950) (“The privilege which we are here considering is not that which attaches to judicial proceedings. We are concerned not with the right of a party to make charges, but with the right of defendant to publish them.”), aff’d on other grounds, 96 N.E.2d 187 (N.Y. 1950); Wright v. Grove Sun Newspapers Co., Inc., 873 P.2d 983, 991 (Okla. 1994) (the majority criticized the dissent for failing to distinguish the “status-based immunity” at a prosecutor holding a press conference and the “transaction-based immunity” of the fair report republisher). Under California’s simplistic approach an attorney’s negotiations with opposing counsel as to litigation contemplated in good faith but not filed, generally covered by the judicial proceedings privilege, see Elder, \textit{Defamation}, supra note 1179, §§ 2:9, at 2-60-2-62, 2:11, at 2-74-76, would be entitled to fair report “under 47(4)!”
\item \textsuperscript{1498} See supra note 1497.
\item \textsuperscript{1499} Elder, \textit{Defamation}, supra note 1179, § 3:10, at 3-31 to -32 n.5. See also infra note 1501.
\end{itemize}
Amendment and expressly rejected the rationale of the “leading” case which led to the “history of the proceedings” doctrine.\textsuperscript{1501}

\textsuperscript{1501} Id. at 417, 429-30. In \textit{Hayward v. Watsonville Register-Pajaronian \\& Sun}, 71 Cal. Rptr. 295, 298 (Ct. App. 1968), the court cited \textit{Glenn v. Gibson}, 75 Cal. App. 2d 649 (Ct. App. 1946). \textit{Glenn} cited to the two leading anti-\textit{Comment h} cases which \textit{Hayward} then quoted from: \textit{McClure v. Review Publishing Co.}, 80 P. 303, 305 (Wash. 1905) (granting a qualified privilege to defendant’s reportage of “the acts and theories and representations of the officers of the law in relation to the pursuit, trial, and acquittal of the plaintiff”) (emphasis added); \textit{Kilgore v. Koen}, 288 P. 192, 196 (Or. 1930) (noting that “[t]he public was entitled to know through the newspaper whether there were reasonable circumstances connected with the matter upon which to base the proceedings and arrest the defendant . . . The sheriff and his deputies had the right to detail the circumstances, and their theories based upon the circumstances, in regard to the arrest and it was proper for the newspaper to publish the same . . .”) (emphases added). \textit{McClure} and \textit{Kilgore} involved truly appalling facts. \textit{McClure} involved a detailed depiction of plaintiff/detainee as the “queen of burglars” and identified as such by a co-defendant—the court conceded that defendant’s article had a “sensational and somewhat flamboyant and embellished style.” \textit{McClure}, 80 P. at 303, 305. \textit{Kilgore} involved a detailed delineation of police theories about a theft, an in-depth assessment of evidence supporting the arrest, and a blow-by-blow refutation of the criminal defendant’s anticipated defense. \textit{Kilgore}, 288 P. at 193-94. The facts of these two leading cases opposing \textit{Comment h} “bear persuasive witness to the need for the \textit{Comment h} limitation by exemplifying the great variety of “incredibly damaging and unreliable information that can emanate from police sources.” \textit{ELDER, DEFAMATION}, supra note 1179, §3:10, at 3-31 to -32 n.5; \textit{ELDER, FAIR REPORT}, supra note 1185, at 104-05 n.45. See also a parallel California case, \textit{Rollenhagen v. City of Orange}, 172 Cal. Rptr. 49, 56-57 (Dist. Ct. App. 1981) (an outrageous case involving a consumer complaint investigation into alleged overcharges for auto repairs, with prearranged video coverage by the media of plaintiff’s arrest for a minor ordinance violation). The “public supervision” rationale in cases like \textit{Kilgore} has been scathingly refuted by the Vermont Supreme Court in \textit{Lancour v. Herald \\& Globe Assn.}, 17 A.2d 253 (Vt. 1941). The court determined that:

\[\text{n}o\text{ doubt it is desirable that the public may know that the police and other officials charged with the duty of detection and arrest . . . are acting upon reasonable grounds. . . . But, weighing the social values involved, it seems better to confide in the diligence and discretion of such officials, rather than that any person should be subjected to unmerited obloquy through the publication of false accusations made to them in the course of their investigations, the tendency of which is . . . “to prejudice those whom the law still presumes to be innocent and to poison the sources of justice.”}\]

\textit{Id.} at 259. It is extremely doubtful that the \textit{McClure-Kilgore} rule would be approved by the California Supreme Court in light of its overall analysis and frame of reference in \textit{Brown v. Kelly Broadcasting Co. Brown}, 771 P.2d at 406. See supra text accompanying notes 771-773, 1115, 1499-1501.

More specifically, \textit{Brown}’s analysis of the court’s own jurisprudence cited precedent dramatically at odds with \textit{McClure-Kilgore}. \textit{Brown}, 771 P.2d at 420-23. The court referenced its decision in \textit{Gilman v. McClatchy}, 44 P. 241 (Cal. 1896). \textit{Id.} at 416-417. In that case defendant’s reporter had gathered evidence of an alleged rape from the purported victim and her friends in the presence of another reporter and the chief of police. \textit{Id.} at 241. The article was published an hour after a formal warrant was issued—the latter did not, however state any of the circumstances of the alleged rape. \textit{Id.} The court specifically rejected a Section 47(4) qualified privilege of “fair report,” concluding it was “not, and does not purport to be” an account covered by 47(4). It was “gathered . . . principally at second-hand from the neighborhood friends [of the purported victim] and gossips.” \textit{Id.} at 242. Although true as to what they told her, it was not true under the truth/justification defense. \textit{Id.} The \textit{Gilman} court specifically reaffirmed the republisher liability rule. \textit{Gilman}, 44 P. at
See supra Part VII.A. The Gilman court then excoriated the media for contending that this information was protected by 47(3) as something the newspaper had a right to publish and readership had a right to read:

[T]heir contention resolves itself to this . . . The people have the right to read the news. Any story gleaned by a reporter as this was gleaned, and published in the ordinary course of newspaper business, without personal malevolence against the victim of the tale, should be held privileged. In support of this contention, there is neither authority, law, nor justice. . . .


It is argued that a newspaper in this day and age of the world when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it had heretofore been understood . . . [N]o sophistry of reasoning, and no excuse for the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful. . . .

Brown, 771 P.2d at 417 (emphasis added). The Brown court noted that Gilman had been explicitly validated by Newby v. Times-Mirror Co., 160 P. 233, 236 (Cal. 1916), and Earl v. Times-Mirror, 196 P. 57, 70-71 (Cal. 1921). An analysis of the rest of the McAllister excerpt quoted in greater detail in Gilman demonstrates that the longer quote was in direct response to and rejection of defendant newspaper’s contention in McAllister it was engaged in “fair report,” “a true and correct account” of a felony and arrest of plaintiff. McAllister, 43 N.W. at 433. The court specifically held that this privilege did not apply in light of defendant’s unfair account of the legal proceedings at issue. Id. at 436-37. It then gave an extended rationale, partly quoted in Brown, supra. Another part of Gilman’s extended quote from McAllister is directly on point and refutes the expansive McClure-Kilgore doctrine:

[T]he reporter for a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates, out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. . . .

Gilman, 44 P. at 243 (emphasis added) (internal quotation marks omitted). This was undoubtedly the view intended to be incorporated into 47(4). It is difficult to believe that the court which issued Brown would suddenly reverse its policy by adopting a policy under 47(4)’s absolute privilege after having expressly and powerfully disavowed such as to 47(3)’s qualified privilege.
Fortunately, the majority of Federal circuits explicitly or implicitly reject Medico, its motley crew and the bizarre California approach, as do the overwhelming majority of pre-Medico and post-

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1502. Gertz v. Robert Welch, Inc., 680 F.2d 527, 536-37 n.14 (7th Cir. 1982) (cryptically rejecting the application of fair report to an unidentified “big Irish cop” with access to plaintiff’s/attorney’s police intelligence file: “A secret police file hardly qualifies as a report on a public proceeding. Nor does the repetition of this information by a public official, a police officer, make this a report of a public proceeding”) (see supra note 169 and the text accompanying note 1381); Bufalino v. Associated Press, 692 F.2d 262, 272 (2d Cir. 1982); Doe v. Doe, 941 F.2d 280, 288 n.9 (5th Cir. 1991) (see infra note 1504); Law Firm of Daniel P. Foster v. Turner Broad., 844 F.2d 955, 960-61 (2d Cir. 1988) (distinguishing accurate reportage of a high ranking FBI spokesperson’s official statements about execution of a search warrant from off-the-record statements of police); Levine v. CMP Publ’g, 738 F.2d 660, 668 (5th Cir. 1982) (in dicta suggesting that it was “by no means clear” that Section 611 applied to a telephone statement by a lawyer in the state attorney general’s office); Cianci v. New Times Pub’g Co., 639 F.2d 54, 70-71 (2d Cir. 1980) (noting in dicta that the Comment h rule would have denied any privilege to the police file and the criminal complainant’s statement).

1503. See Elder, Fair Report, supra note 1185, § 1:10 at 87-88; Harper Et Al., supra note 1180, § 5:24, at 206 (“A conversation between a reporter and a detective is not a public event that requires, or merits, coverage under this privilege. And extra-judicial defamation of the citizenry by the police is not a vital process of democratic government . . .”); Prosser & Keeton, supra note 1180, at 836 (“There is also no privilege to report the unofficial talk of policemen, as distinct from their official utterances or acts, such as an arrest.”). For a few examples of the great volume of case law rejecting fair report under such circumstances, see the following: Pittsburgh Courier Publishing Co. v. Lubore, 200 F.2d 355, 356 (D.C. Cir. 1952) (finding that dissemination of complainant’s affidavit to the police to the press by complainant’s attorney was not covered by fair report) (“[F]ew, if any courts would extend the privilege so far as to cover reports of charges made, without results, to a policeman or prosecutor.”); aff’d, 101 F. Supp. 234, 235-36 (D.D.C. 1951); Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 89 (D.C. Ct. App. 1980) (finding that “a hot line” telephone system established by a public information office as a “joint venture” with the local media was not privileged as fair report); Wood v. Constitution Publishing Co., 194 S.E. 760, 764-67 (Ga. Ct. App. 1937) (finding statements of a jailor and a federal commissioner who had conducted an arraignment were not privileged—the latter’s comment during a “customary call” by a reporter at his office was “outside the discharge of any official duty” and “made only as a statement by one man to another as to what had transpired in a court proceeding and at other places”), aff’d, 200 S.E. 131 (Ga. 1938) (“equally divided court”); Henderson v. Evansville Press, 142 N.E.2d 920, 924-26 (Ind. Ct. App. 1957) (finding that a demurrer was in error where a report of a judge’s statements did not show whether such were “in or out of the courtroom, or while the Judge was in the course of his official duties and in the exercise of judicial function”); Rogers v. Courier Post Co., 66 A.2d 869, 872-75 (N.J. 1949) (finding an account of a “heated colloquy” between a chief of police and an assistant prosecutor after termination of court proceedings was neither a “judicial” nor an “official statement” “by . . . county prosecutors . . . in investigations in progress or completed by them” under the state “fair report statute”—“oral statements made after the legal proceeding has concluded, or after the court has adjourned, although uttered in a court room, are not part of a judicial proceeding and are not protected by the privilege”); Kelley v. Hearst Corporation, 157 N.Y.S.2d 498, 500-02 (App. Div. 1956) (finding that a report based on what “police said privately to newspaper reporters about “acts of other persons” was not a “public and official proceeding” under the New York statute; emphasizing how “closely circumscribed” the privilege was, noting that “proceeding” could not be easily extended to “merely informal statements or assertions by
The leading case is the Second Circuit’s well-considered opinion in Bufalino v. Associated Press.¹⁵⁰⁵

¹⁵⁰⁴ Doe v. Doe, 941 F.2d 280, 288, n.9 (5th Cir. 1991) (“[D]ata proffered by police officers in connection with an arrest are likely not [privileged] . . . the data . . . were provided to the media in guises almost assuredly unofficial and undeserving of public record status.”) (dicta); Stone v. Banner Publ’g Co., 677 F. Supp. 242, 245-47 (D. Vt. 1988) (finding that attribution of statements to a police inspector and his investigative report did not entitle defendant to fair report—police reports without judicial action did not have “the same qualities of fairness or truthfulness as statements of fact resulting from a judicial investigation”); Wiemer v. Rankin, 790 P.2d 347, 354 (Idaho 1990) (finding that statements of an investigator that went beyond the police reports (the court did not decide if the latter were privileged) were not privileged: “[P]rivate statements of police officers made to members of the news media are not [privileged]”) (the court followed Kelley, supra note 1503); Jones v. Taibbi, 512 N.E.2d 260, 267, 270 (Mass. 1987) (holding that “unofficial statements by police sources [were] outside the scope” of fair report; however, if taken from an official statement by a police chief at a press conference, it was privileged); Reilly v. Associated Press, 797 N.E.2d 1204, 1214-15 (Mass. Ct. App. 2003) (finding that fair report did not apply to witness statements to police, even if in an official report where no “official police action” was taken— “[s]uch unconfirmed hearsay” has “neither the authority nor the importance to the public” that other statements or documents covered by fair report have; this information would not “further the public’s interest in learning of official conduct,” as such “depend wholly on the will of a private individual, who may not even be an officer of the court”); Steer Lexleon, Inc., 472 A.2d 1021, 1024 (Md. Ct. Sp. App. 1984) (applying fair report to the official weekly press release by the state police synthesizing the week’s arrests and distinguishing the weekly publication of “some unofficial version of events furnished by a policeman at a crime scene, [or] with some unattributed ‘leak’ or offhand prediction, [or] with some characterization or interpretation of events by a prosecutor in a courtroom corridor . . .”). Furgason v. Clausen, 785 P.2d 242, 245-47 (N.M. Ct. App. 1989) (finding that information supplied by city police and mayoral office employees was not covered: “Not all information released by city or state officials to the media falls within the ambit of the fair and accurate report privilege”); Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 991-92 (Okla. 1994) (granting fair report protection to a prosecutor’s press conference and distinguished the cases denying fair report to “private conversations between media and police officers and their source”) (see supra text accompanying notes 1083-1098).

Compare Yoke v. Nugent, 321 F.3d 35, 39, 43 (1st Cir. 2003) (finding that a police chief’s interview with the media in his official capacity concerning plaintiff’s arrest relying on a police incident report on domestic abuse constituted an “official statement”).

Bufalino rejected fair report where the defendant accurately reported charges from unidentified and undisclosed “officials” of the Pennsylvania Crime Commission that the plaintiff had “alleged mob ties.”\textsuperscript{1506} Applying Pennsylvania law,\textsuperscript{1507} the court cited but ignored \textit{Medico}, holding that “[o]nly reports of official statements or records made or released by a public agency are protected by . . . [Section] 611. Statements by lower-level employees that do not reflect official agency action cannot support the privilege.”\textsuperscript{1508}

A number of federal appellate decisions, including \textit{Medico} and its ill-conceived progeny, have referenced First Amendment “considerations” as “help[ing] resolve”\textsuperscript{1509} or “buttress[ing]”\textsuperscript{1510} determinations of fair report as a matter of state law. One decision erroneously construed \textit{Greenbelt Publishing Association v. Bresler}\textsuperscript{1511} and \textit{Time v. Pape}\textsuperscript{1512} as adopting a fair report rule.\textsuperscript{1513} Yet another

\textsuperscript{1506} Bufalino, 692 F.2d at 267-69.

\textsuperscript{1507} Id. at 269-72. This included Pennsylvania’s shield statute. Although defendants could not be required to disclose their sources, they could not at the same time attempt to base a Section 611 privilege on such. Without disclosure of identity the issue of whether the source’s statements “constituted official action” under Section 611 could not be determined. Id. at 272. Compare the accurate reportage of investigation as pseudo-truth scenario with discussion supra text accompanying notes 1225-1349. One of the anomalies of the absolute defense of such “truth” is that a media defendant could claim and prove such without ever having to identify any specific source that the media relied on or even that it had one. It would be enough that after the fact defendant could produce testimony by affidavits or otherwise that an investigation of plaintiff had in fact been occurring.

\textsuperscript{1508} Bufalino, 692 F.2d at 269-72 (emphasis added). There is a significant minority view opposing Comment h. Few of the cases existing in 1977 at the time of adoption of Section 611 in the RESTATEMENT (SECOND) OF TORTS actually provided a policy rationale for this expansive interpretation. When they did, it involved the “tepid,” “bootstrapping,” dubious rationale, see ELDER, FAIR REPORT, supra note 1185, § 1:10, at 89, referencing the public’s “need to know” via the media whether “there were reasonable circumstances connected with the matter upon which to base the proceedings and arrest the defendant.” Kilgore v. Koen, 288 P. 192, 196 (Or. 1930). See Hayward v. Watsonville Register-Pajaronian & Sun, 71 Cal. Rptr. 295, 299 (Ct. App. 1968). See \textit{supra} note 1501.

