

## Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm

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### I. INTRODUCTION

Who are Collin Finnerty and Reade Seligmann? An Internet search readily describes these men. According to the top three responses to a Google search,<sup>1</sup> Finnerty and Seligmann are "INDICTED AND ARRESTED" Duke Lacrosse players<sup>2</sup> named by "a North Carolina grand jury" in "rape, sexual assault, and kidnapping indictments"<sup>3</sup> and "held on \$400,000 bond."<sup>4</sup>

These three web pages offer accurate information. It is a matter of well established record that Finnerty and Seligmann were Duke University athletes charged in the alleged rape of a dancer in Durham, N.C. who was hired to perform at a private party. The latter web page of these top three search results was authored by Fox News, a reputable provider of news around the world. Another of the pages is operated by Findlaw, a reputable provider of U.S. legal news. The former web page is operated by Dilby, a service occupied principally with aggregating news from reputable sources rather than generating original news content. The web user, then, has no reason to doubt the veracity of any of these sources.

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1. I conducted a search on the popular search engine Google, [www.google.com](http://www.google.com), on January 31, 2008.

2. Dilby.com, Duke Lacrosse Team Roster, <http://www.dilby.com/duke-lacrosse-team-accuser.htm> (last visited Jan. 31, 2008). The quoted words were emphasized by red color. This web page was the first response to the Internet search described in note 1, *supra*. The central purpose of this web page appeared to be a roster of the 2005-06 Duke lacrosse team in connection with the disputed events of spring 2006. This page also named the accuser, explaining that "a young man's career, dreams, aspirations, and educational endeavours shouldn't be overshadowed by allegations." However, the page did not otherwise appear to take sides in the case, nor was it updated with news of the men's exoneration. Dilby is a self-described "Global News Monitor."

3. Findlaw.com, Duke Lacrosse Players' Rape & Kidnapping Indictments, <http://news.findlaw.com/hdocs/docs/duke/ncduke41706ind.html> (last visited Jan. 31, 2008). This web page was the second response to the Internet search described in note 1, *supra*. The central feature of the page was a scan of the indictment papers with the name of the accuser redacted by Findlaw. The page was purely factual and did not comment upon the case. The page did not report the men's exoneration. By its own description, Findlaw provides "Legal News and Commentary."

4. Foxnews.com, Two Duke Players Face Rape Charges, Third Arrest May Come Soon, <http://www.foxnews.com/story/0,2933,192085,00.html> (last visited Jan. 31, 2008). This web page was the third response to the Internet search described in note 1, *supra*. The central feature of the page was a news story, dated April 18, 2006, about the arrest of the men. The site referenced the accuser without naming her. The page did not report the men's exoneration. Fox News is a major international news provider that touts the slogan, "We Report. You Decide."

Of course even modest followers of the news know that these web search results tell only part of the story. In April 2007, Finnerty and Seligmann, as well as later-charged teammate David Evans, were exonerated. In a remarkable step, the North Carolina Attorney General not only dropped all charges against the men, but declared them innocent, citing false statements on the part of the complainant and a botched prosecution. The district attorney initially in charge of the case, Michael Nifong, was disbarred in North Carolina in June 2007.

A review of the top-ten Google results in the Finnerty-Seligmann search does indicate that something is amiss. The eighth search result in the list reports, "Nifong jailed," and Finnerty and Seligmann "declared innocent earlier this year by state prosecutors." But that outcome is not indicated by any of the other nine of top-ten search results, one of which invites users to play, "You're the Jury—Guilty or Not Guilty?" News of the exoneration—while it can be found by follow-up searches on the web sites of Dilby, Findlaw, and Fox—is not indicated anywhere on the top three web pages responsive to the search.

Imagine you are a harried hiring coordinator working for Big X Corporation. Before you sits a stack of 600 resumes, and your job today is to winnow the field by eliminating persons of dubious character. Your tool is Google, today "a commonplace part of hiring (and firing)."<sup>5</sup> A candidate apparently under indictment for rape, sexual assault, and kidnapping is unlikely to make the cut. Applicants Finnerty and Seligmann will probably not get the benefit of careful reading and follow-up searches concerning their charges. Maybe they will get the benefit of your general knowledge about the news. But another applicant, a later-exonerated defendant who once made small-time news for a charge reported from the police blotter, will not have the advantage of your general knowledge.

Finnerty and Seligmann, then, have been injured in their reputations as well as in their persons through wrongful detention. They will continue to be injured in untold ways; they will not even be cognizant of the ways in which they likely will be injured. Revelation of the prosecutor's misconduct in their extraordinary case has rendered the City of Durham vulnerable to a liability claim; at the time of this writing, Evans, Finnerty, and Seligmann have sued the City for \$30 million. But the men have not sued the news media, Dilby, Findlaw, Fox, or any other outlet, for perpetuating recitation of the charges and the injuries that follow.

Meanwhile the reputational injuries to these men are perpetuated and compounded by unusual properties of new technology, such as longevity.

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5. Lucy Kellaway, *Google will make recruits less frugal with the truth*, FIN. TIMES, June 17, available at [www.FT.com](http://www.FT.com) (search title).

Where yesterday's news, before the Internet, faded into obscurity on archival tapes and yellowing paper, the Internet never forgets. The news of 2006 remains at the fingertips of the user of 2008, of 2009, and of 2020. Will the top three responsive web pages to a search in 2048 again reveal only the breaking news of Finnerty's and Seligmann's arrests, or will news of their later exoneration rise to the top? Distressingly, the marvelous flexibility that makes the Internet a medium superior to paper—*e.g.*, the ease of hyperlinking to related content and the ability to correct and update content virtually instantaneously at nominal cost—is not apparently being exploited now. Whereas a newspaper morgue search would readily cross-reference the initial charge and later exoneration of a criminal defendant before the electronic era, the broad range of sources available online are not so readily indexed and cross-referenced.

As the Duke players' attorneys well know, the media probably cannot be held liable, despite their ongoing role in perpetuating the infamy of Evans, Finnerty, and Seligmann. A confusing but entrenched labyrinth of common law, statutory, and constitutional defenses in tort law protects the media against such potential claims. These defenses include truth, fair comment, fair report, neutral reportage, and wire service.

Nevertheless, the vitality, scope, and sometimes the very existence of these privileges is being tested amid the rise of the Internet and "new media" news reporting. In tension with the twenty-four-hour news cycle and proliferation of media outlets, public patience with media sensationalism is wearing thin. Public anxiety has been exacerbated over accountability for online actors. Public concern over values of privacy and reputational integrity has soared in contrast with modest support for media freedom. For better or worse, the U.S. Supreme Court is no longer the same progressive, civil-rights-era body that developed the media-protective doctrines of *New York Times v. Sullivan*<sup>6</sup> and its progeny.<sup>7</sup> The pendulum, in other words, is swinging back, away from classical liberties such as the freedom of speech, and toward individual legal interests such as reputation and privacy; away from media defendants and toward civil plaintiffs; away from privilege and toward liability. The defenses that have protected the media against liability for perpetuating reputational harm are ripe to be tested, probed, and re-defined by courts in this era of reoriented public priorities.<sup>8</sup>

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6. 376 U.S. 254 (1964) [hereinafter *Sullivan*].

7. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

8. This state of affairs has not come into being overnight. *See, e.g.*, Barbara L. Wartelle & Sheila R. Caudle, *Media Defendants Reconsider Common Law's "Fair Report" Privilege as Supreme Court Expands Access to Judicial Proceedings While Limiting First Amendment Protection*, 38 *MERCER L. REV.* 859 (1987).

This Article does not contend that media privileges should be contracted, or for that matter, expanded. Rather, this Article means only to warn. The media have rested too lazily on their labyrinthine tort defenses. They have too readily assumed that the First Amendment reborn in the 1960s and older, free-speech common law precepts will see them through the pendulum's opposite swing. They have not well considered the implications of new media and the challenges, such as perpetual online publication, that the mechanics of new media pose to the free-speech framework in an era when the public increasingly favors the historic priorities of fair trial and reputational integrity over the more amorphous and more recent priority of "uninhibited, robust, and wide-open" debate.<sup>9</sup> This Article warns that the American media must place more weight on the individual rights of the subjects of news stories, such as fair trial, reputation, and privacy, when making *ethical* decisions about online content, or else the legal system will distort the privilege labyrinth to compel *legal* decisions that afford greater respect for individual rights. In other words, self-regulate or be regulated.

Part II of this Article provides an overview of the labyrinth of media tort defenses, specifically the four privileges—fair comment, fair report, neutral reportage, and wire service—that come into play when the media republish defamatory content about criminal suspects and defendants without specific intent to injure. Part III of this Article discusses these privileges in light of a hypothetical case involving a highly publicized crime and an indicted suspect, against whom charges are later dropped, but who suffers perpetual reputational harm from the out-of-context republication online of news related to his indictment. Part III demonstrates how the four privileges would operate in defense of the online news republisher and how the fault lines of these privileges would be pressured to yield to liability in light of the unusual conditions in cyberspace in contrast with traditional media, and in light of how legal norms tend to codify the social norms of journalistic practice and ethics, and of readers' expectations. Part IV concludes by calling on the media to self-regulate, rather than be regulated by shifting legal norms. Specifically, part IV suggests that news media can renew their commitment to journalistic principles and head off top-down legal reform by taking greater responsibility for online content, and by minimizing the risk of unfair process and perpetual reputational harm to the subjects of news coverage through the use of tools, such as hyperlinks, to keep content updated.

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9. *Sullivan*, 376 U.S. at 270.

## II. THE MEDIA-PRIVILEGE LABYRINTH

The historic common law was not very forgiving of defamation. Injuring a person's reputation ordinarily gave rise to strict liability, in contrast to negligence and more elevated standards of fault. Still, British courts understood that not every statement that might lower a person in the estimation of others could be punished. To permit such widespread liability would paralyze everyday conversation. A consumer could not malign a merchant's faulty wares, nor could a politician mock an opponent. Indeed, it would be impossible to bring a lawsuit for fear of denigrating the defendant. To draw the fine line between the actionable and not, courts developed a network of exceptions, or privileges,<sup>10</sup> to govern in recurrent circumstances where free speech served a greater good than punishment for injury to reputation.

Common law in the United States imported this network of privileges and built upon it. In the civil rights era of the 1960s and the decades following, the U.S. Supreme Court buttressed the network substantially by interpreting the First Amendment expansively to constitutionalize much of tort law in cases of a defendant's speech alleged to have caused a plaintiff's psychic harm. Where the Supreme Court did not expand the reach of the First Amendment, legislatures often stepped in to make speech-favorable statutory modifications to the common law. The result today is, for all its intricacy, a virtual labyrinth of privilege: some a product of evolving common law, some of evolving constitutional compulsion, some of statute and interpretation, and much of a provenance mixed in uncertain proportion.

Owing to this privilege labyrinth, U.S. news media own a remarkable advantage, unparalleled the world over, in tort litigation arising from published content. The greatest protection still comes from the Supreme Court's defamation case law, initiated with the 1964 imposition of the First Amendment in state tort litigation in *Sullivan*.<sup>11</sup> Among the most important innovations that can be traced to *Sullivan* is the constitutionally compelled

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10. Technically, "privilege" is not the right word to characterize just any theory of the defense in a defamation suit. Conventionally, a privilege, proved by the defense, operates to protect speech that is defamatory, but for reason of the privilege, does not result in liability. In contrast, a defendant may claim that the speech alleged, perhaps because it is an assertion of opinion without implication of false factual basis, is not defamatory at all. This latter case is sometimes characterized as raising a "privilege" for opinion, while more correctly, the defense theory is that the plaintiff has failed to meet its burden of proving a false assertion of fact. Inversely, the "wire service defense," to be discussed *infra*, part II, is a privilege in function if not name. While the technical distinction between privileges and other defense theories is legitimate and potentially significant when it comes to burden of proof and litigation strategy, I will not here labor to preserve the distinction. Such mistaken characterizations have become common in the vernacular of media tort liability, and the distinction is not especially important in the context of this Article.

