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A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges

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A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges

*David A. Elder**

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The broad outlines of the monumental injustices involved in the Duke lacrosse rape-that-never-happened case are well known. An unethical local prosecutor, Michael B. Nifong,¹ for partisan political reasons,² pursued the Duke lacrosse team³ and ultimately indicted

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1. See *infra* text accompanying notes 378, 379, 435-442, 457, 461-510; see also STUART TAYLOR, JR. & K. C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE CASE 77-89, 96-105, 118-19, 152-206, 219-35, 239-41, 244-68, 270-72, 278-80, 282, 285-357, 367-70, 379-80, 382, 438-442, 461-511 (2007).

2. See *infra* text accompanying notes 379-384, 438-442, 463-466, 473, 484-488; see also *supra* note 1.

3. The three ultimately charged were readily identified by the media or otherwise easily recognizable. See *infra* note 4. The other forty-six members of the Duke lacrosse team were often defamed as an entity. However, that poses no problem under the small-

three of its members⁴ based almost solely on the accusations of a wholly unreliable, self-proclaimed victim.⁵ Nifong received generous support and sustenance from many left-leaning, politically active Duke faculty,⁶ an extraordinarily inept⁷ (or worse⁸) Duke administration, and almost the entirety⁹ of the mainstream media.¹⁰ Ultimately, following a detailed analysis by his office, North Carolina Attorney General Roy A. Cooper¹¹ publicly excoriated Nifong in

versus-large-group defamation rule. Recognizability exists in the Durham locale, and perhaps beyond, as the team's pictures were widely disseminated on the Duke campus and within the City of Durham. See DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE §§ 1:30-:33 (2003 & Supp. 2008) [hereinafter ELDER, DEFAMATION]; TAYLOR & JOHNSON, *supra* note 1, at 104, 145, 275 (noting that the campus was "flooded" with "wanted" posters that illustrated the pictures and names of the forty-six white players); *id.* at 118 (noting *USA Today's* express reference to this poster); *id.* at 212-13 (including a picture insert of the "vigilante" poster); *id.* at 344 (noting that the forty-six white lacrosse players had been identified as felony suspects by Nifong and his office, the police department of Durham, and Durham Crime Stoppers).

4. See *infra* text accompanying note 342.

5. See *infra* text accompanying notes 412-429, 434-435, 472-483, 488-498.

6. TAYLOR & JOHNSON, *supra* note 1, at 103 (noting that the Duke faculty's remarks "topped" even those of Nifong); *id.* at 103-17; *id.* at 371-401; see also *infra* note 8.

7. TAYLOR & JOHNSON, *supra* note 1, at 131 (concluding that the president of Duke, Richard Brodhead, "acquiesced without a peep of protest in a pattern of prosecutorial abuse" directed towards his institution's students for over eight months). Brodhead later apologized for "causing the families to feel abandoned when they were most in need of support." *Duke's President Apologizes Over Lacrosse Case*, N.Y. TIMES, Sept. 30, 2007, at 1.

8. TAYLOR & JOHNSON, *supra* note 1, at 132 (stating that Brodhead was complicit in following Nifong and the activist Duke faculty "in publicly and repeatedly assailing the lacrosse players, albeit in more muted ways . . . [and] entering an alliance of convenience with the oppressor [Nifong] of forty-six of Duke's own students in order to appease activist professors and black Durhamites"); *id.* at 161 (suggesting that Brodhead, like Nifong, engaged in "willful blindness" by "avoiding direct exposure to evidence of innocence"); *id.* at 255 (noting that Brodhead "deliberately cultivated ignorance of the overwhelming documentary evidence of innocence and of Nifong's abuses that were offered him while continuing to defer" to Nifong in public communications).

9. There were a few noteworthy exceptions. For example, Nifong's most forceful antagonist was Joe Neff, an investigative reporter with the *News & Observer* in Raleigh. TAYLOR & JOHNSON, *supra* note 1, at 202. Others included CBS's Ed Bradley, *60 Minutes* producer Michael Radutzky, *id.* at 24-28, 109, 117, 175, 182, 193, 224, 282-83, and MSNBC's Dan Abrams. *Id.* at 86, 100, 123, 205-06, 271; see also text accompanying note 21.