\textsuperscript{1509} Medico, 643 F.2d at 143. Many of the leading precedents for the minority view opposing Comment h pre-date Sullivan and were clearly attempting to “circumvent the niggardly application” of common law privileges and the residual, resulting strict liability imposed even where defendant acted reasonably and/or in good faith. ELDER, FAIR REPORT, supra note 1185, § 1:10, at 89. There seems to be little modern justification for this expansive minority view of fair report rejecting Comment h (particularly according it absolutist status!) in light of the extensive First Amendment protection accorded by the Supreme Court. \textit{See} discussion \textit{supra} Part II.

\textsuperscript{1510} Reeves v. Amer. Broad. Cos., 719 F.2d 602, 603, 606, 607 (2d Cir. 1983) (\textit{dictum}).

\textsuperscript{1511} \textit{See} \textit{supra} text accompanying notes 86-93.

\textsuperscript{1512} \textit{See} \textit{supra} notes 121, 113-148 and \textit{infra} note 1514 accompanying text.
correctly pointed out that no such doctrine was recognized by Pape; it merely gave “explicit recognition” to the “sensitive First Amendment problems” in republication of third party statement scenarios.\footnote{Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1097 (4th Cir. 1993).} One case cited Edwards’ neutral reportage doctrine and the Medina line of cases as evidencing federal tribunals’ “expressed reluctance” to impose republisher liability.\footnote{Medico, 643 F.2d at 144-45 & n.36.} Others discussed the Cox Broadcasting-Landmark Communications line of precedent\footnote{Id. at 145 & n.37.} as “point[ing] toward”\footnote{Id. at 143-44 & n.37} a constitutionalization of fair report, while another saw no need to reach this issue in light of an absolute privilege under state law.\footnote{Dorsey v. Nat’l Enquirer, Inc. 973 F.2d 1431, 1434 (9th Cir. 1992).} A single decision circumvented the “unsettled” qualified privilege versus “absolute” privilege issue as to non-public matter by adopting a flatly erroneous \textit{per se} rule holding that accurate reportage of an official internal document barred constitutional malice as a matter of law.\footnote{Compare White v. Fraternal Order of Police, 909 F.2d 512, 513 (D.C. Cir. 1990) (since defendants’ reports of FOP letters (which were the basis of a police department’s internal commission’s investigation) were “substantially true” (\textit{i.e.}, “accurate”), plaintiff

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\footnote{Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1097 (4th Cir. 1993). The court said Section 611 was “strengthened and given constitutional mettle” by Greenbelt Publishing and Pape. Later, however it correctly conceded that what was accurately reported in the former was “rhetorical hyperbole,” undercutting its conclusion.\textit{ See supra text accompanying notes 88-93. Unbelievably, the court called this rhetorical hyperbole, the core of the Court’s holding, a “nuance.” Chapin, 999 F.2d at 1097 n.11. This erroneous construction of Court precedent was obviously the basis for Chapin’s fallacious conclusion that courts had “severely limited” the republication rule. \textit{Id.} at 1097.}

\footnote{Medico, 643 F.2d at 144-45 & n.36. The court noted some authors had interpreted \textit{Pape} as “elevating” fair report to constitutional status. References included Joel D. Eaton, \textit{The American Law of Defamation Through Gertz v. Welch, Inc. and Beyond: An Analytical Primer}, 61 VA. L. REV. 1349, 1362 n.46 (1976), and \textit{William Prosser, HANDBOOK OF THE LAW OF TORTS} 798 & n.13 (4th ed. 1971). Note that the latter’s constitutionalization analysis was dropped in the next edition in favor of a quite different conclusion.\textit{ See Prosser & Keeton, supra note 1180, at 838-39 (noting that there is “substantial judicial authority” in opposition to Section 611 of the \textit{RESTATEMENT (SECOND) OF TORTS} and “the result does not appear to be constitutionally mandated”).}

\footnote{Medico, 643 F.2d at 145 & n.37. The court interpreted Edwards as having “generalized this [First Amendment] concern to create a constitutional privilege whenever the press republishes defamatory comments while reporting on newsworthy events.” For an extensive critique of Edwards’ egregious abuse of precedent see \textit{supra} Part IV. For a detailed critique of Medina, see \textit{supra} notes 663-697.}

\footnote{Id. at 143-44 & n.37 (the “public supervision” and “informational” analyses in these two cases “provide a constitutional basis” for extending fair report to “a controversy which [like \textit{Medico}] . . . arises from a private figure’s damage action for publication of reports not available to the public”—Judge Adams conceded some language in \textit{Landmark Communications} indicates the Court may have “limited its reasoning” to public officials); Reeves v. American Broadcasting Companies, 719 F.2d 602, 607 (9th Cir. 1992) (\textit{dicta}). For a detailed analysis of the limitations of this line of cases see \textit{supra} text accompanying notes 415-444. \textit{See also Dorsey v. Nat’l Enquirer, Inc. 973 F.2d 1431, 1434 (9th Cir. 1992).}

\footnote{Medico, 643 F.2d at 143.}

\footnote{Dorsey, 973 F.2d at 1434.}

\footnote{Compare White v. Fraternal Order of Police, 909 F.2d 512, 513 (D.C. Cir. 1990) (since defendants’ reports of FOP letters (which were the basis of a police department’s internal commission’s investigation) were “substantially true” (\textit{i.e.}, “accurate”), plaintiff

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Each of the above lines of cases has been dealt with in detail elsewhere.1520 None of them provides substantial support for an absolute First Amendment based doctrine of fair report as to non-public matters. Any suggestion to the contrary is "highly questionable."1521 The Supreme Court has provided some substantial guidance to the contrary in Nixon v. Warner Communications,1522 which cited very approvingly cases rejecting fair report in several settings where state law deemed confidentiality/privacy considerations paramount:1523 matrimonial matters1524; cases supporting the "mere"
pleading rule\textsuperscript{1525}, and non-public preliminary disbarment proceedings.\textsuperscript{1526} On the other hand, in \textit{Smith v. Daily Mail}, the Court broadly and ambiguously opined that “[a] free press cannot be made to solely rely upon the sufferance of government to supply it with information.”\textsuperscript{1527} Furthermore, in \textit{Landmark Communications v. Virginia}, the Court refused to authorize criminal sanctions for media disclosure of accurate investigative information about a sitting judge in the midst of confidential, non-final proceedings of a judicial removal commission.\textsuperscript{1528}

Two modern decisions have confronted the \textit{Landmark Communications} analogy in the context of non-final and confidential professional disciplinary proceedings. In \textit{Gannett Company v. Kanaga}, the Delaware Supreme Court applied \textit{Landmark Communications} to reportage of a pending complaint before the medical society.\textsuperscript{1529} The reporter had relied on and reported the complainant’s viewpoint, together with her surreptitiously recorded and deceptive conversation with plaintiff.\textsuperscript{1530} The issue was extensively briefed by major heavyweights in the newspaper world filing as \textit{amicus curiae}.\textsuperscript{1531} Consider the audacious thrust of the media’s argument: media defendants have an absolute First Amendment right to accurately report misconduct charges pending before any and all “official or quasi-official disciplinary bodies”; a disciplinary complaint against a doctor is a matter of public concern at least as great as that of a judge.\textsuperscript{1532}

details of a divorce case."). See \textit{supra} notes 1397, 1399 and accompanying text (discussing New York precedent on point).

\textsuperscript{1525} Nixon, 435 U.S. at 598 (noting that “courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption”) (citing Sanford v. Boston Herald-Traveler Corp., 61 N.E.2d 5, 6 (Mass. 1945) (involving an alienation of affections suit); Park v. Detroit Free Press Co., 40 N.W. 731, 734-735 (Mich. 1888) (“bastardy petition”); Munzer v. Blaisdell, 48 N.Y.S. 2d 355, 356 (App. Div. 1944) (constituting a libel suit involving publication of a “hospital summary” alleged to involve words “so shocking and scandalous” that the court suggested plaintiff move to seal the court records).

\textsuperscript{1526} Nixon, 435 U.S. at 598. The court cited as an example supporting the “mere pleading” rule Cowley v. Pulsifer, 137 Mass. 392, 393-96 (1884) (involving the filing of a disbarment petition). The Court also cited as an illustrative example “sources of business information that might harm a litigant’s competitive standing.” \textit{Id.} at 598.


\textsuperscript{1528} 435 U.S. 829, 841 (1978). See \textit{supra} text accompanying notes 105-144.

\textsuperscript{1529} Gannett Co. v. Kanaga (\textit{Kanaga II}), 750 A.2d 1174, 1179 (Del. 2000).

\textsuperscript{1530} 750 A.2d 1174, 1179 (Del. 2000). See also Gannett Co. v. Kanaga (\textit{Kanaga I}), 687 A.2d 173 (Del. 1996).

\textsuperscript{1531} \textit{Kanaga II}, 750 A.2d at 1177, 1181 n.2.

\textsuperscript{1532} \textit{Id.} at 1182.
The Delaware Supreme Court was not impressed with the media’s arguments and distinguished *Landmark Communications* on several grounds.\(^\text{1533}\) The case before the court did not involve a public official or public figure and did not involve a matter of public concern.\(^\text{1534}\) It concerned only private treatment of a patient and an investigative process enveloped in confidentiality to protect both patient and physician.\(^\text{1535}\) Most importantly, the matter involved a

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1533. *Id.*
1534. *Id.*
1535. *Id.* The Kananga II court cited *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1047, 1047-50 (N.Y. 1990), where the court followed the Court’s two step access to the proceeding analysis. Such an analysis asks “whether the place and process have historically been open to the press and general public” and “whether public access plays a significant positive role in the functioning of the particular process in question” (quoting *Press-Enterprise Co. v. Superior Court*, 428 U.S. 1, 8 (1986)). The court also rejected greater protection under the New York Constitution, 564 N.E.2d at 1049, or under state common law: “The State’s policy also evidences a sensitivity to the possibility of irreparable harm to a professional’s reputation from unfounded accusations . . . our Court has recognized that professional reputation ‘once lost, is not easily restored.’” *Id.* at 1051. Kanaga II, 750 A.2d at 1181-82 (reaffirming its earlier analysis). See also the excellent opinion in *Lyzkowski v. Bergman*, 700 N.E.2d 1064, 1070-71 (Ill. App. Ct. 1998), where the court followed the “better view” according complainants to lawyer disciplinary panels an absolute privilege as parties to a quasi-judicial proceeding. However, it denied such as to dissemination to third parties and the press. The court also rejected applying fair report to defendant’s forwarding of his complaint to third parties, finding these charges “simply not analogous” to charges in a circuit court “or other public forum.” Applying the “agency” rationale, the court held that the public had no right to see or review “private and confidential” charges prior to issuance of a formal complaint. Accordingly, defendant could not assert it was “acting as a substitute for the public eye.” *Id.* at 1072 (quoting *PROSSER & KEETON*, supra note 1180, at 836). Under this view “sealed records and documents withheld from the public eye under court order may not be so reported.” *Id.* at 837. See also *Fortenbraugh v. New Jersey Press*, 722 A.2d 568, 574-75 (N.J. App. Div. 1999), where the court held that documents subject to a sealed confidentiality order in shareholder litigation were not covered by “fair report,” and that any other result would negative “the salutary effects of keeping some evidence confidential.” *Id.* at 575. In addition, under the “agency” rationale public policy was to facilitate “the public’s awareness of what actually happens at public proceedings.” That policy “necessarily must yield” where a court has determined that “certain sensitive but gossipy matters should remain confidential to protect reputation.” Inclusion of plaintiff’s name in a letter inadvertently made available did not entitled it to fair report. *Id.* See also *McCurdy v. Hughes*, 248 N.W. 512, 516-17 (N.D. 1933) (finding that the fair report statute did not apply to preferment of charges against an attorney prior to the state supreme court’s direction that a “proceeding in disbarment” be pursued following a state bar investigation; the complaint, “secret . . . in its preliminary stages” was not a “public proceeding before the court”); *HARPER ET AL.*, supra note 1180, § 5:24, at 202 (fair report does not apply to “proceedings of which [the public] is not entitled to be informed”). The *PROSSER & KEETON* treatise relied primarily on *Danziger v. Hearst Corp.*, 107 N.E.2d 62, 65 (N.Y. 1952). At that time New York’s fair report statute contained “other public proceeding” language qualifying the reference to “judicial” proceedings. *Id.* The court concluded that such language necessarily excluded nonpublic proceedings by implication. *Id.* Any other interpretation would “do violence to the public policy” of the statute and effectively negate other provisions where the legislature had similarly “directed preservation of secrecy.” *Id.*
private action for damages, not a criminal prosecution by state action that might “prove a form of censorship” as in *Landmark Communications.*

The other opinion, *Lence v. Hagadone Investment,* involved the defendants’ reportage of accusations of attorney misconduct pending before the state practice commission. The defendants learned about the accusations from the complainant and a nonpublic police report. The court’s opinion is confused and confusing. Initially, it correctly sketched out *Landmark Communications*’ holding. However, it then cited *Smith v. Daily Mail* and *The Florida Star v. B.J.F.* for two broad propositions: the protection accorded “truthful information” has been extended to private persons, and confidential matters of attorney discipline are at least as important as the identities of rape victims and juvenile offenders. Of course, the latter proposition ignores the fact that alleged perpetrators and their victims have traditionally been held to be matters of public

At the urging of media lobbyists a statutory deletion of “public” was passed but was then vetoed by the Governor in 1952. It was repassed and signed by a different governor in 1956. He tried to “reinterpret” the deletion by “executive wishful thinking” to have no impact on the case law denying fair report to preliminary divorce or matrimonial matters. Later, in *Shiles v. News Syndicate,* 261 N.E.2d 251 (N.Y. 1970), the New York Court of Appeals in a 4-3 decision creatively construed the modification to have no impact in such cases—a conclusion the dissenters ridiculed as a “vain hope.” *Id. *at 257 (Breitel, J., with Scileppi, J., and Jason, J., dissenting). For another powerful defense of inapplicability of fair report to non-public matrimonial proceedings see *Stevenson v. News Syndicate Co.*, 96 N.Y.S.2d 751, 753-56 (App. Div. 1950), *aff’d on other grounds,* 96 N.E.2d 187 (1950). For a more detailed analysis see *Elder, Fair Report,* supra note 1185, § 1:15, at 139-40. Of course, New York’s statutory abolition of the open-to-the public requirement of the common law has little, if any, impact in a jurisdiction with a common law tradition focusing on its underlying “policy consideration . . . that the public should be informed of public proceedings.” *Pearce v. Courier-Journal,* 683 S.W.2d 633, 636 (Ky. Ct. App. 1985). Compare the parallel language in the California statute, which has been perversely interpreted to the contrary. See supra text accompanying notes 1489-1501.

Following its correct fair report analysis, the court made a curious statement that fair report extended to “opinion, not express or implied misstatements of fact.” *Id.* at 1183. In fact, as its page citation to *Kanaga I,* 687 A.2d at 182, made clear, the court meant “fair comment,” not fair report. *Kanaga II,* 750 A.2d at 1182-83.

Following its correct fair report analysis, the court made a curious statement that fair report extended to “opinion, not express or implied misstatements of fact.” *Id.* at 1183. In fact, as its page citation to *Kanaga I,* 687 A.2d at 182, made clear, the court meant “fair comment,” not fair report. *Kanaga II,* 750 A.2d at 1182-83.

*Compare* the view of the partial dissenters (Trieweiler, J., with Hunt, J., dissenting in part, concurring in part), where *Landmark Communications* was correctly viewed as involving “truthful” information, criminal sanctions, not civil liability, and matters concerning a judge—information of “utmost concern.” They also noted that *Daily Mail* and *Florida Star* had also involved attempts to “criminalize punish” the press in disseminating “truthful” information. *Id.* Note that *Florida Star* actually involved an attempt to impose civil liability based on a criminal statute under a negligence per se theory. *Fla. Star v. B.J.F.* 491 U.S. 524, 528-29, 539-40 (1989).
significance, unlike attorney-client disputes, which are viewed as “private dispute[s] without social or political significance.”

Ultimately, however, the Lence court relied specifically on the plaintiff’s failure to meet the “threshold burden” of proving falsity under *Philadelphia Newspapers v. Hepps*. Accordingly, the First Amendment protected the matters as “truthful information about a matter of public significance.” This is erroneous. Neither the *Landmark Communications* line of precedent nor *Philadelphia Newspapers* provides a substantial truth defense for mere accurate reportage. As a corollary, the plaintiff’s burden of proving stratal falsity is not barred by inability to prove inaccurate reportage.

Two *Medico* progeny illustrate particularly well the boundaryless nature of the marauding predator it has wrought. A New Jersey intermediate appellate case, *Orso v. Goldberg*, demonstrates how media defendants have attempted to commingle fair report and neutral reportage in to an absolute privilege to protect reports of statements by one public official about another public official. The purported rationale is promotion of the “paramount” “public interest” in reporting “conditions and situations existing in government which affect the public.” Under facts indistinguishable

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1542. *See the vigorous partial dissent*, where the matter was properly characterized as of no “significant public interest” and involving a private person on a matter of purely private concern under *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (U.S. 1985). 853 P.2d at 1240 (Trieweiler, with Hunt, J., dissenting in part, concurring in part). For a detailed analysis of *Dun & Bradstreet* see *supra* text accompanying notes 244-253.