11. 376 U.S. at 254.

fault standard of recklessness when the plaintiff is a public figure.<sup>12</sup> *Sullivan* principles are roughly descended from the historic common law privilege of "fair comment," but *Sullivan* went farther. For example, *Sullivan* and its progeny established that truth, a defense to defamation extant at U.S. (and late British) common law, also is constitutionally compelled.<sup>13</sup> Determined to demarcate protection for truth, the Court required, at least in the case of a public-figure plaintiff, that truth effect a burden-shifting in favor of the defendant.<sup>14</sup> Thus the affirmative defense of truth can now be characterized simply as an additional element of the defamation plaintiff's burden.

But in the years since *Sullivan*, litigants have become more creative in working around constitutional safeguards, and courts have become less determined to apply *Sullivan* principles decisively. The plaintiff against the media today rarely pleads mere defamation, but rather pleads a host of torts, emotional distress, false light, wrongful disclosure, trespass, harassment, and infringement of intellectual property rights, many of which were unknown to the law before the twentieth century. Courts vary greatly in subsequently understanding how these various theories fare in the privilege labyrinth. For example again, the classic defense of truth, often a defendant-friendly clincher, seems inapplicable against a claim of wrongful disclosure where the very truth of the matter disclosed is what makes the defendant's conduct injurious. Should the truth defense mean that wrongful disclosure is simply not actionable for a public-figure plaintiff? Or is wrongful disclosure an animal of a different color? In the waning light of the civil rights era, courts have tended to the latter notion. Thus the broad variegation of state and federal courts' interpretations in this myriad of permutations in tort law adds dimensions of complexity to the privilege labyrinth.

Nevertheless, it is possible to generalize and say that, in addition to the truth defense, the modern era has witnessed certain privileges step to the forefront as critical media defense strategies: the fair comment privilege, the fair report privilege, the privilege for neutral reportage, and the wire service defense.

#### A. Fair Comment Privilege

The common law privilege of fair comment traditionally protects assertions of opinion that are "based upon facts truly stated."<sup>15</sup> The rationale

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12. See *Gertz*, 418 U.S. at 342-43.

13. *Sullivan*, 376 U.S. at 278-79.

14. *Id.*

15. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4.4.2 (2007) (quoting *Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977)), available at [www.westlaw.com](http://www.westlaw.com) (citation: PLIREF-DEFAM § 4.4.2).

for the privilege is that "if the facts are stated, readers are able to judge for themselves whether the comment is well-founded."<sup>16</sup> In modern free-speech law, assertions of "pure opinion," based on no stated or implied factual underpinning, may not constitute actionable defamation. Such assertions are sometimes said to also be within the modern rendition of the fair-comment privilege.<sup>17</sup>

In modern First Amendment case law, the Supreme Court has been clear that an assertion of opinion is not protected per se from prosecution for defamation, rather a stated or implied factual underpinning for an assertion of opinion must be tested for defamation like any other statement of fact.<sup>18</sup> A statement of "pure opinion" is not actionable. This approach creates a limited "fact-opinion dichotomy." Thus it is equally slanderous to assert that "merchant Jones cheated me" (fact), that "merchant Jones is not a nice person because he cheated me" (opinion supported by stated fact), or that "merchant Jones is not a nice person because he cheated me, in my opinion" (opinion supported by stated fact, regardless of disclaimer). In any case, the statement of fact "he cheated me," must be tested for potential liability according to the modern rubric of defamatory meaning, truth, and constitutional safeguards, melding historic fair-comment privilege with modern constitutional doctrine. The statement alone, "merchant Jones is not a nice person," is likely protected as pure opinion unless the context suggests a factual underpinning such as "he cheated me." Context is thus crucial; there is more room to construe opinion, or more broadly, fair comment, in the context of a heated political debate or a critical review than of a news story or a research journal.<sup>19</sup>

The common law privilege of "fair comment" thus provided the seed from which the U.S. Supreme Court grew the *Sullivan* doctrine to protect speech critical of public figures on matters of public concern.<sup>20</sup> The breadth of *Sullivan* and progeny have led principal commentators, such as Robert Sack, to declare that "[t]he common-law fair-comment privilege is now largely obsolete as a result of developments in constitutional doctrine."<sup>21</sup> But the

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16. *Id.*

17. *See, e.g., Cianci v. New Times Pub. Co.*, 639 F.2d 54, 66 (2d Cir. 1980); *cf. supra* note 10. Sack described this broader understanding of fair comment as "the minority view" and treated protection of opinion as the broader concept, of which the fair-comment privilege is a special case. *See SACK, supra* note 15, § 4.4.3.

18. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990); *see id.* at 17-20.

19. *See, e.g., SACK, supra* note 15, § 4.4.2 ("The privilege extends also to comments on facts that are common knowledge or readily accessible to the reader. This extension protects continuing commentary on . . . headline news [but not the news itself] . . . It also protects artistic, gustatory, and similar reviews.")

20. *See, e.g., Michele A. Harrington, Case Note, KARK-TV v. Simon: The Current Status of the "Fair Report" Privilege in Arkansas*, 38 ARK. L. REV. 181, 184-86 (1984) (citing English and early twentieth-century U.S. cases on fair comment privilege).

21. *SACK, supra* note 15, § 4.4.1.

privilege of fair comment was and remains broader than *Sullivan* insofar as the privilege, where it still operates outside *Sullivan*, does not depend on the public-figure status of the plaintiff. Rather the fair comment privilege remains animated by the superior need for free debate on matters of public concern over the public good in protecting reputation—a more general approach that the Court rejected for the *Sullivan* doctrine.<sup>22</sup> Indeed, Sack concluded that the fair-comment privilege “may nonetheless retain some vitality in the wake of [the limited fact-opinion dichotomy], especially by filling in gaps in protection that remain.”<sup>23</sup>

A classic demonstration of the fair-comment privilege in case law is the opinion of the court in the factually colorful *Mr. Chow of New York v. Ste. Jour Azur S.A.*<sup>24</sup> Defendant was the publisher of a French-language New York restaurant guide, which published an unflattering review of Mr. Chow, a Chinese-food restaurant.<sup>25</sup> Among the assertions of the French journalist-reviewer were assertions of opinion, to be sure, but also statements of fact, arguably: “[t]he sweet and sour pork contained more dough . . . than meat, . . . the green peppers . . . remained still frozen on the plate,” and “the Peking laquered duck . . . was made up of only one dish (instead of the traditional three).”<sup>26</sup> The court analyzed the statements with the influential four-factor contextual test developed by a plurality of the D.C. Circuit en banc, per Judge Kenneth Starr, in *Ollman v. Evans*.<sup>27</sup> (1) “the common usage or meaning of the specific language” (language), (2) “whether the statement is ‘objectively capable of proof or disproof’” (verifiability), (3) “the immediate context in which the statement is made” (context), and (4) “the broader social context into which the statement fits” (convention).<sup>28</sup> Recognizing that “[r]estaurant reviews are also the well recognized home of opinion and comment,”<sup>29</sup> and that a reasonable reader expects a reviewer to employ “metaphors, exaggeration and hyperbole,”<sup>30</sup> the court held, as a matter of law, that only the statement as to Peking Duck was actionable as a statement of fact.<sup>31</sup> But testing that statement of fact against the rubric of *Sullivan* and its progeny, the

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22. *Gertz*, 418 U.S. at 346 (declining to follow *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality)).

23. SACK, *supra* note 15, § 4.4.1. Sack also observed that fair comment is sometimes protected by privilege. *Id.* at n.233 (citing TEX. CIV. PRAC. & REM. CODE § 73.002).

24. 759 F.2d 219 (2d Cir. 1985).

25. *Id.* at 221.

26. *Id.* at 221-22.

27. 750 F.2d 970 (D.C. Cir. 1984) (en banc plurality).

28. *Mr. Chow*, 759 F.2d at 226 (citing *Ollman*, 750 F.2d at 979, 982-84); see also *Ollman*, 750 F.2d at 979-83 (explaining the four factors).

29. *Mr. Chow*, 759 F.2d at 227.

30. *Id.* at 228.

31. *Id.* at 229.



court further held that Mr. Chow was a "public figure" and remanded to the defendant's favor for lack of fault.<sup>32</sup>

### B. Fair Report Privilege

Fair report is a privilege protecting the republication of a defamatory falsehood in certain circumstances. Generally, a re-publisher is liable for defamation just as well as the underlying declarant, according to the maxim "Tale bearers are as bad as the tale makers."<sup>33</sup> The general rule is supported by the theory that injury is multiplied by the repetition of falsehood, especially when the defendant is a mass medium. But the fair report privilege acknowledges that the public has an interest in the proceedings of public bodies, even when, and sometimes especially when, falsity is uttered in the course of a public proceeding. Thus the fair-report privilege, as rendered by the Restatement (Second) of Torts section 611, protects "the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern . . . if the report is accurate and complete or a fair abridgement of the occurrence reported," and clearly attributed.<sup>34</sup> The publisher's belief in the truth or falsity of the defamatory matter is usually immaterial,<sup>35</sup> as the salient fact of the report is that the defamatory statement is reflected in the public record, not that the underlying defamatory assertion has merit. But the privilege is typically destroyed by common-law malice, that is, ill will, on the part of the publisher,<sup>36</sup> because improper motive suggests that the publisher does mean to communicate merit in the defamatory assertion.<sup>37</sup> Still, the

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32. *Id.* at 230-31.

33. Richard Brinsley Sheridan, *The School for Scandal*, act I, sc. i, in RICHARD BRINSLEY SHERIDAN, *THE SCHOOL FOR SCANDAL AND OTHER PLAYS* (Penguin Classics ed. 1988) (originally published 1777); *see, e.g.*, SACK, *supra* note 15, § 7.2.