10. See TAYLOR & JOHNSON, *supra* note 1, at 119-28; *id.* at 118 (noting that at the end of March 2006, "the journalistic echo chamber quickly spread the image of drunken, disorderly, publicly urinating lacrosse thugs around the world"); Evan Thomas, *A Rush to Judgment; 'Until Proven Innocent' is Harshly Critical of the City and Campus Response to the Duke University Rape Case*, NEWSWEEK, Sept. 10, 2007, at 34 ("By and large, the press did not let the facts get in the way of a good race-class-sex-violence morality play.").

11. Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007, at 1-2 (quoting the detailed report of North Carolina Attorney General Roy A. Cooper's official statements following a thorough investigation) [hereinafter Wilson & Barstow, *All Charges Dropped*].

concluding that the three students wrongfully accused by a “rogue prosecutor”¹² were innocent; there had never been *any* credible evidence to support the charges.¹³ Nifong was disbarred and generally disgraced.¹⁴

The Duke lacrosse fabricated rape case has since entered the annals of legal history¹⁵ and will doubtlessly be analogized for decades to come as a modern, reverse “Scottsboro Boys”¹⁶ epic, with the accused white students being railroaded by an African American “victim”¹⁷ in cahoots with a race-baiting prosecutor.¹⁸ Indeed, being “Nifonged” has become synonymous with being “railroaded.”¹⁹ The authors of *Until Proven Innocent*, Stuart Taylor, Jr. and K. C. Johnson, have written an exceptionally thorough and riveting account of the Duke lacrosse case that exposes and eviscerates the actions of the multiple complicit actors in this perversion of justice. Many have reviewed this account and universally praised its professionalism. None have questioned its basic conclusions.²⁰

As a defamation scholar, I will take a different track. *Until Proven Innocent*, with modest exceptions,²¹ presents the mainstream print and electronic media, as a class, as politically predisposed and non-skeptical, if not institutionally reckless²² in their rush to adopt the race/sex/privilege angle hyped by the media elders.²³ This is

12. TAYLOR & JOHNSON, *supra* note 1, at 351-52 (quoting Cooper’s press conference on April 11, 2007).

13. *Id.*; see also Wilson & Barstow, *All Charges Dropped*, *supra* note 11, at 1-2.

14. TAYLOR & JOHNSON, *supra* note 1, at 404-05 (finding that Nifong had repeatedly and deliberately violated rules of professional conduct in making prejudicial public statements, and lied to the court, the bar, and defense counsel).

15. See *infra* text accompanying notes 399-400, 435.

16. The analogy was often drawn by commentators. See, e.g., *infra* note 457; TAYLOR & JOHNSON, *supra* note 1, at 239, 297; see also *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981) (involving a libel litigation arising from a docudrama portraying the prosecutrix as a prostitute). Mrs. Street died the following year. An article about her demise noted the libel suit was “settled out of court.” *Victoria P. Street Dies at 77; A Figure in Scottsboro Case*, N.Y. TIMES, Oct. 19, 1982, at B7.

17. See *supra* note 5.

18. See *supra* text accompanying note 2.

19. TAYLOR & JOHNSON, *supra* note 1, at 334.

20. See, e.g., *supra* text accompanying note 10; *infra* text accompanying note 364.

21. See *supra* text accompanying note 9; *infra* text accompanying notes 364, 379, 396, 399, 429, 441-42, 470-71, 503, 520, 540, 542-544.

22. See *infra* text accompanying notes 363-544.

23. See *infra* text accompanying notes 364-65, 372, 379-80, 384, 385, 466, 470, 508, 540, 541. This was particularly well-illustrated by the “basically fair” absolution of the *Times* by its ombudsman/public editor Byron Calame. He offered a recommendation if the felony charges fell through: the *Times* should magnify its efforts to investigate “racial insults by various players” and the team’s “seemingly flawed culture.” Byron Calame, *Covering the Duke Lacrosse Team Case*, N.Y. TIMES, Apr. 23, 2006, at 2 [hereinafter

particularly true of that supposed pillar of respectability, the *New York Times*,²⁴ which Taylor and Johnson treat in an especially critical fashion.²⁵ As I read and re-read the book, it became apparent that the *Times* had, as had most of its emulators, largely ignored the law of defamation in its reportage on the Duke lacrosse case. Chest-

Calame, *Covering*]. *But see* TAYLOR & JOHNSON, *supra* note 1, at 197 (critiquing Calame's piece).