1544. *Lence*, 853 P.2d at 1236. This was apparently based on the court’s interpretation of both the *Philadelphia Newspapers* and *Landmark Communications* lines of precedent.

1545. *See supra* text accompanying notes 254-293, 316-326, 405-444.

1546. *See supra* text accompanying notes 254-293, 316-326, 405-444.


1548. *Id.* The co-defendants were the city councilman source and the reporting media defendants. *Id.* at 787. An amicus curiae brief was filed by the New Jersey Press Association. *Id.* at 788. The trial judge had denied fair report on a motion to dismiss in advance of either answer or discovery on the ground that a private interview did not constitute part of an “official proceeding.” *Id.* at 787. The appellate division granted review and reversed for entry of summary judgment. *Id.* In other words, the matter was rejected at the earlier possible preliminary stage. Why this was done and why there was no jury issue of constitutional malice is demonstrated infra text accompanying notes 1550-1554. After citing *Medico* and *Chapin*, the court also cited to *DiSalle v. P.G. Publishing Co.*, 544 A.2d 1345, 1362 (Pa. Super. Ct. 1988), *appeal denied*, 557 A.2d 724 (Pa. 1989), the Pennsylvania case containing extensive dicta supporting neutral reportage, *see supra* note
from Norton v. Glenn, Orso effectively extended absolute protection to reportage of non-public interviews in which a city councilman charged police officials and the police department with criminal conduct and appended a statement that they would be indicted.\textsuperscript{1549}

Obviously, Orso carves out a huge exception to possible liability under the Court’s Sullivan jurisprudence.\textsuperscript{1550} Defendants were held not liable even though the report expressly evidenced on its face that the charges lacked merit.\textsuperscript{1551} This was compellingly demonstrated by several factors. The account denominated the charges of wrongdoing as “persistent and unsubstantiated.” In addition, the plaintiffs had offered the FBI access to all private and public records to refute the charges, the county prosecutor had found the charges meritless, and the New Jersey FBI bureau chief had concurred in the charges’ baselessness and invalidity.\textsuperscript{1552} In the face of these factors, the Orso court found the report to be a “full and fair” media exposition that

540, and then opined that all of these cases shared a common policy feature: “Courts have recognized the importance of permitting the news media to report on issues of important public interest without the fear of being held to have adopted the defamatory charge of another.” Orso, 665 A.2d at 789.

\textsuperscript{1549} 665 A.2d at 788-89. It was enough that the interview “reasonably related to the public disclosure [apparently the “same allegations” had been made repeatedly, including at one public council meeting] or public controversy.” Id. at 789-90. The Orso court purportedly followed its decision in Molnar v. Star-Ledger, 471 A.2d 1209, 1211-14 (N.J. App. Div. 1984), involving an interview by a fire chief with a reporter. However, even a cursory analysis of Molnar demonstrates that no absolute privilege of fair report was adopted. The court expressly did not reach this issue. Id. at 1214. Indeed, the court apparently viewed the privilege as defeasible by “actual malice” and found that the reporter’s failure to contact either police or plaintiff after receiving an informal report from an official source was not actionable—no evidence indicated the reporter “knew or had reasonable grounds to believe the statement was “not truthful.” Id. at 1214 (emphasis added). Of course, this is merely a qualified privilege, not the absolute privilege adopted by Orso, which accorded the media a privilege despite numerous indicia of just such knowledge or “reasonable grounds to believe” the matter was false.

\textsuperscript{1550} See supra Parts I.B, II. This is made clear by the breadth of the rule stated. See supra text accompanying notes 1547-1549, and other equally broadly stated versions in the text, Orso, 665 A.2d at 788-90, including, e.g., the “overriding importance of the public interest in the thorough reporting and evaluation of the charges or dispute,” which were disruptive of local government. Id. at 790. At the end, in concluding that summary judgment should have been granted, the court all but praised defendants for “act(ing) reasonably and in the public interest in a matter involving public officials . . .” Id. at 792. The court cited Stockton Newspapers, Inc. v. Superior Court, 206 Cal. App. 3d 966 (Cal. Ct. App. 1988). See the discussion of the latter supra note 1115.

\textsuperscript{1551} Orso, 665 A.2d at 790 (concluding that “an unbiased reading of the article reveals such an exposition of the lack of validity”; noting that the article was so “filled with exculpatory language” as to co-defendant councilman’s charges that plaintiffs cited such as proof of constitutional malice by the media co-defendant).

\textsuperscript{1552} Id. (the court again quoted the article, including a statement that the exculpatory statement of the F.B.I. was “unalusual”).
refuted constitutional malice. This interpretation bears no resemblance to the Court’s First Amendment jurisprudence and parallels the extraordinarily dubious Medina line of cases.

The second decision illustrating Medico’s predatory impact on reputation is Harper v. Walters, a federal opinion of the District of Columbia. Harper involved media reportage of an adverse, non-public internal employment action against an attorney/employee for alleged workplace misconduct. In light of Medico’s and White’s rejection of the open-to-the-public limitation, the court found that the only limitation on an “official” action was that it meet some “threshold of reliability.” Citing other D.C. Circuit precedent involving public filings or actions, the court found the EEOC’s adverse employment

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1553. Orso, 665 A.2d at 792. This included interviewing plaintiffs. Id. at 791. Although the court referenced “the conflict” between Section 611 absolutism and other privileges defeasible by knowing or reckless disregard of falsity, it is quite clear that the court looked only at facial accuracy and fairness and not whether the underlying matter reported was in fact known to be false or seriously doubted as true. This is made clear beyond peradventure by its emphasis on facial fairness—there was no showing from plaintiff’s pleadings or certification (there was no discovery!—see supra note 1548) that defendants “ignored any available information” or were “less than thorough” in reportage of their lack of ability to authenticate the charges’ validity. Id. at 792. Defendants’ article “reflects not actual malice and/or negligence but rather full and fair exposition of a matter of obvious public interest and importance.” Id. at 792 (emphasis added). Ordinarily, these facts should have been a libel layer’s dream scenario. See Elder, Defamation, supra note 1179, § 7:12, 7-108 (detailing the “black letter law clearly conclud[ing] generally that ‘a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements’”) (emphasis added).

1554. See supra note 1519. See also supra text accompanying notes 663-697.


1556. Id. at 819-28.


1559. The court specifically relied on three examples—the court’s adoption of the “minority” view as to public civil pleadings upon which no action has been taken (for a suggestion that this so-called “minority” status is in error, see supra note 1429), charges made in conjunction with a grand jury proceeding, and statements in an official arrest log. Harper, 822 F. Supp. at 824-27. The court primarily relied on the analysis of District of Columbia law in Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980), where the court had held that an informal police “hot line” log was not an official report because it was mere hearsay by police about the facts of cases as part of a “joint venture” with the media. Id. at 89. Accordingly, it did “not carry the dignity and authoritative weight” as a record for which the common law sought to provide a reporting privilege. Id. Phillips distinguished, however, an arrest or report of such, following traditional law, see Elder, Defamation, supra note 1179, §§ 3:8-3:10, Elder, Fair Report, supra note 1185, §§ 1.08-1.10, and following Bell v. Associated Press, 584 F. Supp. 128, 129-30 (D.D.C. 1984).
action to be “at least as reliable, if not more so.”\textsuperscript{1560} This limited threshold fulfilled the fair report rationale of “promot[ing] official scrutiny of governmental affairs” “serving the overriding purpose . . . that every citizen should be able to satisfy himself with his own eyes of the mode in which a public duty is performed.”\textsuperscript{1561}

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1560. \textit{Harper}, 822 F. Supp. at 827. Although earlier litigation had found the employment procedure insufficiently formal to be admissible as meeting due process standards in a libel trial—\textit{e.g.}, the allegations were not subject to cross-examination, plaintiff had no right to depose or confront witnesses, no witnesses were questioned in person by the recommending official and some of the affidavits involved hearsay—the court rejected any suggestion that due process-based reliability standards for evidentiary admissibility applied in the fair report context. \textit{Id.} at 826. In admissibility cases any reliability requirement had to be:

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\item substantially more rigorous, since a statement admitted as an exception to the hearsay rule is \textit{admitted for the truth of its content}. No such assumption of veracity applies to official government documents under the fair reporting privilege, where the purpose is \textit{not to establish truth but simple to disseminate information about government proceedings}.
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\textit{Id.} (emphases added). The court found the formal notices of adverse action based on particular acts of sexual harassment to be sufficiently “official.” \textit{Id.} Several complainants were identified, detailed personal statements (and one deposition) were relied on, plaintiff was allowed access to the information used and permitted to present affidavits and other documentary matter in rebuttal, together with an answer. \textit{Id.} He also presented oral arguments in separate hearings before the issuing general counsel and later before Chairman Clarence Thomas. \textit{Id.} at 826-27. Collectively, these factors established the “threshold of reliability” required. \textit{Id.} at 827.

1561. \textit{Id.} at 823, 827 (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (Mass. 1884) (Justice Holmes’ famous opinion which declined to apply fair report to mere civil pleadings). The \textit{Harper} court noted later in its opinion that the documents were not “open to public inspection” under the applicable state statute. \textit{Harper}, 822 F. Supp. at 396. Although the eight year-old subject matter at issue arose and received publicity in the context of the Clarence Thomas hearings (now Justice Thomas was plaintiff’s superior who took final action in the case, allowing plaintiff to retire before final disciplinary action was imposed), \textit{Harper}, 822 F. Supp. at 819-21, the opinion in no way limits the case to such facts. Again, although there is a reference in the constitutional malice analysis to the “extreme public concern” in the accusations at the time they were aired, \textit{id.} at 830, the opinion essentially ignores the Thomas connection and broadly analyzes the issue in terms of the “official act” itself—the adverse employment notification. \textit{Id.} at 823-28.

Of course, \textit{Harper}’s “threshold of reliability” standard flies in the face of the powerful arguments that such personal personnel information is entitled to privacy and not subject to disclosure under the Freedom of Information Act, \textit{see supra} text accompanying notes 1385, 1398, and may possibly result in governmental liability under the Privacy Act, \textit{see supra} note 1470. The \textit{Harper} test is an open-ended invitation to both media conduits and their law-violating sources to engage in collaborative efforts that may undermine, if not largely frustrate, the careful balance of competing interests by Congress. That courts, like \textit{Harper}, following the lead of \textit{Medico}, feel free to ignore this careful balancing of competing interests by the authoritative decision-maker and engage in an \textit{independent judicial assessment} that the public has a \textit{right to know} this type of embarrassing drivel typifies a judicial imperiousness that brings the judiciary into disrepute and leads to unconscionable abuse and unpardonable injury to reputation. \textit{All} three examples, \textit{see supra} note 1559, cited by the \textit{Harper} court involved determinations by the authoritative decision-maker to allow public access to the information at issue after a balancing of competing interests.
Under Harper’s open-ended analysis, it is probable that every formal employment action involving every governmental employer and many independent contractors receiving government funding or functioning under government imprimatur are reportable by the media because of the public interest in the way a “public duty” is performed.\footnote{1562} What justification is there for allowing the media to have the protection of fair report any time a government entity, supervisor or employee decides to embarrass another employee or any time the employer is compelled to disclose such information in the preliminary stages of litigation? Such prototypically private, highly embarrassing information is generally not reachable by state or federal open records statutes and has little to offer other than humiliation.\footnote{1563} But Medico justifies its reportage, a result unconscionable and ridiculous to all but the Jabberwock and those it diminishes by feeding them falsehoods. This case offers a compelling example of why the common law limits fair report to actions and proceedings already open to and accessible by the public.\footnote{1564}

Of course, fair report was not directly before the appellate court in Norton v. Glenn. Medico and its illicit progeny were thus only citable for their purportedly persuasive policy rationales as to why neutral reportage was “perfectly consistent”\footnote{1565} with fair report and why there was “no sound reason” for distinguishing the two.\footnote{1566} To achieve this commonality, the defendants portrayed both as having identical policy underpinnings of “allowing citizens to be fully

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That was the governmental decision-maker’s right and duty, subject to the controls and constraints of the political process. The Court recognized and affirmed this discretion in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975): “If there are privacy interests to be protected the states must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests of the public to know and of the press to publish.” (emphasis added).

\footnote{1562} Harper, 822 F. Supp. at 823, 824, 827, 828-30. In light of the constitutional malice limitation on fair report under District of Columbia law, the court did not have to decide plaintiff’s status as a public figure. Id. at 830 n.19. A narrow (and unexceptionable) reading of Harper and its only arguably defensible value as precedent is that it is, in essence, a case of defendant’s reliance on an official, authoritative government source, thereby negating fault as to the underlying falsity of the charges. Indeed, the court reviewed in detail the significant, quite responsible efforts the reporter took in investigating the charges. Id. at 830. Note that it is not clear whether plaintiff would have been a “public official” under controlling precedent. \textit{See supra} note 787.

\footnote{1563} See \textit{supra} text accompanying notes 1450-1451.

\footnote{1564} See \textit{supra} Part VII.C.

\footnote{1565} Brief of Appellants, \textit{supra} note 1358, at 43; Reply Brief of Appellant, \textit{supra} note 1358, at 6.

\footnote{1566} Brief of Appellants, \textit{supra} note 1358, at 43; Reply Brief of Appellant, \textit{supra} note 1358, at 6.
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informed about matters of public concern."1567 The briefs also referred to Medico’s fellow-traveler, Chapin v. Knight-Ridder, which extended fair report to the public, unofficial statements of a Congressman as support for neutral reportage.1568 Chapin explained that “from the public’s viewpoint, a higher proportion of the ‘unofficial’ public statements of congressmen will be newsworthy and of concern than will the countless ‘official’ documents generated by quasi-public agencies.”1569 In other words, whether framed as an extension of fair report or as Judge Kaufman’s First Amendment neutral reportage creation, the statements warranted protection.

In sum, both the appellants in Norton and proponents of neutral reportage in general like to emphasize this commonality rather than the dramatic differences between the two.1570 But reliance on Chapin is no more than Rosenbloom v. Metromedia resuscitated and deified to absolutist status.1571 Proponents have great difficulties, however, with fair report’s primary rationales—"agency" and "public supervis[ion]."1572 Even the Norton appellants acknowledged, but attempted to minimize, that the “only distinction” between the two is “the setting in which the speech is spoken.”1573 However, “setting” is
extremely important. Almost by definition, the “responsible [or] prominent” source deals with the reporter outside the public realm and outside the public domain. In no sense is the media acting as an “agent” or “surrogate” of the public to recount what the public would see, read or view if it had the time.\footnote{1574. Hogan v. Herald Co., 444 N.E.2d 1002 (N.Y. 1982) (adopting the opinion of Simons, J., Hogan v. Herald Co., 446 N.Y.S.2d 836, 842 (App. Div. 1982) (“Obviously, [in Edwards], members of the public could not ‘attend’ to hear the charges in person. . . .”)).}

Equally important, the “public supervisory” or “oversight” responsibilities rationale is absent in the case of non-governmental actions or proceedings.\footnote{1575. Hogan, 446 N.Y.S.2d at 842. As to such, “the public has no oversight responsibility for their conduct.” Id. at 478. The court noted that the public lacked control or supervision over the scientists in Edwards. Id. The court cited and affirmed as directly “analogous” an earlier precedent involving private statements by government officers involving no “oversight responsibility.” Id. The case was Kelley v. Hearst Corp., 157 N.Y.S.2d 480 (App. Div. 1956), discussed as to its rejection of accuracy-as-truth in the discussion supra accompanying notes 1351, and as support for Comment h in note 1503, supra. The Hogan court interpreted Edwards as involving “private statements by private individuals” and equated it with the Kelley scenario. 446 N.Y.S.2d at 841-42.}

Even as to public official plaintiffs, the plethora of both direct and indirect controls are absent for source abuses that exist in the “official reports”/“public proceedings” context.\footnote{1576. For example, as to judicial proceedings, one defamed via cross-examination can respond to refute the imputation. Similarly, those vulnerable to defamation at public meetings can attend and respond in defense of reputation. Martin v. Wilson Publ’g Co., 497 A.2d 322, 329 (R.I. 1985) (distinguishing fair report from republication of rumor and neutral reportage thereof); Dennis J. Dobbels, Edwards v. National Audubon Society, Inc: A Constitutional Privilege to Republish Defamation Should Be Rejected, 33 HASTINGS L.J. 1203, 1211 (1982). See also ELDER, FAIR REPORT, supra note 1185, § 1.00, at 6, where the author noted:}