34. SACK, *supra* note 15, § 7.3.2.2.1 (quoting RESTATEMENT (SECOND) OF TORTS § 611 (1977)).

35. *Id.*

36. *Id.*

37. It is certainly possible for lawyers to take deliberate advantage of the privilege to conduct "public relations litigation." *See generally* Samuel A. Terilli, Sigman L. Splichal, & Paul J. Driscoll, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L. & POL'Y 143 (2007). Lawyers and litigants enjoy a broad privilege of their own protecting defamation in court filings, *see, e.g.*, SACK, *supra* note 15, §§ 8.2.1.3-8.2.1.4, a privilege with undoubted constitutional foundation in the First Amendment right to petition the courts. But abuse of that privilege too may result in its inapplicability, in stricken or redacted pleadings or motions, in sanctions, or in attorney misconduct charges. Terilli, Splichal, and Driscoll concluded that these possible consequences are adequate to check abuse without contracting the scope of this petition privilege. Terilli, *supra* at 150. By extension from this conclusion, if courts have adequate power to check abuse in court filings in the first instance, such "public relations litigation" strategies do not justify contraction of the later-in-time fair-report privilege.

scope of the privilege "differs dramatically from jurisdiction to jurisdiction" and is "frequently augmented or superseded by state statute."<sup>38</sup>

The fair-report privilege is supported by three rationales: agency, supervision, and information.<sup>39</sup> According to the agency rationale, the publisher acts as public proxy, allowing the proxy to witness public proceedings when it is impossible for all members of the public to witness all public proceedings personally.<sup>40</sup> According to the supervision rationale, the sharing of information with the public regarding public proceedings empowers the public to act in its democratic role as supervisor of the public sector, by holding public officials accountable.<sup>41</sup> According to the information rationale, the public interest is served simply by the circulation of maximum information about public affairs, regardless of the source.<sup>42</sup>

To what extent, if any, the fair-report privilege is compelled by the First Amendment is unclear.<sup>43</sup> Invoking the agency and supervision rationales,<sup>44</sup> the Supreme Court forbade punishment for "the publication of truthful information contained in official court records open to public inspection."<sup>45</sup> But as Sack observed, protection for truth "is not the point of the privilege of fair report."<sup>46</sup>

Operation of the fair-report privilege is well illustrated by a recent unpublished opinion from the Texas Court of Appeals, *Freedom Communications, Inc. v. Sotelo*.<sup>47</sup> The Odessa Police Department mistakenly

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38. SACK, *supra* note 15, § 7.3.2.2.1 For example, some jurisdictions extend the privilege to protect statements by public officials outside public proceedings. *See id.* § 7.3.2.2.4. To examine jurisdictional variations, see generally Michael N. Conway, Mona G. Thakkar, & Katherine Licup, *The Illinois Supreme Court and the "Fair Report" Privilege: A Free-Press Victory*, 94 ILL. B.J. 414 (2006); Michael C. Cox & Elizabeth M. Callaghan, *To Be or Not To Be, Malice is the Question: An Analysis of Nebraska's Fair Report Privilege from a Press Perspective*, 36 CREIGHTON L. REV. 21 (2002); Harrington, *supra* note 20 (Arkansas); Steve J. Jasper, Note, *Reporting Behind a Shield: The Growth of Missouri's Fair Report Privilege to Defame*, 68 MO. L. REV. 215 (2003); David Marburger, Note, *More Protection for the Press: The Third Circuit Expands the Fair Report Privilege*, 43 U. PITT. L. REV. 1143 (1982). The status of the privilege as to statements originating with foreign governments is disputed. *See* SACK, *supra* note 15, § 7.3.2.2.4; *see generally*, Kyu Ho Youm, *Republication of Foreign Government Statements: The Fair Report Privilege in U.S. Libel Law Reexamined*, 6 COMM. L. & POL'Y 393 (2001); Kyu Ho Youm, *Fair Report Privilege as a Libel Defense: Status for Foreign Government Statements*, 3 U. FLA. J.L. & PUB. POL'Y 29 (1990).

39. *See, e.g.*, SACK, *supra* note 15, § 7.3.2.2.2.

40. *See id.*

41. *See id.*

42. *See id.*

43. *Id.* § 7.3.2.2.8.

44. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

45. *Id.* at 495.

46. SACK, *supra* note 15, § 7.3.2.2.8.

47. No. 11-05-00336-CV, 2006 WL 1644602 (Tex. Ct. App. Eastland June 15, 2006).

named Sotelo as a sex offender.<sup>48</sup> The charge was republished, with Sotelo's mug shot, by the *Odessa American* newspaper and Midland, Texas, KWES-TV in news coverage of sex offender registration laws.<sup>49</sup> The court held the fair-report privilege applicable under both the Restatement (Second) of Torts and the Texas fair-report statute.<sup>50</sup> The court found U.S. Supreme Court precedent "instructive," even though the statement as to Sotelo was not true,<sup>51</sup> observing that the media publications were "'fair, true, and impartial . . . in reference to the [public] record.'"<sup>52</sup> This distinction drawn by the court between the truth of the underlying factual statement and the relative truth in the rendition of the public record illustrates how the fair-report privilege deviates from the norm that the tale bearer bears the same fault as the tale-maker. Professor David A. Elder described these two "truths" as "substratal" and "facial."<sup>53</sup>

While the facts of *Sotelo* well support invocation of the fair-report privilege, the case also demonstrates a fault line in the jurisdictional variations on the privilege with respect to vitiation by malice. The court charged the defendants with the burden of demonstrating that their republications of the news release were made without malice.<sup>54</sup> But rather than relying on the common-law notion of malice as ill will, the court defined malice in the *Sullivan* sense, by which ill will is immaterial, but "actual malice"—knowledge of falsity or reckless disregard as to truth or falsity—is dispositive.<sup>55</sup> The court found malice absent because the media had no good reason to disbelieve the police news release.<sup>56</sup> This alternative approach to malice is not uncommon and was recognized in Sack's description of the fair-report privilege.<sup>57</sup> But Sack aptly observed, "[t]hat makes little sense. The privilege is designed to enable the public to know what is being said in its . . . public forums, irrespective of whether the person who conveys the statements

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48. *Id.*, 2006 WL 1644602, at \*1.

49. *Id.*

50. *Id.* at \*\*3-5.

51. *Id.* at \*4 (citing *Cox Broadcasting Corp.*, 420 U.S. at 492).

52. *Sotelo*, 2006 WL 1644602, at \*5 (quoting *Texas Monthly, Inc. v. Transamerican Nat'l Gas Corp.*, 7 S.W.3d 801, 806 (Tex. Ct. App. Houston 1999)) (emphasis in original).

53. David A. Elder, *Kentucky Defamation and Privacy Law—The Last Decade*, 23 N. KY. L. REV. 231, 245-46 & n.117 (1996); see also David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 580 (2007).

54. *Sotelo*, 2006 WL 1644602, at \*5 (citing *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995)).

55. *Id.* (citing *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 424 (Tex. 2000)).

56. *Id.* at \*6.

57. SACK, *supra* note 15, §§ 7.3.2.2.1, 7.3.2.2.5.

believes they are true[.]”<sup>58</sup> Sack preferred the Minnesota approach: the privilege relieves the defendant of liability when the republication of the public record is accurate, regardless of the defendant’s state of mind.<sup>59</sup> The *Sullivan* variable-fault rubric comes into play only when the media republication is inaccurate.<sup>60</sup> Misapplication of the “actual malice” standard, as in *Sotelo*, unduly contracts the scope of the privilege by subjecting the media publisher who accurately and knowingly recounts error in the public record to liability.<sup>61</sup> The very purpose of the fair-report privilege is to allow accurate republication of known falsehood, so that the public, not the media, can bear witness to, and exercise supervision over public proceedings.

Another problem in application of the fair-report privilege arises from reporting on dated proceedings. Diane Johnsen addressed this problem in a 1982 note.<sup>62</sup> The problem arises most simply in case of a public proceeding of protracted duration, such as a trial that lasts for months. A publisher may report an initial pleading and not update readers subsequently without forfeiting the privilege.<sup>63</sup> But the privilege might be forfeited by the publisher who offers daily reports of a public proceeding but “abruptly halt[s] the pattern, leaving one side’s evidence unreported.”<sup>64</sup> The problem is compounded when a public proceeding concludes and is reported much later, but the report fails to include intervening events that change the import of the earlier proceeding. Johnsen hypothesizes: “[I]n 1982, a publisher reports that X was convicted of murder in 1975, and does not report that the conviction was reversed in 1976.”<sup>65</sup> She found that courts uniformly withhold the fair-report privilege in such cases by “expanding the proceeding,” that is, treating the earlier proceeding as not having terminated until the relevant subsequent events occurred.<sup>66</sup> Courts hold the media defendant strictly liable for failing

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58. *Id.* § 7.3.2.2.1.

59. *Id.* § 7.3.2.2.1 (citing *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 331 (Minn. 2000)).

60. *Id.* (citing *Moreno*, 610 N.W.2d at 331).

61. Journalism ethics might well discourage the knowing publication of inaccuracy, but that is a matter of ethics, not law. As the *Sotelo* court observed, the privilege is designed to relieve the media of an obligation “to check the accuracy of all information and statements released by government officials and agencies.” *Sotelo*, 2006 WL 1644602 at \*4. Implicitly, this reasoning reflects the information rationale for the fair-report privilege, for if the media were obliged to check the accuracy of rote reiteration of public information, the free flow of information would be inhibited.

62. Diane Johnsen, Note, *When Truth and Accuracy Diverge: The Fair-Report of a Dated Proceeding*, 34 STAN. L. REV. 1041 (1982).

63. *Id.* at 1045 (citing *Phillips v. Murchison*, 252 F. Supp. 513, 522-23 (S.D.N.Y. 1966), *aff’d in part, rev’d on other grounds in part*, 383 F.2d 370 (2d Cir. 1967)).

64. *Id.* at 1045-46 (citing RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (1976)).

65. *Id.* at 1051.

66. *Id.* at 1051-53.

to discover the subsequent events.<sup>67</sup> Johnsen contended that this standard imposes an undue burden on the media by requiring maximum care in the reporting of dated public proceedings, in which the public may have legitimate current interest, in contrast to the lack of inquiry into fault when the fair-report privilege shields the contemporaneous reporting of public proceedings.<sup>68</sup> Johnsen asserted that a recklessness test of a publisher's failure to report intervening events would better serve the public interests that underpin the fair-report privilege.<sup>69</sup>

### C. Neutral Reportage Privilege

The neutral reportage privilege is closely related to the fair-report privilege, but of more recent vintage and less widespread acceptance. Like the fair-report privilege, the neutral-reportage privilege is concerned with the accurate republication of an assertion, and not with substratal truth. In other words, the neutral-reportage privilege exceptionally protects the defendant tale bearer notwithstanding the liability of the tale maker, but the privileges differ. Where the fair-report privilege is triggered by an official proceeding, the neutral-reportage privilege does not turn on the venue in which the underlying defamation is asserted. Where the fair-report privilege turns at most on the "public concern" of the underlying defamation,<sup>70</sup> the neutral-reportage privilege is typically triggered only by "serious charges made against a public figure by a responsible, prominent organization."<sup>71</sup> In further constraint of the neutral-reportage privilege, it applies only when the republication is neutral, that is, "accurate and disinterested,"<sup>72</sup> and the republication occurs amid a "controversy" that is "preexisting" and "public,"<sup>73</sup> or "raging and newsworthy."<sup>74</sup> Like the fair-report privilege, the neutral-reportage privilege is vitiated by common-law malice, as by a publisher "who in fact espouses or concurs in the charges made by others, or who deliberately distorts these

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67. Johnsen, *supra* note 62, at 1053-54.

68. *Id.* at 1054-57.

69. *Id.* at 1057-60.

70. See, e.g., SACK, *supra* note 15, § 7.3.2.4.6.1 ("A fair report . . . is immune irrespective of whether its subject may properly be said to be a matter of or for public debate.").

71. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 660 n.1 (1989) (quoting party petition as to Ohio law, but declining issue as not having been raised on appeal), quoted in Margaret E. O'Neill, 50 AM. JUR. 2D *Libel & Slander* § 295; see also Jennifer J. Ho, *Libel and Slander: Construction and Application of the Neutral Reportage Privilege*, 13 A.L.R. 6TH 111 (2006) (omitting "prominent" in general characterization in the introductory paragraph).