24. Iza Wojciechowska, *Times' Lax Coverage Comes Under Scrutiny*, THE CHRONICLE, Apr. 25, 2007, at 2 (Duke University's independent daily newspaper) (paraphrasing *Slate* editor-at-large Jack Shafer as saying, "[B]ecause of the *Times'* broad audience and established reputation, it was the paper's attention to the case that exploded the story into a nationwide sensation . . ."); *see also infra* text accompanying notes 364., 374, 375-385, 396-544.

25. *See, e.g.*, TAYLOR & JOHNSON, *supra* note 1, at 120-21 (comparing this case to the "prolonged crusade" of several dozen articles for elimination of the Augusta National Golf Club's sexist admission policy and concluding that sports writers' handling of the Duke case was "very much in character: politically correct politics without the scrupulous attention to facts" of the *Times'* best reporters, and that it "spoke volumes" that the editors left the story with the sports division for so long); *id.* at 122 ("Now at the head of the guilt-presuming pack," the *Times* "vied in a race at the journalistic bottom with trash-TV talk shows . . ."); *id.* at 166-67 (citing the *Times'* refusal to disclose the accuser's criminal record); *id.* at 197 (detailing the "highly exculpatory revelations" the paper's readers would not have seen); *id.* at 233 (noting that the co-dancer's statement that the accuser's rape allegations were a "crook" was not reported until August 25, 2006), *see infra* text accompanying note 423-424); *id.* at 235 (noting that moderate conservative David Brooks's criticism of media handling of the Duke lacrosse scenario, *see infra* text supported by note 470, was ignored within the *Times* because he was "far to the right of almost every other writer and editor"); *id.* at 303 (noting that the *Times* ignored a series of defense motions filed over a three-day period, which included information that outside DNA tests possessed by Nifong had revealed the DNA of several non-identified males from the accuser or her clothing that did not belong to her boyfriend/driver with whom she later informed police she had sex within the days prior to the alleged rape; that the identifications were "constitutionally flawed," had resulted in "flawed results" (which included a detailed analysis of the accuser's contradictions), and must be suppressed, barring any identification relying thereon by the accuser; and that a change of venue must be granted because of the highly inflammatory attacks by Duke professors, segments of the local African American community, and the media); *id.* at 305-12, 317 (noting that the *Times* minimized the December 15 hearing where the private testing laboratory owner admitted to what was a conspiracy by him and Nifong—described as "a defense triumph with dramatic elements enough to catch the attention of most [other] big media groups"—to conceal the unidentified male DNA discussed above by including it in a cryptic reference in a December 16, 2006, story on the accuser's pregnancy and only doing a major story thereon (the major focus of which was the dropping of the rape—but not the other—charges, and the reasons therefore) on December 24, 2006, with the "unfailingly politically correct editorial page" still silent while other major newspapers demanded that the remaining charges also be rescinded); *id.* at 323 (noting that by the end of 2006, Nifong, under ethics charges, had been "scorned by virtually every editorial board except" the *Times* and the equally, if not more, slanted local *Herald-Sun*); *id.* at 354 (noting that Duff Wilson posted a reference to the attorney general's dropping of remaining charges on the *Times* website but only referenced the "innocent" conclusion in the second paragraph, and noting the editorial page's continuing silence); *id.* at 377 (noting that the *Times*, as in other cases, continued to protect the accuser's anonymity even where said accuser was demonstrated to be a "vicious liar[] bent on sending innocent men to prison").

thumping newsworthiness²⁶ or news creation²⁷ became its mantra, if not its mode of operations. Maybe this is the unfortunate true legacy of *New York Times Co. v. Sullivan*, the most important defamation decision in Anglo-American legal history:²⁸ that the media may largely act unconstrained by defamation liability concerns because of the practical difficulty of litigation and the huge obstacles to actually collecting an award.²⁹

So far no one has sued the *Times* or other media entities for libel.³⁰ Maybe no one will. Nonetheless, media misfeasance and malfeasance, viewed through the microcosm of the *Times* coverage, raises some basic issues of libel law that future litigants in parallel

26. See *infra* text accompanying notes 458-461, 540-542.

27. See *supra* text accompanying notes 23-25; *infra* text accompanying notes 363-544.

28. FLOYD ABRAMS, *SPEAKING FREELY* 4 (2005) (describing *New York Times Co. v. Sullivan* as “the most significant First Amendment case of his era . . . which rewrote American libel law”).

29. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (“Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”); see also RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION, AND FREE SPEECH* 246 (2006) (stating that *New York Times Co.* has “changed the culture” of defamation suits and “effectively stifled” such suits by public persons and most private persons, providing “little protection for reputation” and “a remarkable platform” for freedom of expression); *id.* at 250 (“[The *New York Times Co.* rule] appears to significantly deter almost all defamation litigation.”); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 (1991) (stating that *New York Times Co.* and its progeny make the libel remedy “largely illusory” with “the likelihood of success . . . miniscule”); *id.* at 525-26 (“[N]o major legal system in the world provides as little protection for reputation as the United States now provides.”); *id.* at 545 (“[M]edia defendants, as a class, have the means and the incentive to spend what it takes to make sure libel does not become an effective remedy.”); Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739, 739, 750-51 (2006) (noting that *New York Times Co.* and its offspring have “effectively eliminated” defamation and privacy liability as a media control by the “virtual impossibility” of plaintiff recovery); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 520 (2001) (stating that under *New York Times Co.* and *Gertz*, the media has “something approaching an absolute privilege to defame; a reasonable publisher should worry about having to pay substantial libel damages as much as she worries about being struck by lightning”).

30. The mistreated and fired coach, Mike Pressler, and the wrongfully accused, David Evans, Reade Seligmann, and Collin Finnerty, initially settled with Duke for undisclosed sums. TAYLOR & JOHNSON, *supra* note 1, at 403. Pressler later broke the settlement by filing suit against Duke for allegedly defamatory statements by a Duke vice-president. *Former Duke Lacrosse Coach Files Suit Against University*, N.Y. TIMES, Oct. 14, 2007, at 1. After settlement negotiations fell through, David Evans, Collin Finnerty, and Reade Seligmann sued the City of Durham and others in federal court. See *Evans v. City of Durham*, No. 1:07-cv-00739-JAB-WWD (M.D.N.C. Apr. 2, 2008). Other Duke lacrosse players have also sued the City of Durham, Duke University, its hospital system, and selected employees of both in separate federal litigation. See *Carrington v. Duke University*, No. 1:08-cv-119 (M.D.N.C., Feb. 21, 2008).

“rush to judgment”³¹ scenarios may find helpful. Were the accused Duke lacrosse players (and other defamed lacrosse players) private persons or involuntary public figures under the Supreme Court’s jurisprudence?³² Were Nifong’s and others’ munificently quoted statements entitled to either fair report³³ or neutral reportage³⁴ protection? Did the *Times* engage in reportage outside the panopoly of First Amendment protection, knowing or reckless disregard of falsity, i.e. “calculated falsehood,”³⁵ particularly as to its much ridiculed “body of evidence” article published on August 25, 2006? Each of these issues will be discussed in detail hereinafter.

I. ISSUES OF STATUS: NEW YORK TIMES CO. OR GERTZ?

Famously, the Supreme Court superimposed a threshold requirement of constitutional malice on public official libel plaintiffs in *New York Times Co. v. Sullivan*³⁶ and later extended the same extremely demanding standard to public figures³⁷ and candidates for public office.³⁸ A plurality then applied this same criterion to all matters of public or general interest in *Rosenbloom v. Metromedia, Inc.*,³⁹ with the net result being that almost all litigants, whatever their status, were subjected to this extraordinary deviation from reputation-protective common-law standards. Following changes on the bench,⁴⁰ the Court revisited this subject matter in its counter-revolutionary decision,⁴¹ *Gertz v. Robert Welch, Inc.*,⁴² in which the

31. TAYLOR & JOHNSON, *supra* note 1, at 10, 404.

32. *See infra* text accompanying notes 36-140.

33. *See infra* text accompanying notes 141-326.

34. *See infra* text accompanying notes 327-362.