Furthermore, in weighing the quasi-constitutional interest in reputation against the right of free expression it should be emphasized that such nongovernmental proceedings often provide fewer and less effective restraints on the dissemination of scurrilous charges than do “official” proceedings—the discussions do not involve the “forensic debate [or] legislative or administrative deliberation or determination” that “official” reports and proceedings normally engage in; many participants therein will not be subject to the normal restraints of the political or electoral processes that apply to official acts or proceedings; the direct or indirect opportunity for response of defamed persons will often be less effective or meaningful; the professional ethical restraints and sanctions that apply in many official proceedings may be inapplicable in the nongovernmental context; the presiding authority in such a meeting (if there is one) will normally not have the same authority to maintain order and restrain, within reasonable parameters, the subjects under discussion; such meetings, unlike many official reports or proceedings, do not operate under rules of procedure or evidence and do not require that allegations be made in any formal manner (such as under oath). For these and similar reasons the courts may well reject the absolute privilege extended to “public meetings,” by the Restatement (Second) of Torts and decide that a qualified privilege provides an appropriate balance between the individual’s basic, quasi-constitutional interest in reputation and the public’s interest in dissemination of the content of such public meetings.
irredeemably undermined by, and tacitly acknowledged by, an admission against media interest—the dramatic shift in emphasis in cases such as Norton. Rather than emphasizing what the sources tell us about governmental functions, the appellants are reduced to a tepid emphasis on what the information offers about the source as a public official: the lies invite his repudiation by the electorate.\textsuperscript{1577} This is not totally insignificant, but it is a thin, if not evanescent, foundation upon which to construct First Amendment absolutism. In almost all such cases, the common preeminent interest of neutral reportage and fair report is the informational interest.\textsuperscript{1578} This is a largely open-ended standard\textsuperscript{1579} without any constraining policies and would justify

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\item 1577. See supra text accompanying notes 576-578.
\item 1578. Hogan, 446 N.Y.S.2d at 842 (noting that Edwards' neutral reportage was based "solely" on the "perceived informational value of the public" of the charges). Note that the court found no indirect "public supervisory" function even though plaintiff's co-equitably defamed father was a public official/candidate for re-election. See supra text accompanying notes 999-1004.
\item 1579. Hogan, 446 N.Y.S.2d at 842 (commenting that "[p]resumably, all publications of the news media are newsworthy."). As to the exceptionally broad swath of what has been deemed of "public" rather than "purely private" interest after the Court's decision in Dun & Bradstreet Inc. v. Greenmoss Builders, see supra text accompanying notes 244-253, and see also ELDER, DEFAMATION, supra note 1179, § 6:10, at 6-55 to -57 (explaining that New York's "arguably" of "legitimate public concern" test for applying its post-Gertz standard "is almost open-ended, if not a matter for auto-determination by the press"); § 6:11, at 6-72 (noting that "[t]he public interest or concern standard" post-Dun & Bradstreet "is a potentially open-ended (and, in the case of the media, essentially self-defining) standard"). See also Columbia Broad. v. Democratic Nat'l Comm., 412 U.S. 99, 106-07 (1973) (quoting Senator Dill in discussing access to radio on "public questions" (the Senator arguing that "[p]ublic questions] is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time)); Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977) (noting that "[w]hat is newsworthy about such accusations is that they were made"); SACK, supra note 1225, at § 3.3.2, at 3-9 (arguing that "[a] broad reading of [public concern] is required. The courts would otherwise be called upon repeatedly to play the constitutionally suspect role of super-editor deciding on a case-by-case basis what is newsworthy. . ."); Dobbels, supra note 1576, at 1210-11 n.45 (arguing that "[i]f whatever the press prints is, by virtue of that fact, newsworthy, then the press becomes the arbiter of constitutional concerns"); Mark W. Page, Price v. Viking Penguin, Inc: The Neutral Reportage Principle and Robust, Wide Open Debate, 75 MINN. L. REV. 157, 191 (1990) (arguing that "[a]t a minimum, courts should find that matters concerning "the governing of the nation or affecting public policy are of public concern"). For a similarly broad "public interest"—"newsworthiness" limitation in privacy cases involving true matter, see ELDER, PRIVACY, supra note 1541, §§ 3:16-3:18. Under such exceptionally broad criteria the potential for abuse by a press with a sponge-like demand for sensationalism and self-defining standards of what the public needs to know is substantial indeed. See the Supreme Court of California's compelling critique of a "public interest" expansion of Gertz in Brown v. Kelly Broadcasting Co., 771 P.2d 405, 413 (Cal. 1989), where the court explained that it would be the "rare case" where media defendants would not claim the privilege to be applicable because "the practical result sought by the news media would be that nearly everything they publish and
access to and potentially result in a deluge of matter from non-public governmental files and records—a truly Orwellian nightmare.

**D. A Reaffirmation of the Federalist View of What Constitutes Defamatory Matter**

Another recent media device used to circumvent traditional republisher liability (and applicable First Amendment standards) is the argument that accurate reportage of third party charges or an ongoing governmental investigation, without endorsing a belief in the plaintiff’s guilt or culpability, does not meet the plaintiff’s threshold common law requirement of being libelous. The leading case for this startling proposition is *Hatfill v. The New York Times*, an unreported district court decision cited in briefs for *Norton v. Glenn*. The *Hatfill* litigation involved a series of columns in which *New York Times* columnist Nicholas Kristof excoriated the FBI for its purported incompetence in investigating who was behind anthrax-tainted letters that killed five people.

Broadcast would be privileged . . . Indeed, the result implicitly sought by the media in this case is a rule that in effect would be, “if it is published, it is privileged.” *Id.* at 432. The court noted that amici curiae had provided no examples of what would not be privileged and cited the inherent dangers for defamation law and reputation of a public interest’s “bootstrapping” potential—the “more sensational and hence injurious a statement is, the more public interest it generates.” *Id.*

1580. Part of the prima facie case upon which plaintiff has the burden of proof is that the matter is actionable as libel or slander. For a detailed examination see ELDER, *DEFAMATION, supra* note 1179, §§ 1-7-1-18. One huge benefit of the doctrine proposed by the district court and by the dissenters from the denial of rehearing en banc is the availability of this proposed doctrine on a motion to dismiss. See the Fourth Circuit’s denial of a petition for rehearing in *Hatfill v. New York Times*. Judge Wilkinson strongly defended use of a motion to dismiss to avoid lengthy and expensive proceedings, which would “dull democracy at the local level,” concluding that a defamation case was not solely a state law matter until it “suddenly acquire[d] First Amendment implications” upon the filing of an answer. *Hatfill v. N.Y. Times Co.*, 427 F.3d 253, 255 (4th Cir. 2005) (Wilkinson J., with Michael, J., and King, J., dissenting from denial of rehearing en banc). This motion to dismiss/threshold analysis was a focus of the *New York Times* certiorari petition. See infra note 1590.

1581. *Hatfill v. N.Y. Times Co.*, No. 04-CV-807, 2004 WL 3023003 (E.D. Va. Nov. 24, 2004). In rejecting the suggestion that alleged accurate reports of an official report were not defamatory, the Fifth Circuit perfunctorily but correctly noted that this “confuses the concept of defamatory words with [that of] the source of the words.” Doe v. Doe, 941 F.2d 280, 293 (5th Cir. 1991). *See also supra* note 1001, for a discussion of the New York Court of Appeals’ rejection of the argument that accurate reportage of irreconcilable sources for a book was protected opinion—this was merely neutral reportage revivified.


Although Kristof's columns contained a large number of questions, assertions, asides and statements implicating and inculpating the plaintiff/biochemist, the trial court dismissed the claim. In dismissing the claim, the court followed the supposedly "long . . . recognized" "principle" "mandated by the First Amendment," that "an accurate report of an ongoing investigation or an allegation of wrongdoing does not carry an implication of guilt." The court produced a list of cases suggesting that courts "routinely dismiss"
A third case relied on, *Miller v. News Syndicate Co.*, 445 F.2d 356, 357-58 (2d Cir. 1971), involved defendant's reportage of plaintiff's indictment. The court found defendant's account "fair comment on official proceedings" based on "reliable sources," i.e., national wire services and personal contacts with customs officials (the indictment was for heroin smuggling, for which plaintiff was acquitted). Based on the fact there was "no lack of checking" of official sources, defendants could not be "accused of gross negligence, much less actual malice." *Id.* at 358 (emphases added). In sum, *Miller* is a mixed fair report—reliable source case refuting constitutional malice under *St. Amant*, see supra text accompanying notes 77-85, and no support for an absolute privilege of accurate reportage about investigations.

The final case cited by the Hatfill brief is *Ramsey v. Fox News Network, L.L.C.*, 351 F. Supp. 2d 1145 (D. Colo. 2005), involving suits by the Ramsey parents and son Burke for a sixth anniversary report that included a strong insinuation of insider involvement. The damning part started with a statement: "Detectives say they have good reason to suspect the Ramseys." The broadcast then added the three were the "only known people in the house the night she was killed." This was followed by a reference to the "longest ransom note most experts have ever seen," implying that whoever killed JonBenet had been there for an extended period (or lived there!). The highly inculpatory implication was made clearer by the next statement: "Whomever killed her spent a long time in the family home, yet there has never been any evidence to link an intruder to her brutal murder." *Id.* at 1147 (emphasis added). Although acknowledging that the absence of intruder statement may have been untrue, the court found it insufficient for an "accusation of misconduct" against plaintiffs—it was "not a sly nod towards plaintiffs as evildoers." *Id.* at 1153. Think of what the court is saying. Plaintiffs are damned by the police, itself highly damaging. As *Jewell* itself said above, statements about a suspect by law enforcement personnel "close to an investigation carry a different weight, and therefore create a different magnitude of harm" than individuals not tied to the investigation. *Jewell*, 23 F. Supp. 2d at 395-96. Plaintiffs are then placed at the scene, statements or inferences are made that the murderer was there for an extended period, and then the "intruder" theory is debunked—a statement that was untrue or so the court seems to have conceded. And, this is not a "sly nod toward plaintiffs as evildoers"! The court's exceptionally strained, if not illogical, interpretation runs afoul of its own statement of basic principles and reinterprets in wholly innocent fashion what any reasonable jury would doubtlessly conclude is just such an inculpatory "sly nod."

The court's resolution of Burke's claim is marginally stronger. The court emphasized that the broadcast referenced him as a "suspect" but stated he had been "cleared" and received millions in libel settlements. But the court is hard-pressed to find a parallel miraculous stain remover for the Ramsey parents. However, it managed to find one: "Importantly, a major thrust" of defendants' broadcast was the fact that the Boulder Police Department, "long suspicious of the Ramseys," *id.* at 1152 (emphasis added), had "turned the case over to the District Attorney . . . to bring 'fresh eyes' to the investigation." Of course, the "fresh eyes" could be renewed interest in the Ramseys—an alternative consistent with the police's "long suspicion." The court seized on plaintiff's counsel's wholly legitimate attempt at damage control ("This is a new day . . . The days of the Ramseys being the focus . . . are over") as "[c]learly . . . reflect[ing]" a "new direction" for the JonBenet investigation, "one in which none of the plaintiffs is being accused or suspected of being involved." Maybe that is a plausible (but just barely) interpretation of the broadcast, but it is not the only one or even the most reasonable. Clearly, a jury could have reasonably interpreted the matter as defamatory—an opportunity denied them (and the Ramseys) by the court's see-no-evil interpretation. Of course, such an approach bars consideration of whether media republication of such highly disparaging statements and implications were made with "serious doubts" as to falsity—which would be supported in part by the court's suggestions concerning "new direction" absolution of the Ramseys. On the "serious doubts" standard under *St. Amant v. Thompson*, see supra text accompanying notes 77-85.
libel claims in cases with plaintiffs such as this.\footnote{1587} In the court’s view the plaintiff was “accurately described as someone expert in the field” that sources had identified as warranting scrutiny.\footnote{1588} He was merely used in the article to illustrate the FBI’s purported bungling and ineptitude.\footnote{1589} Moreover, the plaintiff was not directly accused of criminality, and qualifiers of innocence were inserted in the article.\footnote{1590}

On appeal, the Fourth Circuit reversed in a divided panel decision.\footnote{1591} The majority provided a lengthy analysis of the columns

\begin{footnotes}
\item 1587. \textit{Hatfill}, 2004 WL 3023003 at *5.
\item 1588. \textit{Id.}
\item 1589. \textit{Id.}
\item 1590. \textit{Id.} at 5-6. The majority opinion on appeal characterized the district court as refusing to find actionable Kristof’s columns, which “merely reported on an ongoing investigation” targeting plaintiff while being “careful to disavow” any determination as to his guilt. \textit{Hatfill} v. N.Y. Times Co., 416 F.3d 320, 329 (4th Cir. 2005), cert. denied, 2006 WL 151585 (U.S. Mar. 27, 2006) (No. 05-897). The \textit{New York Times} petitioned for certiorari posing the question whether the First Amendment “limit[ed] the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient \textit{would reasonably conclude the publication, taken as a whole, was intended to convey}?” Petition for Certiorari at i, \textit{Hatfill} v. N.Y. Times, 126 S. Ct. 1619 (2006) (No. 05-897). Petitioners contended that the Fourth Circuit’s focus on specific statements “standing alone,” rather than “each of the columns considered in their entirety,” “eliminates the speech-protective function historically served by the judicial determination of defamatory meaning” and “undermines the entire regime of existing First Amendment protections afforded speech about matters of public concern.” \textit{Id.} at 16-18. This “framework of protection \textit{depends fundamentally on a proper threshold determination of the false and defamatory meaning at issue}.” \textit{Id.} at 18 (emphasis added).

\begin{itemize}
\item \textit{Compare} Judge Shedd’s straightforward and absolutely correct conclusion based on a summary of the complaint’s allegations—\textit{i.e.}, that they did not identify “any other actual or potential target of the investigation” and “\textit{recounted detailed information pertaining to Hatfill alone}”—that Kristof’s columns, “taken together, were capable of defamatory meaning” and that “a reasonable reader” would “\textit{likely . . . conclude}” Hatfill was culpable of the anthrax mailings. \textit{Hatfill}, 416 F.3d at 332-33. \textit{See} the majority response of the Fourth Circuit \textit{infra} text accompanying notes 1591-1603.
\item 1591. 416 F.3d 320 (4th Cir. 2005). The Fourth Circuit’s decision was initially followed as to Virginia law in related substantially similar litigation, \textit{Hatfill} v. Foster (\textit{Foster}), 401 F. Supp. 2d 320, 324-43 (S.D.N.Y. 2005), involving the author and publisher co-defendants of an article published in \textit{Vanity Fair} and later synthesized in \textit{Reader’s Digest}. The court later reversed its determinations of choice of law based on its findings of misrepresentations by plaintiff and counsel for plaintiff and substituted District of Columbia law. \textit{Hatfill} v. Foster, No. 04CIV.9577(CM)(GAY), 2006 WL 396672, at *4-6 (S.D.N.Y. Feb. 14, 2006) (“It turns out plaintiff and his lawyers pulled a fast one on the Court”). It is unclear what impact this will have on the litigation. For illustrative purposes the author has left the citations to Virginia law in the article. Note the Fourth Circuit court also remanded the intentional infliction claim, concluding that a defamatory charge of responsibility in anthrax mailings causing several deaths made “without regard for the truth” and without allowing a response by plaintiff’s counsel raised an issue of “extreme or outrageous” conduct under Virginia precedent. \textit{Hatfill}, 416 F.3d at 336-37. \textit{See also} \textit{Foster}, 401 F. Supp. 2d at 343-44. The final court later dismissed these claims. \textit{Hatfill} v. N.Y. Times, Co., Civ. Action No. 04-0807, 2007 WL 404856 (E.D. Va. Jan. 30, 2007).
\end{itemize}
\end{footnotes}
at issue and then applied traditional libel analysis under state law.\textsuperscript{1592} Classic doctrine provides that a defamatory charge may be made by “inference, implication or insinuation”; it “matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.”\textsuperscript{1593} Applying this rule, the court found that the columns, viewed collectively, were interpretable by a reasonable reader as imputing responsibility for the anthrax mailings to the plaintiff.\textsuperscript{1594} He was the only person depicted as the “actual or potential target” of the FBI investigation; the columns “recounted detailed information” applicable only to the plaintiff.\textsuperscript{1595} The court rejected any suggestions that the defendants’ cautionary admonitions about innocence precluded a charge of criminality given the double-loaded nature of the columns.\textsuperscript{1596}

\textsuperscript{1592} \textit{Hatfill}, 416 F.3d at 330-34.

\textsuperscript{1593} \textit{Id.} at 330-31 (quoting from Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588, 591-92 (Va. 1954)). \textit{See also supra} text accompanying note 1271. In \textit{Carwile}, defendant’s reporter posed questions to the top ranking police officials in Richmond as to whether they would prefer bar charges against plaintiff-attorney based on corruption charges investigated and found baseless. When the officials declined to answer, defendants referred to the authority of the state bar to request that an attorney be disbarred for violation of the code of attorney ethics. The court correctly found a “veiled but pointed” suggestion that plaintiff “could and should be subjected to disbarment.” \textit{Carwile}, 82 S.E.2d 588 at 592. Under this not atypical standard for libelous implications, one must suspend disbelief to think that the \textit{Hatfill} story is not actionable. \textit{See also Foster}, 401 F. Supp. 2d at 334-43. Clearly \textit{Hatfill} is not a case where “(w)ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an explanation unreasonable.” \textit{Restatement (Second) of Torts} § 563 cmt. d (1977) (emphasis added). Compare the analysis of plaintiff/son in \textit{Ramsey v. Fox News}, \textit{see supra} note 1586, and the court’s analysis in \textit{Boone v. Sunbelt Newspapers, Inc.}, \textit{supra} note 1131.