72. O'Neill, *supra* note 71.

73. SACK, *supra* note 15, § 7.3.2.4.6.1.

74. O'Neill, *supra* note 71.

statements to launch a personal attack of his own on a public figure[.]”<sup>75</sup> Like the fair-report privilege, the neutral-reportage privilege is subject to wide jurisdictional variations—such as whether in fact the original defamer need be “responsible,” “prominent,” or even “trustworth[y].”<sup>76</sup> Like the fair-report privilege, the neutral-reportage privilege can be justified with reference to the nebulous information rationale; neutral reportage can be justified with reference to the agency and supervision rationales only when the accusing organization is governmental, and then only arguably.<sup>77</sup> Indeed, some defamatory statements emerging from official proceedings and involving serious charges against public figures may, upon republication, invoke the protection of both privileges.<sup>78</sup> Finally, like the fair-report privilege, there is an open question whether the neutral-reportage privilege is in any measure required by the First Amendment.<sup>79</sup> The U.S. Supreme Court declined the question in a case in which the privilege was dismissed as inapplicable by the trial court and the issue was not preserved on appeal.<sup>80</sup>

The neutral-reportage privilege has a clear and modern lineage dating to the Second Circuit’s decision in *Edwards v. National Audubon Society*.<sup>81</sup> *Edwards* arose amid the “furious controversy” over the environmental impact of the insecticide DDT.<sup>82</sup> The National Audubon Society, a naturalist organization and DDT opponent, sponsored an annual “bird count” to

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75. *Edwards v. Nat’l Audubon Soc’y*, 556 F.2d 113, 120 (2d Cir. 1977); see also O’Neill, *supra* note 71; SACK, *supra* note 15, § 7.3.2.4.6.1. This articulation of malice is not as likely as common-law malice in the fair-report area to be confused with *Sullivan* actual malice, SACK, *supra* note 15, § 7.3.2.4.6.1, probably because of the more recent vintage and therefore clearer lineage of the neutral-reportage privilege.

76. O’Neill, *supra* note 71. Indeed, some jurisdictions have summarily or thoughtfully rejected the privilege entirely, finding the *Sullivan* doctrine adequately protective of defendants and reading implicit rejection of broader protection in the tea leaves of *Sullivan*’s progeny. See, e.g., SACK, *supra* note 15, § 7.3.2.4.4.1 (citing authorities from, *inter alia*, the Third Circuit, Illinois, Michigan, New York, Pennsylvania, and South Dakota).

77. See Elder, *Truth, Accuracy and Neutral Reportage*, *supra* note 53, at 799-802 (rejecting agency and supervision rationales). Elder also scorned the informational rationale by itself in support of a neutral-reportage privilege. *Id.* at 801-02 (“This is a largely open-ended standard without any constraining policies and would justify access to and potentially result in a deluge of matter from non-public governmental files and records—a truly Orwellian nightmare.”).

78. SACK, *supra* note 15, § 7.3.2.4.6.1.

79. *Id.* § 7.3.2.4.3.

80. *Harte-Hanks Communications, Inc.*, 491 U.S. at 660 n.1 (1989). Justice Blackmun lamented in concurrence that “the ‘neutral reportage’ defense” had not been argued on appeal, as “the facts of [*Harte-Hanks*] arguably might fit within it.” *Id.* at 695 (Blackmun, J., concurring). *Harte-Hanks* was a libel suit arising from a newspaper’s report of grand jury witness statements amid an investigation of alleged corruption. *Id.* at 660.

81. 556 F.2d 113 (2d Cir. 1977). See generally SACK, *supra* note 15, § 7.3.2.4.

82. 556 F.2d at 115.

document bird populations.<sup>83</sup> When the society's bird count reflected an increase in the number of birds that counters observed, that datum became a flashpoint in the acrimonious debate.<sup>84</sup> DDT proponents argued that the insecticide was not adversely affecting bird populations, to which the Audubon Society replied, complaining that its study was misused because more birds counted proved only that there were more counters, not more birds.<sup>85</sup> Asserting this complaint, an editor of a society publication described DDT-proponent scientists of "being paid to lie" for the pesticide industry.<sup>86</sup> *The New York Times* investigated and ultimately published a story linking named scientists to the Audubon Society editor's charge.<sup>87</sup>

The scientists sued the Audubon Society and the *Times*, and the neutral-reportage privilege arose in defense of the latter. The court held, per Chief Judge Kaufman, that

when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views of their validity. What is newsworthy about those accusations 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 serious doubts regarding their truth. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.<sup>88</sup>

*Sullivan* would not adequately protect the *Times*, the court reasoned, because the *Times* reporter might well have entertained serious doubts as to the accuracy of the allegation that the scientists were "paid liars."<sup>89</sup> In the classic pattern of a case demanding privilege, the truth determination relevant to the liability analysis was the facial truth—the accuracy of the republication as a reflection of the original statement, and not the substratal truth—the accuracy of the underlying claim that the scientists were "paid liars." The fact of the

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83. *See id.* at 116.

84. *See id.* at 116-17.

85. *Id.*

86. *Id.* at 117.

87. *Edwards*, 556 F.2d at 117-18. The *Times* reporter and the Audubon Society editor disputed whether the editor had named the scientists specifically in connection with the "paid liars" charge, *see id.* at 117, but the jury found the reporter's version of events sufficiently convincing, *see id.* at 122.

88. *Id.* at 120 (citation omitted), quoted in SACK, *supra* note 15, § 7.3.2.4.3.

89. *Id.* at 121.

statement, rather than the asserted underlying claim, was newsworthy.<sup>90</sup> The fair report privilege would not apply because the charge did not emerge from an official proceeding. But the matter is of public concern which gives rise to good public policy by permitting the republication of the charge. Accordingly, the court refused to impose liability on the *Times*.<sup>91</sup>

The elements that may be derived from *Edwards* are (1) a responsible, prominent defendant; (2) serious charges against a public-figure plaintiff; (3) an accurate and disinterested report; and (4) the setting of a raging, newsworthy controversy.<sup>92</sup> But the Second Circuit held only that a neutral-reportage privilege was constitutionally compelled in these circumstances. Even assuming the court was correct as a matter of ultimate interpretation of the First Amendment, the court did not say whether the privilege may be compelled in the absence of any of these elements, nor whether the privilege may be compelled in different circumstances. Some courts adopting the test have constrained the privilege by regarding the elements as conjunctively required.<sup>93</sup> Some courts, such as the Third Circuit, have rejected the privilege, believing it inconsistent with U.S. Supreme Court cases since *Sullivan*.<sup>94</sup> Under the Third Circuit analysis, the Supreme Court had already gone as far as it planned to after *Sullivan*, in extending the actual-malice shield to cases of public-figure plaintiffs.<sup>95</sup> The court felt that the extension of the neutral-reportage privilege in newsworthy matters where the defendant did in fact act with actual malice too closely resembled the Supreme Court's ill-fated and later overruled extension of the privilege in *Rosenbloom v. Metromedia, Inc.*<sup>96</sup> In *Rosenbloom*, the Court extended the actual-malice shield to matters of public concern, and disregarded the *public* or *private* status of the plaintiff.<sup>97</sup> If the Supreme Court saw fit not to extend the *Sullivan* doctrine any further, then the lower courts would be ill-advised to take matters into their own hands.<sup>98</sup> Thus the neutral-reportage privilege continues to be a public controversy in the courts.

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90. Sack observed the likeness of this doctrine to evidence rules on hearsay, by which a statement may be admitted to demonstrate the effect on the hearer rather than to demonstrate the truth of the underlying statement itself. SACK, *supra* note 15, § 7.3.2.4.3.

91. 556 F.2d at 122.

92. See SACK, *supra* note 15, § 7.3.2.4.4.2.

93. *Id.*

94. *Id.* § 7.3.2.4.4.1.

95. *Dickey v. CBS Inc.*, 583 F.2d 1221, 1227-28 (3d Cir. 1978).

96. 403 U.S. 29 (1971).

97. *Id.* at 44 (plurality opinion); see *Dickey*, 583 F.2d at 1225-26 & n.5.

98. Sack observed that the Third Circuit's reasoning might be undermined by the Supreme Court's later indication in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), "which reintroduced the concept of 'newsworthiness' . . . as a basis upon which to determine the extent of constitutional protection." SACK, *supra* note 15, § 7.3.2.4.4.1.



Likely on account of its modern, deliberate, and controversial articulation by the Second Circuit, the neutral-reportage privilege has been the subject of more scholarly contemplation than its more highly regarded relation, the fair-report privilege. Many writers have assessed the correctness of *Edwards*.<sup>99</sup> In a cleverly written and painfully well footnoted article, Professor David A. Elder characterized the media defense bar as a "Jabberwock" crusading upon an absolutist take on the information rationale to circumvent the *Sullivan* doctrine, by having the lower courts accept the neutral-reportage theory.<sup>100</sup> Much speculation has surrounded the elements of neutral reportage and their proper construction. Two articles have called for an overall narrow construction of the elements, lest the privilege too readily license the republication of defamation.<sup>101</sup>

Professor David McCraw suggested that "newsworthiness" and "neutrality" invite improper inquiry into the editorial process and that the privilege would be formulated better with a test of whether the reasonable reader would perceive the report as a mere reporting of substratal defamation, or as in fact injuring the reputation of the plaintiff.<sup>102</sup> Justin H. Wertman feared that "newsworthiness" offers too expansive a privilege and urged construction of the element to require that the reported charges be "of true public concern."<sup>103</sup> Mark W. Page agreed that "public concern" should be the touchstone of the privilege, but argued that the privilege should be construed expansively by simultaneously not requiring that the report be neutral, nor that the plaintiff be a public figure.<sup>104</sup> Page further suggested that ill will should not vitiate the privilege but that the privilege should be forfeited only when the publisher adopts the defamation as the publisher's own statement, rather

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99. See, e.g., Dennis J. Dobbels, Comment, *Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should Be Rejected*, 33 HASTINGS L.J. 1203 (1982); Kimberley Keyes, Note, *Freedom Without Responsibility: Do Massachusetts Media Defendants Need the Neutral Reportage Privilege?*, 34 SUFFOLK U. L. REV. 373 (2001) (predicting acceptance of privilege by Massachusetts state courts); Rodney A. Nelson, Comment, *Neutral Reportage: Making Sense of Edwards v. National Audubon Society, Inc.*, 20 CAP U. L. REV. 471 (1991) (concluding that privilege is supported both by First Amendment freedom of press and First Amendment freedom of public to receive information about public controversies).

100. Elder, *supra* note 53.

101. James E. Stewart & Laurie J. Michelson, *Reining in the Neutral Reportage Privilege*, COMMUNICATIONS LAW., Summer 1999, at 13; Ray Worthy Cambell, Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983) (favoring narrow construction of privilege).

102. David McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader*, 25 AKRON L. REV. 335, 337 (1991).

103. Justin H. Wertman, Note, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern*, 65 FORDHAM L. REV. 789 (1996).

104. See Mark W. Page, Comment, *Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate*, 75 MINN. L. REV. 157 (1990) (analyzing acceptance of the privilege in *Price*, 881 F.2d 1426 (8th Cir. 1989)).

than indicating that the defamation was merely alleged.<sup>105</sup> Keith C. Buell argued for a reassessment of *Edwards* and the neutral-reportage privilege "in this age of constant news updates on cable television and the Internet."<sup>106</sup> Scott E. Saef discussed model statutes, and proposed his own, arguing that the neutral-reportage privilege furthers favorable public policy and should therefore be codified in light of its lukewarm reception in the courts.<sup>107</sup>

#### D. Wire Service Defense

The "wire service defense" is a special application of a broader common law defense for those whose hands the defamatory content merely passes through without meaningful alteration or development of the content, and without common-law malice on the part of the intermediary. Under the common law, libraries and booksellers are not liable for libel within the books they carry on their shelves, and telephone service providers are not liable for slander uttered on their lines.<sup>108</sup> The courts of some jurisdictions have refined this common-law privilege to relieve newspapers of liability for defamation in stories from reputable wire services when the newspapers merely republished the stories without any independent investigation regarding the veracity of the contents.<sup>109</sup> Thus a plaintiff may hold liable the wire service that publishes defamatory content, but not the several newspapers that republish the wire story.<sup>110</sup>

The wire service defense can be traced to *Layne v. Tribune Co.*<sup>111</sup> John Layne sued the *Tampa Morning Tribune* for republishing stories that originated with wire services and erroneously identified Layne as the target of an indictment for possession of liquor.<sup>112</sup> Acknowledging that it was going against the grain of the common law preference for liability for the republication of defamation, the court, in refusing to hold the newspaper liable stated:<sup>113</sup>

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105. *Id.* at 199.