35. *See infra* text accompanying notes 55, 193, 198-200, 239, 242, 248, 249, 255, 321, 325-326, 328, 331, 358-362, 386-395, 401-409, 525-534, 537-39.

36. 376 U.S. 254 (1964).

37. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Associated Press v. Walker*, 389 U.S. 28 (1967); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967); *see also infra* text accompanying notes 46-55.

38. *See, e.g.*, *Monitor-Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

39. 401 U.S. 29 (1971); *see also infra* text accompanying notes 55, 81-82, 88, 92, 104-105, 198, 351.

40. David A. Elder, *Defamation, Public Officialdom, and the Rosenblatt v. Baer Criteria—A Proposal For Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 580 (1984) (noting “the pro-reputation orientation and realignment” on the Supreme Court in the decade starting with *Gertz*).

41. *Id.*

42. 418 U.S. 323 (1974).

Court authorized private persons to collect actual⁴³ (but not presumed or punitive⁴⁴) damages under a negligence standard.⁴⁵

The *Gertz* opinion sketched out broad rules for general application in distinguishing public figures from private persons based on two considerations: a primary “compelling,” “normative” assumption-of-risk policy,⁴⁶ and a subsidiary access to the media/self-help policy.⁴⁷ *Gertz* then identified three possible types of public figures (only the first two of which it specifically discussed in the case before it or thereafter): all purpose or general public figures,⁴⁸ vortex or limited public figures,⁴⁹ and hypothetical involuntary public figures.⁵⁰ The latter, according to the Court, would be “exceedingly

43. *Id.* at 349-50.

44. *Id.*

45. *Id.* at 347-48 (concluding that such was “a more equitable boundary” between reputation and free-expression values in private-person cases). For further discussion of the *Gertz* negligence standard, see *infra* note 122. Although *Gertz* involved both a media defendant and a matter of public concern, it was not explicitly so limited. The Court later resolved this in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985) (rejecting the *New York Times Co.* standard as to presumed and punitive damages in purely private cases) As to the broader impact of *Dun & Bradstreet*, see ELDER, DEFAMATION, *supra* note 3, §6:11.

46. *Gertz*, 418 U.S. at 345. Accordingly, private persons have “a more compelling call” for a remedy than public persons because they are “more vulnerable” and “more deserving” of a libel recovery. *Id.* at 344.

47. *Id.* at 344 n.9 (noting the major limitations of this criterion and stating that defamation law is “rooted in our experience that the truth rarely catches up with a lie.”). However, self-help’s inadequacies did not render them “irrelevant” to the Court’s analysis. *Id.*

48. *Id.* at 345; *id.* at 351 (“[A]n individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”). The Court imposed a heavy burden on asserting defendants, declining to “lightly assume” such status and requiring “clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society.” *Id.* at 352 (emphasis added).

49. *Id.* at 345 (“More commonly, . . . public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”); see also *id.* at 351. This vortex/limited-public-figure question is the “more meaningful context.” *Id.* at 352.

50. *Id.* at 345 (“Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own . . .”) (dictum). Later, in discussing vortex public figuredom, the Court said “[m]ore commonly, an individual voluntarily injects himself, or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.* at 351 (emphasis added). These are the *only* references to involuntary public figure status in the Court’s entire jurisprudence. Cf. *infra* text accompanying notes 52-55 (highlighting the Supreme Court’s other analyses of vortex or limited-purpose public figuredom where this “no purposeful action”/“drawn into” language was clearly and unequivocally ignored). For a more extended criticism, see ELDER, DEFAMATION, *supra* note 3, §5:8, 5-65-74 (listing and strongly criticizing a number of cases appearing to adopt the involuntary public figure concept).

rare.”⁵¹ The Court proceeded to very narrowly construe public figuredom in *Gertz* and two other pivotal cases involving a range of participants in legal proceedings: (1) a prominent civil rights attorney engaged in representational activities⁵² in a case guaranteed to precipitate widespread media publicity,⁵³ (2) a divorce litigant with a household marital name involved in a “cause célèbre” divorce compelled to seek redress in state court who held several press conferences,⁵⁴ and (3) a criminal contemnor who chose not to initially respond to a subpoena wholly aware that his decision might receive extensive publicity.⁵⁵

51. *Gertz*, 418 U.S. at 345. Some have suggested that this is not a separate subdivision, but merely a way of becoming a vortex-limited or all-purpose or general public figure. See, e.g., *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741-42 (D.C. Cir. 1985); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1084 (3d Cir. 1985); see also *infra* text accompanying notes 66-74.