\textsuperscript{1594} \textit{Hatfill}, 416 F.3d at 330-34. \textit{See also Foster}, 401 F. Supp. 2d. at 334-43. The court also found the two articles actionable as impugning plaintiff as unfit for or prejudicing him in his trade or profession. \textit{Id.} at 334, 339, 340, 343.

\textsuperscript{1595} \textit{Hatfill}, 416 F.3d at 333 (the “unmistakable theme” was that the FBI needed to investigate plaintiff “more thoroughly” because all the evidence the author was aware of “pointed to” plaintiff). The court synthesized many of the factors mentioned in its earlier detailed analysis of the columns—plaintiff had the “motive, means, and opportunity” to produce and disseminate the letters; he had expertise with the anthrax form lacing the mailing; his vaccinations were current; he was the “prime suspect” both of federal investigators and the biodefense community; he had failed several polygraphs; trained bloodhounds had responded aggressively to plaintiff, his apartment and his girlfriend’s apartment, but no other person or location had engendered a comparable response; plaintiff was likely involved in other recent anthrax scenarios). \textit{See} the detailed analysis in \textit{Brief of Appellants} at 6-14, \textit{Hatfill}, 416 F.3d 320 (No. 04-2561), at 6-14, 19-28; \textit{Reply Brief} of Appellants at 10-18, \textit{Hatfill}, 416 F.3d 320 (No. 04-2561).

\textsuperscript{1596} \textit{Hatfill}, 416 F.3d at 333-34 (the court specifically compared this to the “in my opinion” qualifier in \textit{Milkovich v. Lorain Herald}, \textit{see supra} note 325). \textit{See also Brief} of Appellants, \textit{supra} note 1595, at 28 (“[D]isavowals are not tantamount to a get-out-of-jail-free card, and cannot be used by sophisticated defamers to shield their most reckless misstatements of fact from legal accountability.”); \textit{Reply Brief} of Appellants, \textit{supra} note
The panel majority specifically rejected three additional arguments raised in the trial court opinion. First, they found inapplicable the libel by implication rule adopted by the Fourth Circuit, i.e., that there must be affirmative evidence that the author intended or endorsed the implication. That doctrine only applied where the facts were “literally true,” not where the plaintiff, as here, alleged that both the inference and underlying factual statements were false. Second, the defamatory charge of responsibility for the anthrax mailings was provable as factually false and actionable under Milkovich. Lastly, and most importantly, the majority strongly

1595, at 15 (“[A] reasonable jury is likely to conclude that the disavowals were a transparent attempt to provide cover.”).

1597. Hatfill, 416 F.3d at 334 n.7 (discussing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092-93 (4th Cir. 1993)). In Foster the court specifically agreed with Hatfill. In addition, the court “reject(ed) categorically” the argument that defendants did not intend the defamatory implication. For example, as to the “The message in the Anthrax” article, the defendants “flat-out” said plaintiff was unfit to work in the job he was then doing. Furthermore, the article’s juxtaposition of a wrongfully implicated Richard Jewell was, in context, “intended to imply” plaintiff was the anthrax murder. Similarly, a reference to a “disturbing” “suspect” (plaintiff) was similarly indicative of defamatory intent to imply involvement. Foster, 401 F. Supp. 2d. at 340-41. As to the “Tracking the Anthrax Killer” article, the title and other language constituted an “indictment” of plaintiff. In addition, a defamatorily intended implication could be demonstrated by statements by defendants imputing to plaintiff unfitness for a position as a bioterror expert for the government. Id. at 342-43. For a brief discussion of the libel by implication cases see Elder, Defamation, supra note 1179, § 1.7, at 1-29 to -34 & nn.25-28.

1598. Hatfill, 416 F.3d at 334 n.7.

1599. Id. at 334 n.6. See also Foster, 401 F. Supp. 2d at 339, where the court rejected the opinion defenses as to a negative comparison of Hatfill with Richard Jewell—i.e., plaintiff was “no Richard Jewell.” This was in the article’s context, a “flat out statement” plaintiff was “unlike Jewell . . . not wrongly suspected of committing a heinous and highly publicized crime.” Id. at 338-39. Neither the “(in my opinion)” preface nor attempted disclaimer barred the defamatory factual implications. Id. at 339. Moreover, there was no such preface to defendants’ impugning of Hatfill’s professional fitness. Id. at 329, 339 (applying Virginia’s “particularly attentive stance” toward allegations of professional incompetence or unfitness). For discussion of Milkovich see supra text accompanying notes 309-326.

Luckily for him, Hatfill was not required to litigate his claim in a New York State court or a federal court applying the media-protective, essentially open-ended opinion doctrine adopted post-Milkovich in New York. Even after the court’s reversal on the choice of law issue, the court substituted District of Columbia law, not New York law. Hatfill v. Foster, No. 04CIV.8577(CM)(GAY), 2006 WL 399672, at *4-6 (S.D.N.Y. Feb. 14, 2006); see infra note 1786. In Brian v. Richardson, 660 N.E.2d 1126, 1129-31 (N.Y. 1995), the Court of Appeals eviscerated plaintiff’s claim against defendant, a former Attorney General, based on a New York Times “Op-Ed” piece, “A High Tech Watergate,” which plaintiff claimed asserted that he was charged with participating in a scheme to steal corporate software (from a company defendant represented), had benefited from “politically motivated favoritism,” had been involved in “a morally reprehensible scheme” to obstruct the return of hostages during the 1980 election (the “Iran-Contra affair” and the so-called “October Surprise”), had sold the software to foreign states to enhance U.S. illegal covert surveillance, and implicated him in the death of a journalist investigating the linkages. Id.
suggested that any reliance on the defendants’ supposed “accurate report[s] of [an] ongoing investigation” to immunize the defendants from liability was misplaced.\footnote{Hatfill, 416 F.3d at 333 n.5.} Adopting the powerful and compelling argument in the appellant’s brief,\footnote{Energized by Kristof’s biting criticism of perceived F.B.I. ineptitude, the F.B.I. obtained plaintiff’s consent to search his apartment in June 2002 and leaked the place and time thereof to the media. Brief of Appellant, supra note 1595, at 10. The search found nothing and this was “not sufficient to quell the media criticism.” Defendants then ran three additional columns in July 2002 imputing incompetence to the F.B.I. in failing to investigate plaintiff. The F.B.I. conducted a second search on August 1, 2002, again with a prior tip-off to the media so that they could witness and report the search. Nothing was discovered. However, the Attorney General designated plaintiff on television on August 6, 2002, as a “person of interest.” In self-defense, plaintiff then made a public statement stating he had no involvement with the anthrax letters. “That got the Times off the F.B.I.’s back.” In his final column Kristof gave plaudits to the F.B.I. for “finally pick[ing] up its pace” in pursuing plaintiff. In essence, Kristof was “more of an instigator and cheerleader than a reporter of objective facts.” Reply Brief of Appellants, supra note 1595, at 4-6. Compare with the consensus rejection of neutral reportage where defendant is the \textit{creator} of the news. See supra text accompanying notes 881-887. \textit{See also} Elder, Johnson \& Rischwain, supra note 1330, at 342 (noting that in hidden camera cases “a news agency plays agent provocateur and does not just report a story after it has transpired, but literally generates it and carries it out to completion as if it is a spying mission—manufactured ‘news.’ Unlike the typical defamation case, the \textit{participants} in these ‘news’ events are usually employees, independent contractors, or interns of the news organization. The media is thus covering itself and is going to make itself look good to the viewer.”).} In other words, Kristof’s columns were not merely reporting third party suspicions. The columns “actually generated suspicion by asserting

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\item[1600] Hatfill, 416 F.3d at 333 n.5. The court was responding to the lower court’s infusion of “truth” and fair report analysis into motion to dismiss analysis, an issue criticized in detail by Appellants. \textit{See} Brief of Appellants, supra note 1595, at 4, 14, 29-33; Reply Brief of Appellants, supra note 1595, at 2-7. For a detailed analysis of this perverted accuracy-pseudo-truth doctrine, \textit{see} supra Part VII.B. For a discussion of an equally open-ended fair report doctrine \textit{see} supra Part VII.C. Note that in \textit{Foster} the court applied the common law foreseeable republication rule, \textit{see} supra note 1179, to co-defendant’s authorized republication by co-defendant \textit{Reader’s Digest} of a somewhat synthesized but equally inculpatory version of the \textit{Vanity Fair} article. \textit{Foster}, 401 F. Supp. 2d at 343 & n.2.
\item[1601] Energized by Kristof’s biting criticism of perceived F.B.I. ineptitude, the F.B.I. obtained plaintiff’s consent to search his apartment in June 2002 and leaked the place and time thereof to the media. Brief of Appellant, supra note 1595, at 10. The search found nothing and this was “not sufficient to quell the media criticism.” Defendants then ran three additional columns in July 2002 imputing incompetence to the F.B.I. in failing to investigate plaintiff. The F.B.I. conducted a second search on August 1, 2002, again with a prior tip-off to the media so that they could witness and report the search. Nothing was discovered. However, the Attorney General designated plaintiff on television on August 6, 2002, as a “person of interest.” In self-defense, plaintiff then made a public statement stating he had no involvement with the anthrax letters. “That got the Times off the F.B.I.’s back.” In his final column Kristof gave plaudits to the F.B.I. for “finally pick[ing] up its pace” in pursuing plaintiff. In essence, Kristof was “more of an instigator and cheerleader than a reporter of objective facts.” Reply Brief of Appellants, supra note 1595, at 4-6.
\item[1602] Hatfill, 416 F.3d at 333 n.5.
\end{footnotes}
facts that tend[ed] to implicate” the plaintiff in the anthrax killings.1603

Dissenting Judge Niemeyer would have affirmed the trial court. He concluded that “[r]eporting suspicion of criminal conduct—even elaborately and sometimes inaccurately”—did not equate to the “accusation of criminal conduct” required by state law.1604 The Fourth Circuit evenly divided on a petition for rehearing en banc, resulting in its denial.1605 Judge Wilkinson viewed the panel majority opinion as “restrict[ing] speech on a matter of vital public concern” and “aggravat[ing], rather than alleviat[ing], the constitutional dimensions

1603. Id. Judge Shedd seems to be anticipatorily responding to the suggestion this might be entitled to fair report (a la Medico-Chapin), see supra text accompanying notes 1476-1485, or “truthful” reportage of an ongoing investigation. See supra Part VII.B. In Foster the court rejected both of defendant’s defenses—the “official government action” and mere accurate reportage of FBI investigation arguments. Foster, 401 F. Supp. 2d at 335-38, 342. The court summarized its reasons in discussing the Reader’s Digest synthesized republication of the Vanity Fair article (“The Message in the Anthrax”)—the report could not be described as “just a report and critique of the FBI investigation . . . [the article] focuses on Foster’s own investigation, his musings, his theories and his conclusion. . . .” Id. at 342 (emphasis added). Similarly, the Vanity Fair article was “Foster’s report about his own work[,] not a report about the FBI’s work.” Id. at 337. What the FBI was doing was “barely mentioned.” Id. The article was not a report on an “official investigation” but a “marshal[ling] of evidence to show what motivated defendant/author, a “private citizen,” to draw his conclusions and criticizing the FBI for not concuring. Id. at 337-38. In sum, Foster “claims ownership of the investigation.” Id. at 337. The Foster court specifically distinguished Global Relief Foundation, see supra text accompanying notes 1225-1283, in part on factual grounds. The articles at issue contained “very little” about plaintiff, included statements from its attorney denying involvement in terrorism, and, “[s]ignificantly,” most of the articles involved other organizations similarly under investigation. Foster primarily emphasized, however, that plaintiff in Global Relief Foundation was actually complaining of “reports about an official investigation.” By contrast, the Foster defendants “went well beyond” such reporting or tendering of an opinion. For example, in “The Message in the Anthrax” defendants “unmistakably implicate[d]” plaintiff was guilty of the murders. Foster, 401 F. Supp. 2d at 338.

Note that Kristof’s column cited to general governmental sources—“F.B.I. profilers,” “investigators,” “the authorities,” and “the F.B.I.” Id. at 325-28. He also made reference to “some” or “people” in “the biodefense field,” id. at 325, but apparently the information was passed to Kristof through governmental sources. Id. On the issue of “source attribution” in fair report see ELDER, DEFAMATION, supra note 1179, § 3:3, at 3-11 n.6, where it is suggested that a court should only find “source attribution” where there is “sufficient identifying data to inform the reader or viewer that the source is an authoritative government agency or official taking official action, reports of which are entitled to fair report status.” (emphases added). See also Williams v. Pulitzer Broad. Co. 706 S.W.2d 508, 511 (Mo. Ct. App. 1986) (the news report of a proceeding “must purport to be a report of a proceeding entitled to be covered by the privilege”). There is case law to the contrary. See DEFAMATION, supra note 1179, § 3:3, at 3-11 n.6; ELDER, FAIR REPORT, supra note 1185, § 1.17, at 159 n.2.

inherent in the defamation field." He rejected the suggestion that actionability remains "wholly" a question of state law and sharply criticized the majority's aggressive reading in expanding the boundaries of what was defamatory under Virginia law.1607 Following Judge Niemeyer's dissent, Judge Wilkinson found no actionable libel in view of the lack of any direct accusation and the repeated admonitions of plaintiff's innocence.1608 Incredibly, Judge Wilkinson portrayed the defendants as the *protectors* of the plaintiff, "someone [left] in the prolonged limbo of suspicion."1609 Doubtlessly, the plaintiff will profusely thank defendants for destroying his life and reputation.1610

A scholar of defamation law scratches his head trying to fathom how to respond. Amazingly, neither Judge Niemeyer nor Judge Wilkinson cited to *Masson v. New Yorker Magazine* and its clear holding that what is actionable as libel is purely a matter of state law, not of First Amendment import.1611 Judge Wilkinson did quote briefly

1606. *Id.* (Wilkinson, J., with Michael, J., and King, J., dissenting from a denial of petition for rehearing en banc); *id.* at 253-54.

1607. *Id.* at 254-55.

1608. *Id.* at 256-57.

1609. *Id.* at 258.

1610. Brief of Appellant, *supra* note 1595, at 2-3 ("[Plaintiff–appellant is] likely always to be known as the man whom the press named as a suspect in the anthrax attacks of 2001 . . . Kristof . . . had the avowed purpose of 'lighting a fire' under the FBI. He succeeded, and in the process ruined Dr. Hatfill's life.").

1611. *See supra* text accompanying notes 327-351. *See also* the Court's reaffirmation of state law standards for punitive and presumed damages in cases not of public concern, *see supra* text accompanying notes 244-253, and its reference to "general principles" of defamation in rejecting the "rational interpretation" rule for misquotations in the text. *See supra* note 342. Note further that the Court has eloquently described the common law's protection of reputation since the latter part of the 16th century, quoting Shakespeare: "But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed." *Milkovich*, 497 U.S. at 11-12 (quoting Shakespeare, *Othello*, Act III, scene 3). Importantly, the Court also noted and affirmed the common law's broad defamation of libel—"... a false publication that would subject him to hatred, contempt, or ridicule" and specifically ratified that "[t]he common law generally did not place any additional restriction on the type of statement that could be actionable." *Milkovich*, 497 U.S. at 13 (emphasis added). Furthermore, the Court has not required reputational damages as a threshold precondition to collecting other actual damages, *see note 206, supra*, and has never had any constitutional problems with the "false light" tort as long as minimal fault and material falsification requirements are met. *See supra* text accompanying notes 64-70, 179-186. Lastly, the Court regularly applied "general principles of defamation actions in its pre-*Sullivan* decisions. Wash. Post Co. v. Chaloner, 250 U.S. 290, 291-94 (1919) (the Court remanded for a trial by jury where the defamatory statement could reasonably be understood as either implicating or absolving plaintiff of the crime of murder); Baker v. Warner, 231 U.S. 588, 593-94 (1913) (where purportedly libelous words were ambiguous but susceptible of a defamatory construction, the issue was for the jury); Peck v. Tribune Co., 214 U.S. 185, 188-90 (1909) (in a case involving a teetotaler portrayed as endorsing a Scotch whiskey, Justice Holmes found a jury question of actionability if the ad was
from *Milkovich v. Lorain-Journal* as limiting “the type of speech which may be the subject of state defamation actions.” However, he failed to note that that case only dealt with non-factual types of speech, such as imaginative expression and speech not provable as factually false.

By contrast, *Masson* unequivocally reaffirmed the classical understandings of truth and the common law consensus conclusion that defamers often do so artfully and creatively (e.g., by misused quotations). Additionally, *Masson* repudiated any suggestion that either the common law or the First Amendment countenances or approves libel by implication, innuendo or artifice. Interestingly, neither Judge Wilkinson nor Judge Niemeyer explained how their theory of non-liability meshes with *Milkovich*’s rejection of any “artificial dichotomy” between fact and opinion and *Milkovich*’s explicit repudiation of immunity so long as the author prefaced with “[i]n my opinion.”