106. Keith C. Buell, Note, "Start Spreading the News": Why Republishing Material from "Disreputable" News Reports Must Be Constitutionally Protected, 75 N.Y.U. L. REV. 966, 1003 (2000).

107. Scott E. Saef, Comment, *Neutral Reportage: The Case for a Statutory Privilege*, 86 NW. U. L. REV. 417, 448 (1992).

108. See generally SACK, *supra* note 15, § 7.3.1.

109. See *id.*

110. "The converse is also doubtless true: A wire service that repeats what a reputable newspaper has published is protected, too." *Id.*; see also Jennifer L. Del Medico, Comment, *Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age*, 31 FORDHAM URB. L.J. 1409, 1422-24 & n.158 (2004).

111. *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933).

112. *Layne*, 108 at 179-80, 146 So. 2d at 235-36.

113. *Id.* at 184-88, 146 So. at 237-40.

The mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news, . . . cannot through publication alone be deemed per se to amount to an actionable libel by indorsement, in the absence of some showing . . . that the publisher must have acted in a negligent, reckless, or careless manner[.]<sup>114</sup>

As indicated by the court, some level of scienter—knowledge, negligence, or actual malice—vitiates the wire service defense, though a dearth of subsequent case law on this point provides no universal rule.<sup>115</sup> Simply put, the wire service defense operates merely to impose a minimum fault standard of negligence in case of a media defendant who unwittingly republished defamatory content from a news service without substantial alteration.<sup>116</sup> This deviation from strict liability in news reporting is generally consistent with modern U.S. Supreme Court decisions disapproving of defamation liability without fault.<sup>117</sup>

The *Layne* court rationalized its departure from the common-law norm with reference to the advent of the “modern daily newspaper.”<sup>118</sup> Where newspapers formerly printed only stories that the publisher stood behind as true, the modern daily newspaper “act[s] as a local ‘screen’ from which is reflected, without any authorship of [the newspaper’s] own, dispatches composed and sent out by others.”<sup>119</sup> To compel the modern daily newspaper to warrant the accuracy of its wire-service content would make it impossible for local media to meet consumer demand for daily news from around the world.<sup>120</sup> Jennifer L. Del Medico suggested that the court also wanted to foster the development of then-nascent telegraph technology, realizing that “a contrary decision in *Layne* could have potentially destroyed the wire services.”<sup>121</sup>

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114. *Id.* at 186, 146 So. at 238.

115. *See id.*

116. Del Medico recounted that since *Layne*, courts adopting the wire service defense also have required that “the republisher must read the [news] release to make sure there are no inconsistencies;” and that the republisher who fails to investigate inconsistencies or publishes known falsity may not claim the privilege. Del Medico, *supra* note 110, at 1417.

117. *See* SACK, *supra* note 15, § 7.3.1 (discussing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

118. *Layne*, 108 Fla. at 187, 146 So. at 238.

119. *Id.* at 190, 146 So. at 239.

120. *Id.* at 183, 146 So. at 237. “Later courts recognizing the defense explained that an obligation of independent verification ‘would leave only large, wealthy newspapers capable of covering multiple stories and regions.’” Del Medico, *supra* note 110, at 1418 (quoting *Cole v. Star Tribune*, 581 N.W.2d 364, 369 (Minn. Ct. App. 1998)).

121. Del Medico, *supra* note 110, at 1419.

The wire service defense and its parent common-law privilege for distributors has taken on new significance in the Internet age, and accordingly has been codified expansively and controversially in federal law. Online, traditional news "wire" services have found new life in a multitude of outlets, and ordinary individuals have attained the power to disseminate third-party content as broadly and quickly as only an international telegraph provider once could. This new environment offers two unusual new conditions. First, ready access to the Internet and the ease with which users interact, especially when behind online masks of virtual anonymity, have vastly increased the mass circulation of socially undesirable content including defamation (an aspect of Internet "accessibility," as termed in part III, *infra*).<sup>122</sup> Second, where traditional distributors such as booksellers and telephone companies were preoccupied principally with the service of delivering content to customers and not with the content itself, that line has been blurred in cyberspace where the Internet service provider ("ISP"), more readily than the traditional distributor, can participate simultaneously and fluidly in content creation, alteration, and delivery (an aspect of the Internet's "dynamic" properties, as termed in part III, *infra*).

Taking these conditions together, a business model has emerged in the ISP as a filtering agent of Internet content in order to present the user with a customized amalgamation. In this model, is the ISP more akin to the detached, service-oriented bookseller, or to the content-involved book publisher? Arguably the role of an online distributor is better analogized to the owner of a fiber-optic data delivery system than to the ISP. At the same time, though, the policy behind the wire service defense seems well served by privileging, for example, AT&T Yahoo! News against liability for defamation in the underlying Reuters content.

This problem led Congress to codify a broad immunity from liability for ISPs in the Communications Decency Act of 1996 ("CDA").<sup>123</sup> An irony arose from the limitations of the common-law distributor privilege online. The content-filtering business model was socially desirable to enhance users' Internet experience, but the model was disincentivized by the legal privilege regime, which increased ISP liability exposure in proportion to its content involvement. To address the problem, § 230 of the CDA affords ISPs broad latitude, effectively classifying them as re-publishers notwithstanding their involvement in content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

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122. See, e.g., Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401 (2002).

123. 47 U.S.C. § 223 (2000).

provided by another information content provider.”<sup>124</sup> An “interactive computer service” is an “information service, system, or access software provider,” whereas an “information content provider . . . is responsible . . . for the creation or development of information provided through . . . [an] interactive computer service.”<sup>125</sup> Thus, under the CDA an author or creator remains responsible for content as under the ordinary defamation system, but the Internet re-publisher is relieved of liability. The CDA draws the liability line at content “development,” a concept derived from the common-law privilege.<sup>126</sup> But “development” excludes “any action taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]”<sup>127</sup> Therefore a degree of content alteration or filtering does not forfeit the distributor privilege.

In accordance with the apparently broad intent of Congress,<sup>128</sup> courts have applied the CDA in a broad range of circumstances.<sup>129</sup> At the same time the breadth of the CDA has been harshly criticized for shielding otherwise unlawful or undesirable conduct, and leaving injured persons without a remedy, especially in cases where the identity of the originator of the harmful online content cannot be determined.<sup>130</sup> CDA immunity is not vitiated

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124. 47 U.S.C. § 230(c)(1) (2000).

125. *Id.* § 230(f)(2)-(3).

126. *See generally* Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247 (2004).

127. *Id.* § 230(c)(2)(A).

128. *See id.* § 230(a)-(b) (findings and policy).

129. *See, e.g.*, Karen Alexander Horowitz, *When Is § 230 Immunity Lost?: The Transformation from Web Site Owner to Information Content Provider*, 3 SHIDLER J. L. COM. & TECH. 14 (2007); Leslie Paul Machado, *Immunity Under § 230 of the Communications Decency Act of 1996: A Short Primer*, J. INTERNET LAW, Sept. 2006, at 3; Andrea L. Julian, Comment, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509 (2004); Walter Stillwell, Note, *Carfano v. Metrosplash.com: An Expansion of Tort Immunity for Web Service Providers Under 47 U.S.C. § 230, Even When They Take a Greater Editorial Role in Publishing Material from Third Parties*, 6 TUL. J. TECH. & INTELL. PROP. 307 (2004).

130. *See, e.g.*, Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. the Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007); Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285 (2007); Emily K. Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765 (2004-05); Miree Kim, *Narrowing the Definition of an Interactive Service Provider Under § 230 of the Communications Decency Act*, 2003 B.C. INTELL. PROP. & TECH. F. 33102; Devon Ishii Peterson, Comment, *Child Pornography on the Internet: The Effect of Section 230 of the Communications Decency Act of 1996 on Tort Recovery for Victims Against Internet Service Providers*, 24 U. HAW. L. REV. 763 (2002).

according to any scienter-based rule; an ISP may continue to publish defamatory content because it is under no obligation to remove the content. This has led to some commentators to call for a "notice and takedown" remedy similar to the regime under which web publishers are obliged to remove content that infringes intellectual property rights upon notice of the infringement.<sup>131</sup> Some commentators have concluded that while § 230 might once have fostered the development of Internet services, the shield is no longer needed and the common law regime, or some approximation of it, should be restored.<sup>132</sup>

Barring reforms, the CDA represents a powerful codification of the distributor privilege generally, and the wire service defense specifically in cases where online news aggregators are defendants. Just as the CDA has come under fire for being excessively protective, so the wire service defense has been criticized as excessively protective in the Internet age. Del Medico made the case in 2004 for replacing CDA immunity and the wire service defense with a medium-neutral rule, which would provide for liability on the part of the original defamer for third-party republication when the plaintiff can demonstrate injury flowing specifically from the republication.<sup>133</sup> Del Medico observed that the persistence of the wire service defense in the Internet era, in the absence of actual "wire" technology, demonstrates that the broader policy of a news republisher privilege is desirable regardless of medium.<sup>134</sup> Condemning common-law republisher liability as "paternalistic," she argued that the experience of the CDA and online news aggregation has demonstrated that news consumers are "intelligent enough to digest information and for themselves to decide if it is worthy of belief."<sup>135</sup>

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131. See, e.g., David V. Richards, Note, *Posting Personal Information on the Internet: A Case for Changing the Legal Regime Created by § 230 of the Communications Decency Act*, 85 TEX. L. REV. 1321 (2007); Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster,"* 9 B.U. J. SCI. & TECH. L. 407 (2003); Ryan W. King, Note, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24; see generally Cyrus Sarosh Jan Manekshaw, Comment, *Liability of ISPs: Immunity from Liability Under the Digital Millennium Copyright Act and the Communications Decency Act*, 10 COMPUTER L. REV. & TECH. J. 101 (2005); Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295 (2002).

132. See, e.g., Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

133. Del Medico, *supra* note 110, at 1439-40.

134. *Id.*

135. *Id.* at 1440.

## III. THE PROBLEM OF PERPETUAL REPUTATIONAL HARM

The facts of the Duke Lacrosse case have been well documented and analyzed.<sup>136</sup> Professor Robert P. Mosteller rightly cautioned against "broad generalizations" drawn from the extraordinary facts of the Duke case: "[a] rogue district attorney and an accuser either perpetrating a hoax or suffering from a delusion."<sup>137</sup> Stuart Taylor Jr. and K.C. Johnson in their book on the case, *Until Proven Innocent*, had venom to spare for the media complicit in the injustice wrought against the Duke Lacrosse players.<sup>138</sup> The ill effects of attorney misconduct<sup>139</sup> were amplified by legal commentary<sup>140</sup> and the tempest of the intensely competitive, twenty-four-hour, multimedia news market. But Mosteller and other commentators have used the Duke case as a spring board to examine real problems in the media and legal system that might not otherwise have been raised to the glare of public scrutiny.