Undoubtedly, it was not Judge Shedd but Judges Wilkinson and Niemeyer who proposed a revolutionary, constitutionally based redefinition of what is defamatory. Think of what is offered: a media defendant can parse together a highly inculpatory collage of factually false evidence compellingly pointing suspicion at a particular person. The defendant can then claim *absolute immunity* if the media throws in the occasional teaser proclaiming plaintiff’s innocence. This would be true even where the defendant otherwise admits that it has “serious doubts” as to whether the plaintiff is in fact culpable. If that is the law, journalism schools and media employers will no doubt

“obviously” hurtful “in the estimation of an important and respectable part of the community”—“liability is not a question of majority vote” and “obviously an unprivileged falsehood need not entail universal hatred . . .”) (emphases added); Dorr v. U.S., 195 U.S. 138, 149-53 (1904) (the court interpreted a federal statute adopting the common law doctrine of fair report but found it abused and upheld a criminal conviction of media defendants); Pollard v. Lyon, 91 U.S. 225, 236-38 (1875) (the Court applied then applicable general rules of defamation law and held that an imputation of fornication to a woman not involving an indictable offense was not actionable as slander per se; since special damages in the sense required by general rules of defamation had not been pled, the complaint was defective). Modern common law would treat the latter as slanderous per se if imputing a crime involving moral turpitude or “serious sexual misconduct.” RESTATEMENT (SECOND) OF TORTS §§ 571, 574 (1977).

1614. See supra notes 327-351 and accompanying text.
1616. See supra text accompanying notes 79-85. Later, a federal district court dismissed the libel claims. See infra text accompanying note 1740.
start hiring creative writing professionals astute in keeping journalists on the non-actionability side of the new “artificial dichotomy” divide. Libel by implication, innuendo, indirection and artifice1617 will become a graduation requirement, the focus of in-house continuing education and the modus operandi of the media. And this will happen under the indulgence of the First Amendment.

Troubling times often pose temptations for courts. For that reason, courts need to be excruciatingly careful in creating new constitutional doctrine.1618 Hard cases do indeed make bad law. A doctrine promulgated under seemingly unique circumstances such as Hatfill v. The New York Times cannot be easily circumscribed. The court that applauds and applies such radical doctrine will open the floodgates to all manner of inflammatory defamatory abuse. Media artful dodgers will thumb their collective noses at New York Times v. Sullivan, Gertz v. Robert Welch, and the Court’s carefully nuanced balancing of the “equally compelling need[s]” of reputation and free expression.1619 The Court’s determination in Milkovich to “hold the balance true”1620 and provide a libel plaintiff a fair shake will be tacitly annulled. The Court’s common sense confidence in a jury’s ability to separate the wheat from the chaff1621 will be supplanted by an open ended, abuse generating, bootstrapping invitation to engage in immune libel by reportage of suspicions with tepid protestations of plaintiff’s probable innocence.

Under the media Jabberwock’s Hatfill proffer, trial and appellate courts would have a new howitzer addendum to its vast arsenal of First Amendment artillery in the form of a resuscitated

1617. See supra text accompanying notes 1271-1593.

1618. Compare Judge Wilkinson’s characterization of the Hatfill litigation as involving “a question of grave national import and life-or-death consequence,” Hatfill v. N.Y. Times, 427 F.3d 253 (4th Cir. 2005) (Wilkinson, J. with Michael, J. and King, J., dissenting from denial of rehearing en banc), and as involving “an undeniable public threat,” id. at 256, and “urgent national security implications.” Id. at 258. For a particularly troubling example of a court’s overreaction and departure from the common law tradition see Global Relief Foundation, Inc. v. New York Times supra text accompanying notes 1225-1283.


1620. Milkovich, 497 U.S. at 23.

1621. Id. at 21-22 (the Court cited the “dispositive question” on remand to be whether a “reasonable fact finder” could find an implication of perjury in defendant’s statements. The Court held this could be resolved based on a “core of objective knowledge”) (emphasis added). Unfortunately, Milkovich’s strong defense of reputation, a circumscribed “opinion” rule and enhanced jury involvement in determining actionability have been largely ignored. See supra note 310.
version of *in mitiori sensu* for libel by indirection, implication, or innuendo. The media would do a merry jig with glee, judges would breastbeat about the media as protector of the hapless victim of governmental ineptitude, and reputation would shrivel into nothingness, impaled through its “deep heart’s core.” This would all be done to protect “speech on a matter of vital public concern,” but without paying the desiccated victim of reputation forfeiture a worn farthing.

VIII. IMPLICATIONS OF NEUTRAL REPORTAGE FOR OTHER POSSIBLE “CONDUIT” AND “MESSENGER” DEFENDANTS

Although neutral reportage supposedly has a unique focus on the media’s “conduit” and “messenger” functions, it is entirely inconsistent with extensive precedent regarding issues of media liability. This precedent presents a host of scenarios where defendant republishers act in a functionally indistinguishable fashion and where the constitutional malice standard has long been thought to sufficiently protect media interests. For example, consider the liability of magazines and book publishers for the acts of authors/independent contractors. Since generally no vicarious liability is or can be imputed, the plaintiff must independently demonstrate the requisite burden of fault against the publisher/defendant. As to public person plaintiffs, this is constitutional malice, knowing or reckless disregard of falsity. There is a plethora of decisions on point. None of them even obliquely intimates that neutral reportage is or should be available. The focus is always (and properly) on whether the plaintiff can meet *St. Amant v. Thompson*’s demanding criteria. The cases do not provide a glimmer of precedent for the

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1622. On the modernly rejected strict construction/*in mitiori sensu* rule see *Elder, Defamation*, supra note 1179, § 1:7, at 1-26 to -26 (discussing the “modern consensus rule” rejecting it).

1623. As the Court noted in *Milkovich*, an “opinion”-“fact” dichotomy was unnecessary in light of the “established safeguards” adopted by the Court. 497 U.S. at 14-21. See supra text accompanying notes 316-326.


1627. *Id*. *See also id.*, § 7:9; Price v. Viking Penguin, 881 F.2d 1426, 1446 (8th Cir. 1989).


1629. *See discussion on St. Amant, supra notes 77-85.*
suggestion that such media defendants should be exempt from fault-based liability because the source/author (almost invariably a public figure when suing as a plaintiff\textsuperscript{1630}) is a “responsible, prominent” source whose serious defamatory charges should be non-actionable if neutrally recounted (in other words, largely unedited).\textsuperscript{1631}

Illustrative of the cases is \textit{Masson v. New Yorker Magazine}, on remand from the Court’s powerful reaffirmation of the classic doctrines of substantial truth and material falsity.\textsuperscript{1632} Responding to the Court’s mandate, the Ninth Circuit found\textsuperscript{1633} that Masson’s protestations to the magazine’s fact-checker led to an investigation, which in turn gave rise to a jury issue of whether the magazine defendant “had obvious reasons to doubt” the accuracy of author quotations that were controverted by Masson.\textsuperscript{1634} The book publisher, Knopf, was absolved, as it had the right to rely on the magazine’s “sterling reputation” and its “fabled fact-checking” division, despite Knopf’s awareness that Masson’s lawyer had contacted \textit{The New Yorker}.\textsuperscript{1635}

Although lack of vicarious liability and required proof of direct fault of the book publisher are substantial hurdles, they do not invariably preclude liability. For example, a court held a book publisher could be held liable where its editor admitted to a good opinion of the plaintiff, was skeptical of the cult book author/deprogrammer’s “background and bizarre theories,” was aware of the latter’s hostility to the plaintiff, and noted the book’s tendency to lump all cults indiscriminately “using somewhat dubious overarching theories.”\textsuperscript{1636} Similarly, a book publisher may be liable under \textit{St.}

\textsuperscript{1630} Elder, \textit{Defamation}, supra note 1179, § 5:17.
\textsuperscript{1631} Id.
\textsuperscript{1632} See supra text accompanying notes 327-351.
\textsuperscript{1633} The Court remanded the case as to both publisher defendants—\textit{The New Yorker} and Alfred A. Knopf, Inc.—as to their liability “on the basis of their respective relations with Malcolm [the author] or the lack of any independent actual malice.” (emphasis added). Note that these two bases are well-established in the Court’s jurisprudence. See Elder, \textit{Defamation}, supra note 1179, §§ 7:9, 7:2, respectively. Both involve potential forms of republisher liability. On remand the Ninth Circuit treated Malcolm as an independent contractor for the purposes of the opinion but referred Masson’s claims of agency vis-à-vis \textit{The New Yorker} to the trial court for consideration on a fuller record. 960 F.2d 896, 898 n.2 (9th Cir. 1992).
\textsuperscript{1634} Masson, 960 F.2d at 900-902. At trial the author was absolved. Three of the libels were not false, one was not defamatory and the third was not made with constitutional malice. This was affirmed on appeal. Judgment for \textit{The New Yorker} was affirmed on the ground of defensive collateral estoppel. Masson v. New Yorker Magazine, Inc., 85 F.3d 1394, 1397-1400 (9th Cir. 1996).
\textsuperscript{1635} Masson, 960 F.2d at 902-03.
Amant for continuing to sell copies of books with knowledge of falsity, or for publishing an “exposé type book” knowing it had been rejected by several other book publishers, or for republication after scienter of the original publication’s factual error.

Less extensive but well considered case law has also allowed a syndicator to publish columns of a reliable columnist without liability under the constitutional malice standard, so long as the columnist has a reputation for “general accuracy and reliability.” Liability may exist, however, if a columnist’s “persistent inaccuracy” puts the syndicator on notice as to “serious doubts” under St. Amant.

A parallel consensus rule allows newspapers and television stations to rely on a major wire or news service as reputable news sources where the republisher has “no reason to question the reliability of the organization as a newsgatherer.” This right to rely is not absolute and may be forfeited by, for example, “an apparent inconsistency or other indication of error.”

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1638. Id. at 445-48. A book publisher was also at risk under St. Amant where plaintiff controverted a book’s conclusion through a several factors, including a detailed legal analysis of the appropriateness of plaintiff’s conduct, a verifiable delineation of the long-established procedure against which plaintiff’s conduct could be compared and contrasted, proof defendant’s/publisher’s own investigation had demonstrated that the charges were inaccurate in part, and defendant’s unmet promise to make corrective changes in future editions. Rinaldi v. Viking Penguin, Inc., 420 N.E.2d 377, 382-84 (N.Y. 1977). See ELDER, DEFAMATION, supra note 1179, § 7:11, at 7-102 n.21.
1639. Wash. Post Co. v. Keogh, 365 F.2d 965, 971-72 (D.C. Cir. 1966). However, it was not sufficient that a columnist had engaged in “isolated instances of inaccuracy” or that he had “a controversial reputation for indecency or vulgarity. . . .” Id.
1640. Id.
1641. See ELDER, DEFAMATION, supra note 1179, § 7:21. A parallel line of cases has applied the same “wire service defense” or “reverse wire service defense” to bar a finding of negligence under Gertz, see id., § 6:8, or “gross irresponsibility” under the New York rule. See id. at § 6:10.
1642. Mehau v. Gannett Pac. Corp., 658 P.2d 312, 322 (Haw. 1983). For an excellent “wire service” example, see Walker v. Pulitzer Publishing Co., 394 F.2d 800 (8th Cir. 1968), held in abeyance until the Supreme Court decided Associated Press v. Walker (see supra notes 71-76 and accompanying text), one of a host of cases filed by General Walker. See Walker, 394 F.2d at 806-807 (Appendix). The court refused to find constitutional malice since the dispatches relied on were largely the ones in the case before the Court in Walker—i.e., from “established reputable and properly-regarded-as-reliable news services . . .” Id. at 805. The only exception was a report from AP’s own employee at the scene, who had a “long and satisfactory” employment. Collectively, these caused defendants’ editors to reasonably believe the contents of the alleged defamation to be true. The particular editorial accusations in question were also based on dispatches and a television broadcast from Texas and a competitor Saint Louis newspaper. Based on these sources, the court found no evidence for liability under Sullivan-St. Amant. Id. at 805.
article taken wholly from an anonymous telephone call. Likewise, “secondary distributors” such as booksellers are protected only by Sullivan when sued by public figures.

In addition to the above scenarios, voluminous case law has held that, as a matter of law, constitutional malice cannot be shown where a publisher’s account is “supported by a multitude of previous reports upon which the publisher reasonably relied.” Accordingly, defendants “will not be forced to defend, nor will a trial judge in a later libel case have to retry, the truthfulness of previous reports made by independent publishers.” A great volume of case law, often treated as functionally equivalent to the “wire service defense,” has identified other classes of reputable sources upon which defendants can “justifiably and non-recklessly rely.” These include newspaper, book, magazine, or television stories, a multiplicity of previously published reports or studies, and other articles consistent with defendant’s investigation . . . law enforcement source[s] . . . informal and formal governmental records, reports, documents, and statements and proceedings . . . reputable writers, journalists, and newspapers . . . sources of good, or distinguished reputation . . . an organization dedicated to the study of the particular matter in controversy.

1644. Id.
1646. Rosanova v. Playboy Enter., Inc., 580 F.2d 859, 862 (5th Cir. 1978). In suits by non-public plaintiffs defendant/republisher can republish a report by a reputable media source without being liable under New York’s “grossly irresponsible” conduct, post-Gertz standard. In Bryks v. Canadian Broadcasting Corp., 928 F. Supp. 381, 382-86 (S.D.N.Y. 1996), defendant CNN reissued a thirty minute investigative report into allegations of sexual misconduct by plaintiff/rabbi done by CBC. There was no evidence attributable to CNN that CBC was anything other than a “long-established reputable news agency” that other news entities were entitled to justifiably rely on for news. Id. at 385. There was no evidence CBC was “generally unreliable” as a news source, or that there was anything in CBC’s account that gave CNN “substantial reasons to question” the account’s accuracy. Id. at 385-86. The court cited literature drawing an analogy to the “wire service defense.” The sensational nature of the title did not make the allegations “inherently incredible,” as such wrongdoing allegations were commonplace. Id. at 385.

1647. Rosanova, 580 F.2d at 862.
1648. Jewell v. NYP Holdings, 23 F. Supp. 2d 348, 369-71 (S.D.N.Y. 1998) (the court applied precedent adopting a “general republication defense” “broader” than the “wire service defense” that applied to any republisher from “any source” where there was “no substantial reason to question the accuracy of the material or the reputation of the reporter”). See also supra note 1646 (discussion of Bryks).

1649. ELDER, DEFAMATION, supra note 1179, § 7:2, at 7-25 to -32 (citations omitted).
1650. ELDER, DEFAMATION, supra note 1179, § 7:2, at 7-25 to -32 (citations omitted).
But this reliance does not always bar liability. For instance, a defendant cannot rely on a newspaper story and ignore the editorial apology for any misstatements in the story.1651 Consider that the above are all cases epitomizing possible reasonable, good faith reliance as a bar to liability under Sullivan and St. Amant. Clearly such reliance involves accurate rather than distorted reportage. Are such uses measurably or qualitatively different from neutral reportage with its purported “conduit”/“messenger” functions? Check the need for neutral reportage proposed by the amici curiae in Norton v. Glenn.1652 If neutral reportage were the law, would publishers of wire service accounts, publishers relying on other media entities’ accounts, publishers of syndicated columns, and publishers of books and articles by reputable authors or magazines not restructure their arguments to portray themselves as mere “conduits”/“messengers” entitled to equivalent absolute protection?1653 They are republishing or distributing either verbatim accounts or the gist of controversies that would often meet the “raging controversy” requirement, often focus on a public person, and their source would be a “responsible, prominent” one.1654 The net result of such an extension would be catastrophic for plaintiffs and effectively eviscerate much of the prevailing case law on constitutional malice1655 and the minimal fault-negligence standard applicable to private persons in public interest cases.1656 There is no warrant in Supreme Court precedent, logic, or public policy for such radical changes which would pervasively undermine the viability of a libel

1652. See supra notes 571, 591.
1653. See supra text accompanying notes 1626-1651. For an example of wire service defendants asserting the neutral reportage doctrine for reporting accounts of other media defendants, see Whitaker v. Denver Post, 4 Media L. Rep. 1351, 1352 (D.C. Wyo. 1978) (applying neutral reportage but anomalously finding it defeasible by constitutional malice—note that this provided no additional protection in a public figure case).
1654. See supra Part V.C.
1655. Once the focus shifts from the reasonableness of reliance to accuracy-neutrality of reportage, plaintiff would lose even where reliance is ill-vised or problematic and based on “serious doubts” as to falsity. See supra notes 50, 77-85, 179-186, 295-308 and accompanying text. Indeed, non-liability where defendants have “serious doubts” about the underlying truth of what they are reporting is the essential substratum of neutral reportage. See supra notes 655-657 and accompanying text.
1656. This would happen if neutral reportage were to be extended to private persons. See supra note 1738. On the standards applicable in private person-public interest cases, see the discussion supra in text accompanying notes 166-169, 268-293.
action against media republishers. However, such a transformation would be the inevitable, volcanic domino effect.

IX. NEUTRAL REPORTAGE’S BIZARRE MISAPPLICATION OF NEW YORK LAW IN THE SECOND CIRCUIT

Adoption of neutral reportage may result in other breathtaking anomalies. For example, in Konikoff v. Prudential Insurance, the Second Circuit, the genesis and a major proponent of neutral reportage, had before it a suit by an independent appraiser. The appraiser claimed she had been defamed by Prudential’s widespread dissemination to shareholders and the public of a report and transcript inculpating plaintiff in: (1) being coerced by portfolio managers to overvalue property; and (2) implying that she no longer did appraisals for Prudential because of these delinquencies. The federal magistrate found the widespread dissemination qualifiedly privileged under New York common law and determined that there was no evidence of either common law nor constitutional/Sullivan-styled malice sufficient to forfeit the privilege. The Second Circuit affirmed, but not on the common law privilege ground, concluding that such widespread dissemination could not be easily delimited and might then logically extend to other media sharing a common interest with audiences or subscribers. The court conceded that this result might be “difficult to square” with New York’s “grossly irresponsible”/Chapadeau v. Utica Observer-Dispatch standard in private person-public interest cases. The Second Circuit then stunningly did an

1657. Indeed, such broad “conduit”/“messenger” immunity is totally inconsistent therewith. See supra text accompanying notes 571-583.
1658. 234 F.3d 92 (2d Cir. 2000).
1659. See infra text supported by notes 1668-1677.
1662. Konikoff, 234 F.3d at 94.
1663. Konikoff, 234 F.3d at 100. The court noted that the traditional rule stringently restricted the common law privileges to “an extremely limited, clearly defined group of private persons with an immediate relationship to the speaker, such as a family member or an employer’s own employees.” Id. at 99 (quoting Theodore J. Boutrous, Why an Expanded Common-law Privilege Should Also Protect the Media, COMM. LAW. 9 (1997)). The court noted that New York courts had not abrogated the “excessive publication” limitation to extend the common law privilege to such public disseminations. It noted the minority view to the contrary. Konikoff, 234 F.3d at 100. For citations to the minority view see ELDER, DEFAMATION, supra, note 1179, § 2:34, at 2-231 to 232.
1665. Konikoff, 234 F.3d at 100, aff’d on grounds on grounds other than qualified privilege.
about-face and found a Chapadeau-based absolutist protection by infusing neutral reportage into “gross irresponsibility”.”

The Konikoff opinion, authored by Judge Robert Sack, himself a noted media scholar and former media litigator, bears close examination. First, one needs to examine the disseminated defamatory matter. Prudential issued a transcript of a meeting between investors and outside counsel who had analyzed accusations of appraiser impropriety generated by litigation. In that transcript the law firm partner was asked whether the firm recommended that Prudential initiate action regarding particular appraisers. Counsel’s response is illuminating: “No. No hard evidence suggests that the appraisers did not formulate their own conclusions or that the appraisers would not stick to their conclusions.” After noting there was “more than one way to view the evidence” regarding the appraisers, counsel then identified as illustrative a specific property that an earlier publicly disseminated report had claimed involved an appraiser possibly “compromised or coerced by Prudential into reporting biased or false property values.” “[Plaintiff] . . . came up with an appraised value under disputed factual circumstances from which one could argue circumstantially that the value conclusion was not reached independently.” Counsel then followed that option with a stark rejection: “All direct evidence, however, indicated that [the plaintiff’s] value conclusion was reached independently.” Outside counsel expressed that “reasonable minds will differ as to what conclusions should be drawn.”

1666. Id. at 100-06.
1668. Konikoff, 234 F.3d at 96.
1669. Id.
1670. Id.
1671. Id.
1672. Id. at 95-96 (emphasis omitted).
1673. Id. at 96. An earlier investigation by an outside firm had found the allegations “unsubstantiated.” Id. at 95. Compare the federal district court’s detailed analysis. Konikoff, 1999 WL 688460, at * 19-26.
1674. Id.
independent appraisers (identified by name, including plaintiff) “no longer perform . . . appraisals” for Prudential.\textsuperscript{1675} The transcript did not include what defendant Prudential knew—that the plaintiff no longer did appraisals because she had left Prudential to start her own company.\textsuperscript{1676} Plaintiff claimed the omission implied she was terminated because of the controversy.\textsuperscript{1677}

Although the federal magistrate found no evidence of common law or constitutional malice,\textsuperscript{1678} a view with which the Second Circuit seems to agree,\textsuperscript{1679} the issue is not free from doubt. An argument could be made that the report set up a culpable straw person and then refuted it, reducing the matter to little more than conjecture or speculation.\textsuperscript{1680} However, the court’s analysis ultimately circumvented the knowing or reckless disregard of falsity/calculated falsehood/defeasance of privilege argument. The court’s methodology is informative. The court noted that the plaintiff had pointed out that the \textit{Chapadeau} “grossly-irresponsible” test was “less difficult” for a plaintiff to meet,\textsuperscript{1681} an argument that has strong underpinnings.\textsuperscript{1682}

\textsuperscript{1675} Konikoff, 234 F.3d at 96.
\textsuperscript{1676} Id.
\textsuperscript{1677} Id. \textit{But see} Konikoff, 1999 WL 688460, at *26-27 (interpreting the statement as indicating, in context, that defendant neither discouraged nor encouraged inflated appraiser evaluations, and even if interpretable in the loose fashion suggested by the plaintiff, there was no basis for a finding of constitutional malice).
\textsuperscript{1678} Konikoff, 234 F.2d at 97.
\textsuperscript{1679} Id. at 104. The court doubted a “triable issue” existed, but did not have to resolve this in light of the approach taken.
\textsuperscript{1680} See \textit{ELDER, DEFAMATION}, \textit{supra} note 1179, \textit{e.g.} §§ 7:2, at 37-45, 7:12 (detailing the plethora of precedent supporting a finding of constitutional malice where defendant publishes in the face of known contradictory or refutatory information); \textit{supra} text accompanying note 79.
\textsuperscript{1681} Konikoff, 234 F.3d at 104.
\textsuperscript{1682} \textit{Chapadeau} itself noted that lower courts relied upon \textit{Rosenbloom v. Metromedia Inc.} “compulsions.” See \textit{supra} text accompanying notes 149-157. The Court’s repudiation of \textit{Rosenbloom} in \textit{Gertz v. Robert Welch, Inc.} allowed New York to adopt a standard between the two and by a preponderance of evidence. See \textit{Chapadeau} v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1977); \textit{see also supra} text accompanying notes 158-169. Other New York Court of Appeals decisions likewise reaffirm that \textit{Chapadeau} was a \textit{less demanding} standard than \textit{Sullivan-Rosenbloom}. See \textit{e.g.}, Gaeta v. N.Y. News, Inc., 465 N.E.2d 802, 805-07 (N.Y. 1984) (in light of a finding of no fault under \textit{Chapadeau} the court did not have to reach the availability of punitive damages issue; based on \textit{Chapadeau}’s “wholly objective” standard, summary judgment was appropriate, distinguishing constitutional malice cases, where the substantive standard did not “readily lend itself” to such disposition (see \textit{infra} note 1687)). \textit{See also} Huggins v. Moore, 726 N.E.2d 456, 459-60 (N.Y. 1999) (the court noted that \textit{Chapadeau}’s deference to “professional journalistic judgments” standard was its response to \textit{Gertz}’s discretion to mandate “a higher decree of culpability than simple negligence” in non-public person cases not subject to the \textit{Sullivan} standard; however, the court reaffirmed that constitutional malice would be required for presumed and punitive damages in private person-pubic concern cases).
Clear and unequivocal New York precedent allows a claimant to proceed with a claim for compensatory damages under Chapadeau, while also affirming that punitive damages are unavailable under the Sullivan-Gertz requirement of constitutional malice. That line of cases was not cited by the Second Circuit. Instead, it concluded that the Chapadeau and Sullivan tests were qualitatively different, rather than the latter being a “more onerous version” of the former. The court did concede that “[o]rdinarily” the higher standard would subsume the lower, stating it is “grossly irresponsible to make a defamatory statement knowing that it is false or while highly aware that it is probably false.” But then the court added the kicker: “But that is not necessarily the case.”

The court’s reasoning as to why publication of a lie—a calculated falsehood—is not “grossly irresponsible” is fascinating. Judge Sack referenced the example of media rebroadcasting of a public official’s press conference despite its independent knowledge that one of the statements therein is probably false. This publication would meet the “subjective awareness of probable falsity” constitutional malice standard, but it would still be “responsible journalism” under Chapadeau. Of course, that example is inapt and misleading, as it falls within the parameters of fair report which has distinguishable functions and policies, and where substratal falsity is never the issue and facial accuracy controls.

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1684. Konikoff, 234 F.3d at 92.

1685. Id. at 104.

1686. Id.

1687. Id. (emphasis added). Judge Sack noted that one post-Chapadeau decision, Gaeta v. New York News, Inc., had “explicitly acknowledged” that Chapadeau might be “more protective” than Sullivan. See id. at 105 n.12.; supra note 1682. Judge Sack makes too much of this statement. As he notes, that statement was made in the context of the enhanced availability of summary judgment under the objective “gross irresponsibility” standard as compared to the subjective inquiry into “serious doubts” under the Sullivan-St. Amant standard. Regarding the latter, see supra text accompanying notes 77-85. Of course, a similar objective inquiry applies under the simple negligence rule applying in most jurisdictions in private person-public concern cases. See Elder, Defamation, supra note 1179, at §§ 6:2, 6:4, 6:5. Under Judge Sack’s simplistic logic simple negligence is a more demanding test than constitutional malice.

1688. Konikoff, 234 F.3d at 94.

1689. Id.

1690. Id. at 104.

1691. See Elder, Defamation, supra note 1179, §§ 3.1, 3.6-3.7; Elder, Fair Report, supra note 1185, §§ 1.00, at 3-5, 1.06-1.07. Judge Sack in his treatise notes that “some jurisdictions” extend fair report to press conferences, even those convened by the speaker.
Judge Sack conceded that “an anomaly seems to emerge” because a publication about a private person might be protected while the same publication would be unprotected as to a public person post-

Gertz. Judge Sack suggested this incongruity “may be more apparent than real.” If a public person brought a suit parallel to the one before the court, New York courts might decide that such a plaintiff had a burden of establishing “gross irresponsibility” as an additional hurdle to constitutional malice. Konikoff made the undeniable point that New York can, and has, accorded greater than First Amendment protection to defamation defendants. But consider what Judge Sack is suggesting: a state that has unequivocally adopted and regularly reaffirmed a standard greater than Gertz but lower than Rosenbloom “gross irresponsibility” might choose a greater than Sullivan standard to “harmonize” New York law! Of course, it could do so but that is extraordinarily, even laughably, unlikely.

SACK, DEFAMATION, supra note 1225, § 7.3.2.2.4, at 7-22 & n.4. Interestingly, he includes Chapin v. Knight-Rider, Inc. in his listing. See supra text accompanying notes 1472-1483. Of course, Chapin did not involve a public official acting in his official capacity. See supra text accompanying notes 1472-1483, 1568-1569.

1692. Konikoff, 234 F.3d at 104
1693. Id. at 104-05.
1694. Id. at 105.
1695. Id.
1696. Id. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) (the state constitution could permissibly protect a news organization against liability under a promissory estoppel theory for illegal news gathering even though such liability would not offend the First Amendment); Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) (the Court will not review decisions based on “adequate and independent” state grounds]. See also the memorable phrase of Justice Robert Lukowsky in rejecting a suggestion that the U.S. Constitution controlled. Pointing to more protective provisions of the Kentucky Constitution, he concluded that the Supremacy Clause did “not require us to ride with the Federales.” Ky. State Bd. v. Rudasil, 589 S.W.2d 877, 879, n.3 (Ky. 1979). See also the discussion of Chapadeau, supra text accompanying notes 1664-1666, 1681-1687, 1690-1695. On New York’s adoption of a broader opinion privilege than that in Milkovich v. Lorain Journal Co., Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1277-80 (N.Y. 1991), see also supra notes 315, 1599.

1697. See supra text accompanying notes 71-85, 149-169.
1698. See generally ELDER, DEFAMATION, supra note 1179, § 6:10. See supra text accompanying notes 149-157. See also Konikoff, 234 F.3d at 105. Interestingly, the court did not certify this highly problematic interpretation of New York law to the New York Court of Appeals despite its earlier suggestion that it “might be inclined” to certify the issue of whether New York law would have authorized common law privilege in cases of dissemination to the public at large. Id. at 100.
The court frankly acknowledged what it was doing in an unusually pregnant footnote infusing into Chapadeau a species of “neutral reportage protection.” The court’s prediction about a possible future New York harmonizing development is particularly dubious since New York has rejected neutral reportage in private person cases and, very likely, in public person cases How did the court reach this result? It applied standards of “responsible journalism” to refocus the inquiry and found that neither Prudential’s initial commissioning of the report and transcript nor its dissemination was “grossly irresponsible.” The court rationalized that it was “plainly reasonable” for Prudential to publicize the unmodified text of the report and transcript in response to demands from its investors and governmental entities to deal with the prior accusations. In light of its “purpose . . . to inform the public” about its independent assessors’ conclusions, Prudential “could hardly have edited the reports to omit information Prudential thought to be inaccurate” while honoring its goal of publicly disclosing, in haec verba, what [outside counsel] thought to be the facts.

1699. Id. at 105 n.11. See also SACK, DEFAMATION, supra note 1225, at § 7.3.2.4.6.2, at 7-52 (citing Konikoff but, without disclosing his authorship, Judge Sack suggests neutral reportage has “arguably stolen in through the back door”). Judge Sack noted that New York had rejected neutral reportage, but that the New York Court of Appeals had suggested that defendants not covered thereby might be protected by Chapadeau—citing Weiner v. Doubleday & Co., 549 N.E. 2d 453, 456-57 (1989). Konikoff, 234 F.3d at 105 n.11. That is undoubtedly true, but an examination of Weiner indicates that it involved no more than a case of “reasonable confirmation” of the underlying charge under Chapadeau.

1700. See supra text accompanying notes 998-1004, 1573-1579.

1701. Konikoff, 234 F.3d at 104.

1702. Id.

1703. Id. at 103. It stated this even though it would apparently violate common law limitations!

1704. Konikoff, 234 F.3d at 103 (emphasis added). This concession seems to admit there was substantial evidence of knowing or reckless disregard of falsity sufficient to forfeit any qualified privilege and to warrant punitive damages under the Sullivan-Gertz standards. See supra text accompanying notes 1681-1683 and infra text accompanying note 1710.

1705. Konikoff, 234 F.3d at 103. The court cited “strikingly similar” cases in support. However, an examination of the cases relied on discloses that they were “strikingly dissimilar”—none of them involved accurate reportage of information known to be false or published in reckless disregard of falsity. Mott v. Anheuser-Busch, Inc., 910 F. Supp. 868, 875-78 (S.D.N.Y. 1995) (finding the Chapadeau standard was not met where the investigation was based on “thoroughness and rigor”—the court emphasized that the state in the consent decree had acknowledged defendant acted in a “responsible and cooperative manner”), aff’d mem., 112 F.3d 504 (2d Cir. 1996); Post v. Reagan, 677 F. Supp. 203, 208-09 (S.D.N.Y. 1989) (finding that the detailed investigation and later reporting were done in a “careful, responsible manner,” negating Chapadeau’s fault requirement and the higher standard of constitutional malice), aff’d mem., 854 F.2d 1315 (2d Cir. 1988); Luise v. JWT
words, any censorship by Prudential to prevent reputational harm to persons like the plaintiff “would have undermined its justifiable objective of baring all that the investigators had to say about the results of their inquiry.”

The court’s shift in emphasis is startling and unequivocal. The court reversed focus from a fault regarding falsity analysis under Sullivan, Gertz, and Chapadeau to a process orientation unrelated to substratal falsity and focusing on facial accuracy. This should

Group, Inc., 14 Media L. Rep. (BNA) 1732, 1733-34 (N.Y. Supp. 1987) (finding that Chapadeau was not met where defendant’s press release was consistent with the report of an independent auditor and was based on a detailed investigation—both interviews and documents), aff’d w/o op., 525 N.Y.S.2d 454 (App. Div. 1988), app. denied, 528 N.E.2d 520 (N.Y. 1988).

1706. Konikoff, 234 F.3d at 103.

1707. Concededly, Chapadeau was adopted from Harlan’s minority position in Curtis Publishing—see supra notes 59-76 and accompanying text. Konikoff, 234 F.3d at 101 n.7. An analysis of Chapadeau discloses that the case involved defendant newspaper’s abuse of the fair report privilege. Apparently, plaintiff had been arrested on drug charges—that much was not controverted. Plaintiff claimed however, that the charge was embellished by inculpatory additions—“police charge” “[d]rugs were found at a party, at a particular location and plaintiff was one of a trio arrested.” Chapadeau, 341 N.E.2d at 569-70. Of course, the latter informal comments of police are not covered by either New York law truth or fair report law, see supra text accompanying notes 1351, 1657-1662, supra, respectively, or the strong majority view of the case law nationally. See supra Part VII.C. and this note, infra. The added comments tended to convict plaintiff in the public mind by adding inculpatory matter to a mere charge, effectively abrogating its presumption of innocence. See ELDER, FAIR REPORT, supra, note 1185, § 1:10, at 90-93. In such cases, the shift is from facial accuracy to the implication—i.e., that plaintiff was in fact guilty. See ELDER, FAIR REPORT, supra, note 1185, § 1:10 at 87-88, §§ 2.07-2.08. This was clearly the implicit focus of Chapadeau’s analysis. However, defendant’s use of two authoritative sources and checking the matter with third parties was found to be reasonable conduct, not “gross irresponsibility.” Chapadeau, 341 N.E.2d at 571-72.