Evans, Finnerty, and Seligmann are certainly not the only persons across the country who have been accused of crimes that they did not commit. In fact, the extremes of the Duke case have left these men in a much better position than the average vindicated person. Not only did state authorities order all charges to be dropped against the Duke defendants, officials also awarded the men an affirmative declaration of innocence. The public interest in the case afforded the defendants extensive access to the media to clear their names, of which their attorneys took advantage. Journalistic champions such as Taylor have written books exposing the truth. The men are likely to win a substantial award in their civil rights litigation against the City of Durham. In contrast, the ordinary innocent accused receives at best a "not guilty" determination, and perhaps no better than a persistent cloud of continuing suspicion and unresolved allegations. The U.S. criminal justice system is

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136. See generally STUART TAYLOR JR. & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007); DON YAEGER & MIKE PRESSLER, *IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED* (2007); NADER BAYDOUN & R. STEPHANIE GOOD, *A RUSH TO INJUSTICE: HOW POWER, PREJUDICE, RACISM, AND POLITICAL CORRECTNESS OVERSHADOWED TRUTH AND JUSTICE IN THE DUKE LACROSSE RAPE CASE* (2007). For an easily accessible recitation of the official record of facts, see Robert P. Mosteller's law review article *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice."* 76 *FORDHAM L. REV.* 1337, 1342-46 (2007).

137. Mosteller, *supra* note 136, at 1338.

138. See, e.g., TAYLOR & JOHNSON, *supra* note 136, at 118-28.

139. See generally Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 *FORDHAM L. REV.* 1453 (2007); Susan Hanley Kosse (a.k.a. Susan Duncan), *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 *S. ILL. U. L.J.* 243 (2007); Mosteller, *supra* note 136.

140. See generally Sarah K. Fleisch, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke Lacrosse Matter*, 20 *GEO. J. LEGAL ETHICS* 599 (2007).

concerned with the just prosecution of wrongdoers, not with truth or reconciliation. When a person is no longer targeted for prosecution, for whatever reason, the justice system does not stick around to repair reputations. As a society, we write off that collateral injury as the cost of pursuing justice.

*A. Media Power and Responsibility*

In light of the limitations inherent in the American criminal justice system, the media bears a special responsibility of which they are cognizant. The Code of Ethics of the Society of Professional Journalists ("SPJ Code") admonishes, "[b]e judicious about naming criminal suspects before the formal filing of charges."<sup>141</sup> Drawing a line at the point of filed charges makes some sense; the facial fact of the filing charges is news regardless of the substratal truth of the charges filed. That line accords with the fair-report privilege which protects a media defendant legally for a facially accurate report of the charges, even if the charges are false. The charging line also accords roughly with the fair-comment privilege, as the suspect charged is more likely a public figure than the suspect uncharged, at least for the limited purpose of reporting on the charges.

The implication of viable legal defenses does not end the ethical analysis, and does not license an unrestrained investigative assault upon the accused. Guided by the overarching principle of "minimizing harm," the SPJ Code also admonishes, *inter alia*: "[s]how compassion for those who might be affected adversely by news coverage[,] [r]ecognize that gathering and reporting information may cause harm or discomfort[,] [a]void pandering to lurid curiosity[, and b]alance a criminal suspect's fair trial rights with the public's right to be informed."<sup>142</sup> As every law student learns, and the general public might not well understand, a prosecutor can indict a ham sandwich.<sup>143</sup> Thus the naming of an accused in an indictment does little to ensure that the journalist is getting the story right, and if the story is not right the public interest in the identity and life of the accused does not necessarily outweigh that person's interests in individual privacy and dignity.

Both legal and ethical questions are implicated when reporting on criminal charges, because the media possess enormous power to unjustly injure an accused, innocent person. The fundamental theory that posits tort liability for republished defamation, which is applicable in the absence of a privilege, is animated by the understanding that injury occurs in the

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141. Code of Ethics, Society of Professional Journalists, <http://www.spj.org/ethicscode.asp> (last visited Feb. 15, 2008) ("Minimize Harm" section).

142. *Id.* ("Minimize Harm" section).

143. See, e.g., Tresa Baldas, *Prosecutors Feeling Impact of "Duke Effect, Many Defense Counsel Are Using Duke Rape Case to Sway Jurors"* NAT'L L.J., May 14, 2007, at 6.



unrestrained repetition of injurious falsehood. When the injury to an accused is caused by the wrongful connection of that person to criminal charges, legal privileges are implicated. Reporting the charges and the name of an accused as facts serves the agency and supervision rationales that support the fair-report and neutral-reportage privileges because the circulation of information about the progress of a criminal investigation empowers the public to ensure the proper functioning of the justice system.

But when reporting reaches beyond charges, both legal and ethical limitations come into play. Consider this discussion on Fox News about a month after the indictments of Finnerty and Seligmann:

[John] GIBSON: . . . New DNA evidence may be emerging in the Duke rape case. A report claims tissue found under the fingernails of the woman who claimed she was raped at a party may be consistent with a lacrosse player who was there. For a look how this will impact the investigation, let's bring in FOX's Megyn Kendall. So Megyn, it . . . may be consistent with one of the players who was there. Does that mean one of the players who was charged?

MEGYN KENDALL, FOX NEWS CORRESPONDENT: No. We are being told by sources close to the case that it relates to a third defendant, not Reade Seligmann, not Collin Finnerty, but to a third defendant. And we're being told that it's the one who she identified in the photo lineup as someone she was ninety percent sure attacked her. So there could be indictments of that third person as early as next week, John.

GIBSON: Megyn, what [does] it mean that they are not saying it's a match but it's consistent with?

KENDALL: Well apparently—and of course this is—we haven't confirmed this directly so this is second hand. But apparently there was some sort of a match. But I'm being told that there are—when it comes to DNA, 13 potential markers that could match up and this may be something less than all 13. You know, forensic pathologists are telling me that doesn't necessarily mean it's not a provable case, but it certainly isn't helpful that it's not a perfect match.

GIBSON: If there is a match to somebody that wasn't charged and there is no match to the two who are charged, doesn't the district attorney have to sort of adjust what he has done here? Uncharge somebody and recharge somebody else?

KENDALL: Not necessarily. Because keep in mind, we are just talking about tissue that was found under one of the fake fingernails that was found inside of the bathroom. We're not talking about semen found inside the victim. That wasn't there. That wasn't found and it's not going to be found. So this evidence neither necessarily

entirely inculpates—in other words, points the finger at one person, nor exculpates, exonerates any of the particular defendants. But it is helpful to [district attorney Michael] Nifong to the extent he wanted to go after that third guy but he couldn't do it because all he had was I'm pretty sure—I mean, I'm ninety percent sure. Well that's reasonable doubt, arguably. So now at least he's got some physical evidence, maybe, we will find out more next week that helps back her story on that. That doesn't necessarily let the other two off the hook. We will see how he decides to play it.

GIBSON: FOX's Megyn Kendall, who has been down there in Durham covering this story. Megyn, thanks very much.

KENDALL: You bet.<sup>144</sup>

Fox News—certainly not the only news network that followed the Duke case closely—was influenced in its reporting by Nifong's improper efforts to build a case in the media rather than in the court. Fox and its compatriots are generally free of legal liability for these contemporaneous reports. Here for example, the imperfect DNA match to Finnerty and Seligmann was substantially true. The third player to be indicted, Evans, was not yet named, and so he was not asserted as the person whose DNA was identified. Any speculation in other programs about Finnerty's and Seligmann's guilt, as long as it was not accompanied by false assertions of fact, would at least implicate the fair-comment protection. Insofar as the news networks might have reported any defamatory falsehood that originated with the prosecution,<sup>145</sup> the fair-report or neutral-reportage privilege would come into play depending on the venue of the charge and the jurisdiction of the republication. Insofar as any such defamatory falsehood might have been repeated through news services—such as the Westlaw News database that republished this transcript from Fox—the wire service defense would come into play.

But what of ethics? Did blow-by-blow reporting on the development of the prosecution's case threaten the fair trial rights of the defendants? Was this reporting on DNA evidence more than pandering to lurid curiosity? Did repetition of Finnerty's and Seligmann's identities, to the point of making

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144. *The Big Story with John Gibson*, Fox, May 11, 2006 WLNR 8135377 (transcript).

145. For example, one North Carolina bar charge against Nifong asserted that he told a reporter that the lack of DNA evidence linking Finnerty and Seligmann to the crime might be explained by the men having used condoms. Associated Press, *Prosecutor Faces Ethics Charges in Duke Case*, AUGUSTA (Ga.) CHRONICLE, Dec. 29, 2006, at C08, 2006 WLNR 22704941. The bar alleged that that statement was misleading, because Nifong knew that the complainant had told an emergency nurse that her attackers had not used condoms. *Id.* Notwithstanding Nifong's position and legal privilege as a prosecutor, the statement is arguably capable of defamatory meaning when uttered with knowledge of facts that cast serious doubt on the continuing vitality of charges in light of the DNA results. Accordingly, the re-publisher may face strict liability absent privilege.

them household names that conjured up the image of a brutal crime, ever reach a point that defied "compassion for those who may be affected adversely by news coverage[?]"<sup>146</sup> Transcripts and news coverage of the Duke case typified by this Fox transcript do not reflect ethical angst in reporting on the district attorney's disclosures. Arguably, the news network that failed to report the latest reports from Durham, in all its morbid detail, would have found itself lagging in the ratings. But market conditions do not justify media substitution of their own ethical judgments with those of the district attorney's office. The ethics of journalism and the ethics of legal practice are two different animals serving two different policy goals. As the Duke case demonstrates with tragic consequences, the journalist's search for truth and "a fair and comprehensive account of events and issues"<sup>147</sup> is no more interchangeable with a prosecutor's pursuit of justice than the media's thirst for audience is interchangeable with a district attorney's hunger for reelection.

### B. *The Internet Is Different*

The power of the media to injure the innocent, and the risk of injury through ill-considered ethical judgments, is changed when the Internet is involved. In the U.S. Supreme Court's first great Internet case in 1997, *Reno v. ACLU*, the Court, much to the delight of civil libertarians and intellectual freedom advocates, made much ado of the importance of the Internet as a thriving new democratic medium. As a result, scholars have pained themselves to show how old law can be adapted readily to new media. Time and experience with the Internet has shown that it exhibits important differences from the traditional media. Specifically, the Internet is uniquely accessible, online content has unprecedented longevity, and web publishing is a dynamic process.

The Internet's unique accessibility distinguishes it from the traditional media. Online, anyone can be an international publisher. There are no professional constraints. Many web users blasted Finnerty and Seligmann (and still other users blasted their accuser), assuming their guilt without any apparent ethical restraint.<sup>148</sup> While the focus of this Article is responsibility in professional media, and not the important but separate problem of online public rants, the latter might well effect media liability for two reasons. First, professional media are compelled to compete for an audience with the Internet at large, so the pressure, for example, on a twenty-four-hour news network to deliver the latest scoop unfiltered is amplified by the risk that viewers will

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146. Code of Ethics, *supra* note 141.

147. *Id.* at 141 (preamble).

148. *See, e.g.*, Collin Finnerty, dukelacrosse.us, <http://www.dukelacrosse.us/collin-finnerty/> (last visited Feb. 15, 2008).

otherwise defect to obtain the same raw information elsewhere. In ethics, this is a "race to the bottom" problem. Second, professional media are not usually entitled to special treatment as defendants, so if tort law changes to reach online bottom-feeders, professional media are likely to be caught in the same net.