The court’s trio of post-Chapadeau opinions likewise focused on fault regarding substratal falsity. In Gaeta v. New York News, Inc., 465 N.E.2d 802, 805-07 (N.Y. 1984), the court applied Chapadeau to an investigative article suggesting plaintiff/wife/mother was implicated (or so “psychiatrists said”) in precipitating her husband’s “nervous breakdown” in a “messy divorce” and had caused her son’s suicide because she “dated other men.” The court found that defendant had used a previously reliable source, the facts had “inherent plausibility,” and defendant had “no reason to suspect her source.” Id. at 806-07. Next, in Weiner v. Doubleday & Co., 549 N.E.2d 453, 457 (N.Y. 1989), the court absolved both co-defendants. The book publisher was entitled to rely on an author of impeccable reputation. The author in turn had relied on an experienced research person who had engaged in multiple interviews with the primary source for the libel of plaintiff/psychiatrist—an implication he slept with a particular patient whose criminality and family dynamics were the focus of the book. The author herself had interviewed corroborating independent witnesses likely to be conversant with family dynamics. Furthermore, it was undisputed that the source was the patient’s confidante with an intimate familiarity with the patient’s life and the source had also related the same matter earlier to a third party. In sum, there was “reasonable
surprise no one familiar with either neutral reportage or the media’s conflation of truth and accuracy.\textsuperscript{1708} Judge Sack was quite up front and explicit about what the court was doing: transferring focus to whether a self-interested and financially motivated defendant “acted responsibly” in choosing and dealing with the outside evaluator and then publicizing the unexpurgated results.\textsuperscript{1709} Under such circumstances, a defendant such as Prudential was authorized to ignore with impunity its knowledge or awareness of the probable falsity of defamatory statements and the incalculable harm to personal and professional reputation. This level of culpability would have authorized presumed and punitive damages under First Amendment jurisprudence and forfeited any common law privilege.\textsuperscript{1710}

Under such circumstances, any media republisher of the report and transcript with parallel knowledge would also have been confirmation” of the libelous statement. \textit{Id.} Most recently, in \textit{Huggins v. Moore}, \textit{726 N.E.2d 456}, 459-62 (N.Y. 1999), the court focused exclusively on whether the reported charges against plaintiff by his former wife—“victimization by her financial as well as marital partner to the point of economic and career ruination”—met \textit{Chapadeau’s} “arguably of legitimate public concern” standard. It remanded for a fault finding as to whether defendants were “grossly irresponsible in publishing any untruths” or “damaging falsehoods.” \textit{Id.} (emphases added).

The case of \textit{Hogan v. Herald Co.}, \textit{444 N.E.2d 1002} (1982), aff’d \textit{446 N.Y.S.2d 836} (App. Div. 1982) (for the reasons stated in the opinion by Simons, J.), is not inconsistent with the above. In \textit{Hogan} the court held that two statements were libelous in conjunction—that plaintiff had been “arrested” for criminal mischief and an implication plaintiff and his father, a town supervisor/candidate for reelection, had “taken care of” (i.e., “fixed” the arrest). The court found them potentially libelous. \textit{Id.} at 838-40. As to the arrest statement, the court noted that co-defendant/alleged victim had filed a complaint with the police accusing plaintiff. Co-defendant/chief of police investigated and “issued” an appearance ticket so charging plaintiff. However, that same day affidavits were filed with the police department controverting plaintiff’s involvement in the mischiefful damage at issue. As a result, no one ever served the appearance ticket on plaintiff and he was never arrested. \textit{Id.} at 838. The court treated the matter as non-authoritative, informal, unofficial statements of police—the sources quoted or relied on in the article were three co-defendants—the complainant, the chief of police (the unidentified “police official”) and plaintiff’s father’s primary opponent/town councilman, and a town justice. The court correctly viewed them correctly as not covered by fair report. This is clear from the court’s reference to New York’s leading case rejecting fair report, in cases of public officers’ private views or statements, \textit{Kelley v. Hearst Corp.}, \textit{157 N.Y.S.2d 480} (App. Div. 1956), the analogy \textit{Hogan} relied on in rejecting neutral reportage. \textit{See supra} notes 1001, 1575 and accompanying text. In such cases police sources are only gauges of journalistic responsibility or irresponsibility (a question as to the latter in \textit{Hogan} was presented for trial) and the focus is on fault as to the underlying falsity of the criminal implications or imputations—in \textit{Hogan} guilt of criminal mischief and a “fixed” arrest. \textit{See supra} notes 1169-1177, 1330-1334 and accompanying text.

\textsuperscript{1708} \textit{See supra} Part VII.B.

\textsuperscript{1709} \textit{Konikoff}, \textit{234 F.3d} at 104.

\textsuperscript{1710} \textit{See supra} text accompanying notes 76, 166-169, 181, 248, 295-308, 1681-1683.
immune. In addition, in future cases like Chapadeau or Konikoff, reformatted and expanded “responsible journalism” standards would allow any media republisher broad immunity to accurately report any calculated falsehood if it was “arguably within the sphere of legitimate public concern.” Apparently, this would apply without whatever constraints exist on neutral reportage within the Second Circuit, including the public person limitation, reportage of plaintiff’s response or denial, and maybe others.

X. CONCLUSION

In exhaustive (and arguably exhausting—mea maxima culpa) detail, this paper has delved into the media Jabberwock’s broad gauged, multi-faceted and intertwined arguments for why accurate republications should, and must, be accorded absolute First Amendment protection from republication liability. To the Jabberwock, the Court’s New York Times v. Sullivan jurisprudence, giving the American media protection unknown in the world or in history, is insufficiently protective of the media in its self-assumed function of providing the public with accurate information on all

1711. See the brief discussion of RESTATEMENT (SECOND) OF TORTS § 612 (1977) in supra note 1206.


1713. In Konikoff, Judge Sack noted that the Second Circuit had adopted neutral reportage as to public figures. Konikoff, 234 F.3d at 105 n.11. The issue as to private persons remains open. See supra note 749.

1714. See supra text accompanying notes 858-876. There is no indication plaintiff was given any chance to respond to the statements in the separately distributed summarized transcript of the meeting of investors, although her responses and denials had been included in the earlier report by outside counsel. See the district court’s analysis. Konikoff v. Prudential Ins. Co. of Am., No. 94 Civ. 6863(MBM)(MHD), 1999 WL 688460, 20 (S.D.N.Y. 1999).

1715. Given the breadth of this new splendid and novel Chapadeau-Konikoff doctrine, it is quite conceivable that the media will defend as “responsible journalism” accurate reportage of charges by a “key participant” in a controversy of exceptionally dubious reputation not meeting the Edwards-Cianci “responsible, prominent source” requisite. See supra Part V.C. Indeed, given the proposed shift to facial accuracy and New York’s strong deference to “professional journalistic judgments” in defining what is of “genuine public concern,” Huggins v. Moore, 726 N.E.2d 456, 460 (N.Y. 1999), with a media defendant’s allocation of resources and determinations of newsworthiness deemed “powerful” but not determinative, Gaeta v. N.Y. News, Inc., 465 N.E.2d 802, 805 (N.Y. 1984), one may anticipate, at least in a federal court bound by Konikoff, breast-thumping defenses of accurate reportage of all manner of sleaze about all plaintiffs, public or private, as Chapadeau-Konikoff characterized “responsible journalism.” Undoubtedly, the “Chapadeau Konikoff” doctrine has hugely open-ended bootstrapping potential. See supra the discussion in the text accompanying notes 1578-1579. Compare the types of issues—including neutral reportage—where the major media have orchestrated reciprocal support groups in defending dubious doctrine. See supra notes 310, 315, 571, 763, 1226, 1445, 1531, 1535.
matters it deems to be of public concern or newsworthy, without
guard to underlying truth. The Grand Canyon-esque obstacle to this
radical endeavor, insuperable as this author suggests, is the Court’s
repeated reaffirmation of Sullivan’s exceedingly generous protection
as quite sufficient!1716 Indeed, the Court recently has buffeted two of
the Jabberwock’s attempts with nary a dissenter.1717

Although the Court has occasionally hinted at the possibility of
absolute protection for fair and accurate reports of judicial
proceedings, its jurisprudence on point is thin and decidedly
ambiguous.1718 A growing amount of lower court case law and the
Restatement (Second) of Torts Section 611 would seem to likewise
accord absolute protection.1719 However, other cases deem fair report
defeasible by some version of malice: the “made solely for” version
from the original Restatement of Torts,1720 constitutional actual
malice,1721 or some other form of malice.1722 The Court may, and
should, resolve this issue. It will then be required to decide how far
fair report absolutism should extend, if at all, beyond the judicial
proceedings context, while carefully analyzing its three identified
rationales—“agency,” “public supervisory,” and “informational.”1723

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1716. See supra Part II.

1717. The Court denied certiorari in Hatfield v. New York Times, see supra Part
VII.D, on March 27, 2006. See supra note 1590. The Court denied certiorari in Norton v.
Glenn, see supra Part III, on March 28, 2005. See supra note 605.

1718. See supra text accompanying notes 86-100, 113-148, 217-227, 416-444, 1509-
1518.

1719. See Elder, Defamation, supra note 1179, § 3:17, at 3-59 (noting that a
“growing number” follows the Section 611 view).

1720. Restatement of Torts (1938); see, e.g., supra note 152.

1721. See supra notes 98-99, 173, 1321, 1448-1457 and accompanying text (infusing
Sullivan into the Texas statute). This forfeiture standard likely would not survive
constitutional scrutiny. See note supra 1188. But compare DeMary v. Latrobe Printing &
Publishing Co., 762 A.2d 758 (Pa. Super. Ct. 2000), with supra note 1188. See also Elder,
Defamation, supra note 1179, § 3:17, at 3-57 (noting that it has been adopted “without
significant discussion in a growing minority” of decisions). Some erroneous fair report
precedent has held that accurate reportage per se negates any argument for constitutional
malice. See supra text accompanying note 1519.

1722. See cases cited in Elder, Defamation, supra note 1179, § 3:17, at 3-56 & n.3.
However, note that both common law malice and the “made solely for” version, are
“unequivocally and irredeemably antithetical” to the concept of constitutional malice
adopted by the Court. See id. at 3-56 to -57.

1723. It is doubtful the Court would adopt the full breadth of Section 611 absolutism
and apply it to all matters discussed in all open, public meetings. See supra notes 1075,
1132, 1576. The Court’s analysis in The Florida Star v. B.J.F. would give pause to anyone
suggesting a broad swath for fair report absolutism. 491 U.S. 524, 532 & n.7 (1989)
(rejecting Cox Broadcasting as controlling and noting that the latter involved “courtroom
records . . . open to public inspection,” emphasizing “the important role the press plays in
subjecting trials to public scrutiny and thereby guaranteeing their fairness,” recognizing
the diminished privacy interests in information already in the public record and the self-
What now seems quite clear is that the Court will not revive and enhance *Rosenbloom v. Metromedia*'s now discredited qualified First Amendment privilege for matters of public concern into First Amendment absolutism by adopting one or more of the circumvention devices proposed by the media Jabberwock and strongly criticized in this article. Even in the fair report context, it is highly unlikely that the Court will expand that doctrine's First Amendment protection to non-public proceedings. In the latter setting, reliance on a “public supervisory” rationale, together with its symbiotic “informational” alter-ego, without any limiting “agency” open-to-the-public requirement, would disparage, denigrate and debilitate the important interest in personal reputation. This interest is particularly apparent in cases involving official action on such dubious matters of public concern as sexual harassment allegations or unexpurgated criminal investigative file information arguably implicating (in some co-employee’s view) malfeasance, misfeasance or nonfeasance by a supervisor in the law enforcement hierarchy. While such information can be riveting and is often sensational or salacious, there censorship potential from making such “generally available” but then punishing disseminators for their offensiveness—in the case before the Court no such “public scrutiny” was “directly compromised” where the information emanated from a police report “prepared and disseminated” at a time when “not only had no adversarial proceedings begun, but no suspect had been identified”).

1724. See supra text accompanying notes 149-157.
1725. *ELDER, DEFAMATION*, supra note 1179, § 3:12, at 3-41 to -42; see supra Part VII.C.
1726. See supra Part VII.C. In *ELDER, DEFAMATION*, supra note 1179, § 3:12 at 3-41 to -42, the author stated:

The common law refusal to accord privileged status to matter unavailable to the public appears justified modernly by two legitimate, if not compelling reasons. First, the public proceeding/record/action requirement assists in guaranteeing that disclosures by government are indeed “official statements made or released by a public agency” constituting “official agency action.” By contrast, as exemplified by *Reeves* [see supra notes 1494, 1497, 1510, 1516] and *Medico* [see the text accompanying notes 1382-1429], non-public matter accorded or endeavoring to receive fair report protection has normally involved preliminary or tentative conclusions or investigations that do not “carry the dignity or authoritative weight as a record for which the common law sought to provide a reporting privilege.” Public reports or proceedings, by comparison, are normally the result of official action by a responsible, authoritative decision-maker who assumes legal and political responsibility for his or her official actions. Second, the “public” requirement helps ensure that some matters of a purely private nature or of mere curiosity to the public—e.g., domestic relations matters that are non-public under state statute or court rule—and other matter where compelling policies justify non-disclosure—preliminary investigative matter informally proffered by police or prosecutors, preliminary, uninvestigated complaints against lawyers or doctors—remain private.

*Id.* (citations omitted).

1727. See supra Part VII.C.
is no legitimate need to protect it beyond whatever status-based protection is currently available under *Sullivan*, *Gertz*, and the reputation devouring opinion doctrine.\(^{1728}\) The citizenry can engage in productive exercise of its citizenship functions without the need to know such exemplary drivel.

As the examples cited above evidence, the “public supervisory”/“oversight” rationale provides little, maybe even de minimus protection against the accurate reportage to the world at large of a potentially infinite variety of highly inculpatory defamatory and private types of information that state and federal statutes treat, for compelling reasons of public policy, as not subject to disclosure.\(^{1729}\) Yet, a minority of courts, exemplified by *Medico’s* revolutionary exercise in self-justificatory illogic, feels free to ignore the legislative and/or executive determinations as to the appropriate balance between reputation/privacy interests and what the public needs to know to fulfill its democratic functions of citizenship.\(^{1730}\) Rather, they substitute the courts’ own largely untethered judgment of what the media can accurately disseminate in the so-called public interest.

Of course, the media Jabberwock must minimize fair report’s defining justifications as “fictions”\(^{1731}\) in favor of fair report’s minor or subsidiary “informational” rationale.\(^{1732}\) Why is this? These defining, pivotal justifications are “the public supervisory”/“oversight” and “agency” rationales. Operating in tandem, they circumscribe and limit the reportage of information from non-public and unofficial government sources. This leaves the Jabberwock proponent of open-ended fair report and neutral reportage tottering at the apex of an absolutist “informational” rationale set in quicksand by *Gertz’s* repudiation of *Rosenbloom’s* qualified privilege.\(^{1733}\) For all but the media Jabberwock, defending this shabbily refurbished “conduit”/“messenger” version of *Rosenbloom* is a tough sell.\(^{1734}\) But the Jabberwock has had a go at it and will continue to do so. The Pennsylvania Supreme Court’s decision in *Norton v. Glenn* left it

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\(^{1728}\) See supra note 310 and text accompanying notes 52-53, 62, 70, 74-76, 77-85, 159-169, 254-293, 295-308, Part II.

\(^{1729}\) See supra text accompanying notes 1395, 1452-1457, 1555-1562. *But see supra* note 412 and text accompanying notes 1450-1451, 1466.

\(^{1730}\) See discussion supra Part VII.C.

\(^{1731}\) See supra note 1573.

\(^{1732}\) See supra text accompanying notes 1567-1579.

\(^{1733}\) See supra text accompanying notes 139-169.

\(^{1734}\) See, e.g., supra text accompanying notes 571-644, for media arguments made in *Norton v. Glenn*. 
reeling but not down for the count. But never fear. There are always theories to devise and reformulate, new and old rationales to espouse or revitalize, new vistas to explore. For example, a closely-divided Hatfill court rejected arguments to the effect that reportage of accusations with highly damning supporting “evidence” was non-defamatory and incapable of causing harm. Having overcome the threshold motion to dismiss, plaintiff Hatfill continued to proceed through the litigation morass and its media-protective gauntlet. Other absolutist possibilities included calculated falsehood enshrouded in the magical mystery oxymoron of responsible journalism and accurate reportage of investigations as pseudo-truth—and whatever else the media Jabberwock could conjure up. And who should absorb the burden of this reputation “valley of death” by calculated falsehood? Tell me you haven’t guessed! Yes, the victims of the media Jabberwock: “Their’s not to make reply, their’s not to reason why, their’s but to do and die.”

Ultimately, plaintiff Hatfill may lose based on his failure to prove constitutional malice as a public person. If so, the focus will be where it should have been all along—on the Sullivan standard, not doctrines attempting to circumvent its restrictions in favor of unrestrained media absolutism.

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1735. See supra text accompanying notes 571-644
1736. See discussion supra Part VII.D.
1737. See supra Part VII.D.
1738. See discussion supra Parts VII.B, IX.