A second difference between the Internet and the traditional media is that the Internet never forgets, which is to say electronic content has unprecedented longevity. Content, including defamation, once put online can be reiterated in fresh electronic transmission *ad infinitum*. A web site removed can remain available in a search engine cache or an Internet archive such as the Wayback Machine.<sup>149</sup> Even besides the inadvertent archive, media entities deliberately keep vast stores of information online, such as the three dated stories discussed at the beginning of this Article. In the electronic medium, old and new content are not immediately distinguishable, because there are no obvious signs of aging. While a researcher using a microfiche newspaper archive can readily ascertain the age of the content being reviewed, it is not clear on the Internet whether the owner or the user bears any burden to date-stamp or to update outdated content. Thus content that is defamatory, or that is capable of defamatory meaning when taken out of the context of time, will retain the potential to injure anew at any time that it is downloaded—a perpetual reputational harm.

For a third difference, web publishing is a dynamic process. Whereas Internet accessibility and longevity both tend to magnify the injury of defamation which is perpetuated online, the dynamic nature of the Internet can help to ameliorate online injury. Online content is modifiable virtually instantaneously, and can be presented in a protean environment of interrelated data. Historically, correction to a newsprint or broadcast story required gearing up the machinery of publication, whether it be the literal presses or the broadcast transmitter. But the record online can be changed at any time, twenty-four hours a day, with only a laptop computer and a wifi signal. At the same time, online content can be grouped and cross-referenced with tools such as hyperlinks and frames. The good news for new media enterprises is that the dynamic properties of the Internet allow the correction of error at a minimal cost and the creation of value-added news content for consumers with considerably less investment than traditional media required. The bad news is that the power of correction unexercised is a failure to mitigate the plaintiff's tort damages. Moreover, courts might be less tolerant of a failure to provide context for outdated electronic content.

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149. Internet Archive Wayback Machine, <http://www.archive.org/web/web.php> (last visited Feb. 15, 2008).

The extent to which these new-media conditions will permanently alter the landscape of media tort law remains to be seen, but a lasting impact is likely. Admittedly ten years later, § 230 immunity has already become a familiar landmark. The key defenses of fair comment, fair report, neutral reportage, and wire service are all malleable because of their wide jurisdictional variations, their variable and uncertain foundations in common, statutory, and constitutional law, and their disputed policy objectives. The unusual pressures exerted on the tort system by the online environment are likely to cause fractures along the existing fault lines of the media-privilege labyrinth.

*C. Inocente v. LegalNewz.com*

Consider then the four privileges in the context of an outdated Internet report containing defamation. Suppose an overzealous prosecutor names Acusado Inocente as a suspect in a high-profile sexual assault investigation. Inocente is subsequently indicted. The prosecutor then reports falsely in a press release that there is a DNA match between the evidence and Inocente. The saga, from suspect identification to DNA match, is intensely monitored and dutifully reported in newspapers, broadcast news programs, and online. News service stories are carried by professional media and online news aggregators. Months later, the prosecution's case crumbles when the complainant recants. The falsity of the DNA announcement is exposed. Charges are dropped. But because of intervening breaking news in the war on terror, these later events are not reported as widely as the original charges.

A year after the indictment of Inocente, reports of the case can still be found by searching online news source LegalNewz.com<sup>150</sup> for Acusado Inocente. LegalNewz.com publishes both news service reports and original legal commentary on the news. Perhaps 100 stories of news and legal commentary are available from LegalNewz.com linking Inocente to the ugly details of the sexual assault charges, including extensive repetition of the suspect naming, the asserted DNA match, and the proposition that no other suspect need be sought after the DNA match. Among the search results, some ten percent of the stories report that charges were later dropped or that the DNA match was falsely reported. The search results are returned according to relevance and not date, so the ten exonerating stories are in no way grouped or readily distinguished from the other results.

The news reports connecting Inocente to the sexual assault have a profound effect on Inocente's life. For example, when Inocente applies for a

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150. Speculators be warned, this domain name appears to be spoken for. It does not presently offer substantive content, however, so I use it here as a fictitious name.

job along with 600 other applicants at Big X Corp., he is eliminated in a screening round based on a LegalNewz.com search. Big X recruiters are doubtful of Inocente's character in light of the crime reports naming him as a suspect and the subject of an indictment. When a co-worker forwards a story about the DNA match in the sexual assault case to Inocente's present employer, Inocente has to explain the situation. The employer promises Inocente that there will be no repercussions, but record of the matter will remain in Inocente's personnel file, ostensibly to preclude a repetitive inquiry. Inocente is subsequently passed over, without explanation, for promotion to a job in the company's public relations office. When Inocente makes a new social acquaintance at a speed-dating event, his potential partner cancels on him after receiving from a friend a LegalNewz.com story about the DNA match in the sexual assault case.

Inocente sues LegalNewz.com for stories reporting the suspect naming and the DNA match, generated in current web searches, and dated before charges were dropped and the DNA announcement was revealed as false. Inocente does not dispute that these stories are facially accurate reports of matters of public concern. Inocente points, though, to the substratal falsity of his having been named as a suspect, absent the context of later dropped charges, and of the DNA announcement. Inocente asserts that LegalNewz.com has knowingly republished substratal falsity both in LegalNewz.com original content and in republication of news-service content. He asserts that he is a private figure; he never sought the spotlight, he declined to talk to the media on advice from counsel, and lacked any practical access to the media after the news turned to other matters. Inocente complains that LegalNewz.com, with actual knowledge of the substratal falsity in its continuing republication of the dated news stories, has recklessly failed to complement that web content with adequate notice of its datedness, or with links to other stories that would inform the reader of later developments.

This case could exert irresistible pressure on the fault lines of the media-privilege labyrinth. LegalNewz.com defends on grounds of fair comment, fair report, neutral reportage, and wire service. Consider these defenses in turn.

#### 1. Fair Comment?

LegalNewz.com argues first that the fair-comment privilege protects news analyses that suggest Inocente's guilt, specifically a story indicating that the search for suspects in the sexual assault case should be called off upon a DNA match to Inocente. Under the limited fact-opinion dichotomy, LegalNewz.com writers' opinions as to Inocente's guilt may be actionable if predicated upon the assertion that Inocente in fact committed the crime. Inocente's status as a private or public figure is arguable upon additional facts before and after he was indicted, though the indictment certainly moved him

toward limited-purpose public-figure status.<sup>151</sup> In any event, he has alleged actual malice, which is sufficient to overcome the *Sullivan* fair comment privilege. LegalNewz.com had actual knowledge of the falsity of the substratal assertion of a DNA match, giving Inocente a strong case on actual malice.<sup>152</sup>

Does the fair comment privilege, as it fills in gaps in the *Sullivan* constitutional doctrine, ride to the rescue to preclude liability for the legal commentator who opines little more than that a suspect in a high-profile criminal case is likely guilty or not guilty, as a matter of fact? Certainly journalism ethics does not condone drawing such conclusions about suspects in crimes, just as "innocent until proven guilty" is supposed to be a maxim of American criminal justice. But as indicated by the title of the Taylor-Johnson chronicle of the Duke case, *Until Proven Innocent*, this maxim is often turned on its head in today's pop culture. For their part, legal commentators do not necessarily follow the strictures of journalism ethics, just as Fox News in the excerpt above did not seem excessively concerned for the fair-trial interest of the third suspect in the Duke case. But this is the function of law: it provides a floor of normatively acceptable social behavior. Professional ethics usually require a standard of conduct above this minimum, requiring compliance with legal norms and then some.<sup>153</sup> But sometimes the law steps in where professional ethical standards are regarded by society as having failed to provide a minimally acceptable level of responsible conduct. If journalistic enterprises such as LegalNewz.com, or for that matter Fox News, CNN, and Court TV, through their legal commentators expose suspects to excessive publicity in contravention of societal norms, a court will be more inclined *not* to let the fair comment privilege fill in a *Sullivan* gap. LegalNewz.com might well find itself on the hook for a legal commentator's one-time suggestion that the reported DNA match is conclusive in the case against Inocente, fair-comment privilege notwithstanding.

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151. See, e.g., *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 183-86 (Ga. Ct. App. 2001).

152. LegalNewz.com here is more than a mere news aggregator; its generation of original news content suggests conscious awareness of the news. A mere news aggregator might challenge knowledge of falsity to constitute actual malice much as *The New York Times* advertising department in *Sullivan* was not held to have actual knowledge of the content of *New York Times* news archives. See *Sullivan*, 376 U.S. at 287.

153. Sometimes legal norms conflict with ethical norms, as in the case of the reporter's obligation to maintain source confidence as against a legal inquiry. See generally Anthony L. Fargo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 WM. MITCHELL L. REV. 1347 (2007).

## 2. Fair Report?

LegalNewz.com argues that the fair-report privilege protects dated news reports of the indictment of Inocente. Recall that the privilege protects "the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern . . . if the report is accurate and complete or a fair abridgement of the occurrence reported."<sup>154</sup> The substratal assertion that Inocente is guilty of sexual assault is false and defamatory. The assertion derives, however, from an official report, an indictment. An indictment is a public report, and the sexual assault investigation is a matter of public concern. LegalNewz.com accurately reported on the indictment, and there is no evidence of any unfair abridgment. But recall too that Inocente has complained of LegalNewz.com's perpetual online rendition of these reports without a context of later exonerating information.

Is the report thus *complete*, so as to warrant fair-report protection? In *Sotelo*, the defamation plaintiff complained of the *Odessa American's* instant republication of mistaken information from police.<sup>155</sup> The newspaper was protected, but would it be protected if it inadvertently re-ran the same report in the newspaper the following week? Surely not. At the same time, the *American* is protected in the perpetuation of its archives. The newspaper is not required to censor its history. That outcome is dictated by the "single publication rule," a rule of U.S. defamation law that treats every reiteration of a defamation within a single cause of action predicated on the first iteration. The *American's* later reprinting of the allegation in a new edition of the newspaper creates a new publication, and therefore a new defamation action, outside the operation of the single publication rule. But the *American's* reiteration of the initial publication, in multiple copies of the same edition of the newspaper and its archives, creates no additional causes of action.

To resolve the application of the fair-report privilege, one might first determine whether the LegalNewz.com story being subject to the privilege analysis is a new publication occurring in the context of presently known information, or a reiteration of an old publication within the single publication rule, occurring within the context of only information then known. The Fifth Circuit recently observed that courts so far have overwhelmingly favored application of the single publication rule. Thus in a dispute over an allegedly defamatory *Dallas Morning News* story published in print and later on the newspaper web site, the court applied the Texas statute of limitations to the

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154. SACK, *supra* note 15, § 7.3.2.2.1 (quoting RESTATEMENT (SECOND) OF TORTS § 611 (1977)).

155. *Sotelo*, 2006 WL 1644602, at \*1.



original paper publication, despite the later web republication.<sup>156</sup> The court explained that “retail sales of individual copies after the publication date and sales of back issues do not trigger a new limitations period.”<sup>157</sup> The court ruled Internet republication more akin to a publisher that continues to make a book available from existing stock, rather than the printing of a new edition of the book, the former but not the latter triggering the protection of the single publication rule.<sup>158</sup>

This conclusion on the single publication rule is not necessarily correct,<sup>159</sup> and even if it is, the rule might not control for purposes of determining the context of a fair-report privilege analysis. Johnsen’s assessment of fair-report cases involving dated proceedings showed that courts were willing to “expand the proceeding” for fair-report purposes, taking the broader view of context in determining whether a report is fair and complete.<sup>160</sup> Indeed, Inocente makes a compelling case for the broader view when he asks, not that LegalNewz.com rewrite or redact history, but only that it provide context with more current information when it has actual knowledge of substratal falsity. While courts that have extended the single publication rule to encompass Internet publication have done so in part for fear of discouraging innovation in the provision of online content,<sup>161</sup> Inocente’s position calls for the posting of more information, not less, and in accordance with a measure of social responsibility. The single-publication rule therefore does not necessarily lead to a favorable outcome for the media defendant on the fair-report privilege.

Other issues in fair-report analysis point to its possible inapplicability to LegalNewz.com. If a court were to apply the actual malice standard to vitiate the privilege, rather than the common-law malice standard, despite the objection of commentators such as Sack, LegalNewz.com could be liable if it had actual knowledge of substratal falsity and republished anyway. The lack of clear First Amendment underpinnings for the fair-report privilege allows for it to be adapted to the Internet differently in different jurisdictions more

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156. *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 143-44 (5th Cir. 2007).

157. *Id.* at 142.

158. *Id.* at 142, 145.

159. *See id.* at 143 n.2 (comparing Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639, 662 (2003) and Lori A. Wood, Note, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895, 913-14 (2001) with Odelia Braun, Comment, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U. L. REV. 325, 332-37 (2002)).

160. Johnsen, *supra* note 62.

161. *See id.* at 144 (quoting *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002), that without single publication rule, “there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise”).

easily than a constitutional doctrine. Also the agency, supervision, and information rationales are all served by Inocente's argument that the dated report is incomplete absent the addition of adequate context; public understanding of the criminal justice process can only be enhanced with the addition of information about the outcome of the Inocente prosecution.

### 3. *Neutral Reportage?*

LegalNewz.com argues third that the neutral-report privilege protects dated news reports of the press release asserting a DNA match in the Inocente prosecution. Recall that the privilege protects republication of "serious charges made against a public figure by a responsible, prominent organization,"<sup>162</sup> but only when the report is "accurate and disinterested," and the republication occurs amid a "controversy" that is "preexisting" and "public," or "raging and newsworthy."<sup>163</sup> The neutral-reportage privilege essentially broadens the scope of the fair-report privilege to reach the assertions of the prosecutor because the fact of their utterance, and not necessarily their substratal veracity, is of public interest even though the assertions occur in a press release rather than an official proceeding. As in the case of the fair-report privilege, LegalNewz.com can satisfy most of the elements of the neutral-reportage privilege easily; the charges are serious, the prosecutor's office is a responsible and prominent source, the news coverage is facially accurate, and the coverage is disinterested as LegalNewz.com has no stake in the case. But there are open questions. As mentioned previously, it is not clear that Inocente is a public figure. His refusal to talk to media at the time of his indictment and his subsequent lack of access to media to correct the record militate in favor of private-figure status, rendering the privilege inapplicable. There is also an open question about the newsworthiness of the case after it has faded from current events news.

The public controversy over the sexual assault case is not necessarily still "raging," or even newsworthy, at the time of later Internet downloads from LegalNewz.com. The same policy question arises here as in connection with the fair-report privilege: whether the single-publication rule should provide the proper context for the privilege analysis. If later Internet republication without the context of subsequent developments constitutes a single publication with the original in its context, then the neutral-reportage privilege may pertain. But the application of the single publication rule is not necessarily dispositive of how the neutral-reportage rule would operate. "Expired newsworthiness" is the equivalent of the "expanded proceeding"

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162. *Harte-Hanks Communications*, 491 U.S. at 660 n.1.

163. O'Neill, *supra* note 71.

theory from the fair-report privilege. If the download of LegalNewz.com's archived stories occurs when the event is no longer newsworthy and the theory of the single-publication rule does not shield the Internet archive, then the neutral-reportage privilege may be held inapplicable for lack of ongoing newsworthiness. This possibility points to the concerns in the literature about the proper scope of the newsworthiness element. Professor McCraw's reasonable-reader test might save LegalNewz.com as long as it date-stamps its content.<sup>164</sup> A broad construction of "public concern" in lieu of newsworthiness, especially while dispensing with the "public figure" test, would also favor LegalNewz.com. But a tight construction of newsworthiness could condemn LegalNewz.com.

Other issues in neutral reportage point to the possible inapplicability of the privilege. As in the fair-report area, the uncertain constitutional footing of the neutral-reportage privilege renders it readily amenable to substantive change. In contrast with the fair-report privilege, the neutral-reportage privilege is simply less likely to be recognized at all in the jurisdiction in which *Inocente* sues. Given the nature of the Internet and the law of long-arm jurisdiction, LegalNewz.com has as much chance of facing a plaintiff in one state's courts as another's (not to mention another country's). Also, this case demonstrates the theory that *Edwards* was wrong in light of *Gertz*. In *Gertz*, the Court chose to apply the *Sullivan* doctrine to cases involving public-figure plaintiffs as opposed to applying *Sullivan* to all matters of public concern, as had been suggested by the Court's decision in *Rosenbloom v. Metromedia, Inc.*<sup>165</sup> If this is a matter of public concern with a private-figure plaintiff, then this case presents a *Rosenbloom* scenario, calling for no heightened constitutional scrutiny.

The tendency of law to correct for omissions in professional ethics also provides grounds to anticipate rejection of the neutral-reportage privilege. Notice how the neutral-reportage privilege itself embodies principles of journalism ethics. The privilege requires that the report be facially accurate, a journalistic *sine qua non*,<sup>166</sup> and the privilege requires that the report be disinterested, a principle embodying journalistic detachment and objectivity.<sup>167</sup> The neutral-reportage privilege was created to accommodate

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164. McCraw, *supra* note 102.

165. *Gertz*, 418 U.S. at 346 (declining to follow *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality)).

166. *See, e.g.*, Code of Ethics, *supra* note 141 ("Seek Truth" section) ("Test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.").

167. *See, e.g., id.* ("Seek Truth" section) ("Distinguish between advocacy and news reporting."); *id.* ("Act Independently" section) ("Avoid conflicts of interest, real or perceived."; "Disclose unavoidable conflicts."). The privilege has been held not to require balance, i.e., presenting both sides of the story. Ho,

journalistic practice that the courts perceived to be in the public interest, according to the same information rationale that motivates the practice of journalism.<sup>168</sup> The contours of the neutral-reportage privilege were drawn along the limits of responsible journalism. Journalistic practice calls for the prompt correction of error.<sup>169</sup> If prompt correction is made possible by the dynamic properties of web publishing in a way that was not possible in traditional media, the courts might well expect journalists to conform to that norm. Accordingly, the neutral-reportage privilege might be construed not to tolerate outdated and out-of-context information online, especially when the online content provider has actual knowledge of substratal falsity.

#### 4. Wire Service?

LegalNewz.com argues fourth and finally that the wire service defense protects it from liability for those dated news reports about Inocente that LegalNewz.com republished from news services without development or meaningful alteration. Presumably, the elements of the defense are met. LegalNewz.com is a (more than) daily news provider relying on reputable news services. Whereas the evolved common-law privilege for negligence might lead to liability for LegalNewz.com, they may now claim to the broader protection of § 230 immunity as an Internet provider. The defense is subject to the same criticisms leveled against § 230 and the wire service defense in the Internet age, namely that both doctrines came about to protect nascent industries that no longer need protection. Both the accessibility and longevity properties of the Internet that threaten enhanced injury to the substratally defamed, as well as the dynamic property that empowers publishers to limit injury online support reform and limited liability. If a "notice and takedown" model were adopted instead, LegalNewz.com would have an opportunity to dock in safe harbor from liability to Inocente upon his request. From Inocente's perspective, this remedy might seem inadequate, given the number of other web sites where dated news-service content might yet be found. But the balance would nonetheless be shifted substantially in Inocente's favor in contrast to the balance drawn, or not drawn, in a § 230 regime.

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*supra* note 71, § 8. But the fact that the argument for balance has been made demonstrates how closely the privilege is tied to journalism ethics. *See, e.g.*, Code of Ethics, *supra* note 141 ("Seek Truth" section) ("Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.").

168. *See, e.g.*, Code of Ethics, *supra* note 141 ("Seek Truth" section) ("Journalists should be honest, fair and courageous in gathering, reporting and interpreting information.").

169. *See id.* ("Be Accountable" section) ("Avoid mistakes and correct them promptly.").

#### IV. CONCLUSION

The unusual properties of the Internet, namely accessibility and longevity, pose a danger of "perpetual reputational harm" that did not exist in traditional media. This harm manifests whenever defamation is perpetuated because outdated content is downloaded anew. The problem is especially salient in the business of mass news media, which maintain news archives that contain potentially injurious information about individuals. Often the truth regarding these individuals has yet to be tested in a court of law, or is later disproven or changed by other subsequent events. The problem is especially acute in news that transmits underlying or substratal, defamatory falsehood, such as news of criminal charges that are later dropped or found unsubstantiated in court.

In recent history a complex network or labyrinth of common law, statutory, and constitutional privileges, which are all characterized by jurisdictional variation and disputed foundation and scope, has been instrumental in protecting media defendants against defamation liability for substratal defamatory falsehoods in media reports that, while facially accurate in context, became outdated or incomplete upon the unfolding of subsequent events. However, the enhanced potential for harm in online publication is expected to pressure this media-privilege labyrinth to yield greater liability. Because of the uncertainty inherent in application of the privileges—namely fair comment, fair report, neutral reportage, and wire service—the media-privilege labyrinth is likely to crack along existing fault lines, resulting in less media-sympathetic liability rules for Internet publication. This article contends that movement toward greater media liability for substratal defamation online is likely, regardless of whether greater liability is desirable.

But a third unusual property of the Internet, the dynamic property, allows potential defendants to exploit the nature of the medium to mitigate the harms that would otherwise flow from the perpetual republication of defamation by using tools such as hyperlinked cross-referencing. This article takes no position on the desirability of enhanced media liability for the news media's failure to take advantage of dynamic, harm-mitigating tools in the preparation of web content. But this article does assert that the news media would be well served by embracing the advantages of new technology and becoming more cognizant of the harm caused by archival material being taken out of context. Furthermore, this article suggests that the media should take affirmative steps to tell more complete, accurate, and fair stories by, conscientiously endeavoring to give readers links to related, updated content involving subjects of later developed news coverage.

The judicially crafted defenses for media protection from defamation liability are designed to achieve socially desirable norms for journalistic conduct. Unsurprisingly, the defenses tend to import the norms of ethical

journalistic practice such as fairness, accuracy, and neutrality. This understanding of the conceptual underpinning of the media-privilege labyrinth bolsters the theory that courts will change the contours of the legal privileges to accommodate changes in social norms. As reputational and privacy interests take on increasing importance in American society, and courts become more cognizant of the dynamic properties of the Internet and less indulgent of *laissez faire* regulatory policies to protect technological developments, the court system as a whole will become more willing to evolve legal rules to enhance the liability of online publishers. The news media can prevent this re-shaping of Internet regulatory policy by taking responsibility and re-shaping journalistic practice: they can strive for more sensitivity to the risk that unrestrained coverage poses to individual rights, such as fair trial, reputation, and privacy, and they can take steps to minimize that harm. Media that beef up online correction and updating policies, perhaps by developing more sophisticated tools to cross-reference dated and new content automatically, will be ahead of the curve in averting perpetual reputational harm and other injuries, and will therefore ease the pressure on the labyrinth that threatens to contract the wealth of media tort defenses.