52. *Gertz*, 418 U.S. at 352 (concluding that the plaintiff, although well known in legal circles, had only a “minimal role” during the coroner’s inquiry into the death of his clients’ son, did not participate in the criminal prosecution of the police officer, never discoursed on the civil litigation or criminal prosecution with the media, and was not quoted in such capacity). *Gertz*’s involvement was strictly limited to client representation. Consequently, he did not “*thrust himself into the vortex* of this public issue, nor did he *engage the public’s attention* in an attempt to influence its outcome.” *Id.* (emphasis added). The Court also cryptically rejected the suggestion he was a public official as an officer of the court because such a recognition would “distort the plain meaning” of this concept “beyond all recognition.” *Id.* at 351.

53. *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 167 (1979) (interpreting *Gertz* as rejecting public figuredom despite *Gertz*’s voluntary affiliation with a case “*certain to receive extensive media exposure*”) (emphasis added).

54. *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976) (citing only two public figure standards—“all purpose” and “vortex”—and concluding that plaintiff met neither). She had not “assume[d] any role of especial prominence in the affairs of society” (with the exception, arguably, of Palm Beach) and had not “thrust herself to the forefront of any particular public controversy in order to influence the resolution” of any issue. *Id.* at 453. As to the “cause célèbre” contention, acceptance of such would “reinstate” *Rosenbloom* by equating “public controversy” under the *Gertz* test by defining it to include “all controversies of interest to the public.” *Id.* at 454. Marital controversies involving the ultra-rich did not meet the *Gertz* standard despite the interest therein by some element of the public. See *id.* Nor was such a matter of free choice in light of the state’s monopoly over dissolution. See *id.* In such situations “[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.” *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971)). The press conferences respondent held to try to “satisfy inquiring reporters” did not translate into public figuredom. *Id.* at 455 n.3. Such actions “should have had no effect” upon the underlying legal dispute and the Court declined to think “any such purpose was intended.” *Id.* In addition, there was no suggestion respondent “sought to use” the conferences “as a vehicle . . . to thrust herself to the forefront of *some unrelated controversy* in order to influence its resolution.” *Id.* (emphasis added).

55. See *Wolston*, 443 U.S. at 167 (finding plaintiff’s health-based refusal to appear, “knowing that his action might be attended by publicity,” was not conclusive). The Court cryptically rejected a per se rule of public figure status as to *all* who engaged in criminality, *id.* at 168-69, and rejected in some detail the lower court’s conclusion that via his refusal,

Against this backdrop, how should the three Duke accused be evaluated,⁵⁶ given the extensive and ultimately successful efforts of the accuseds' lawyers⁵⁷ to counter Nifong's extraordinary barrage of highly prejudicial, inculpatory, and defamatory statements,⁵⁸ and the limited contacts the accused had with the media?⁵⁹ Are the accused quintessential examples of the hypothetical "exceedingly rare" involuntary public figure? Or do they fall into the category, under *New York Times Co.*, of those "dragged unwillingly"⁶⁰ into the public

plaintiff "stepped center front into the spotlight" on Soviet espionage, *id.* at 165-68 (quoting *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427, 431 (D.C. Cir. 1978)). The Court noted that *Wolston* had never discussed his situation with the media and emphasized that attraction of media attention did not "automatically transform[]" a private person into a public person, because such a transformation would resurrect the *Rosenbloom* approach that was doubly rejected in *Gertz* and *Firestone*. *Wolston*, 443 U.S. at 167-68. In powerful language, the Court thundered: "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." *Id.* at 167-68 (citing *Firestone*, 424 U.S. at 454) (emphasis added). Justice Rehnquist repulsed any suggestion that the plaintiff "engaged the attention of the public in an attempt to influence the resolution of the issues" therein. *Wolston*, 443 U.S. at 168. Nor was *Wolston's* failure to respond "calculated to draw attention" to him in order to "invite public comment or influence the public with respect to any issue." *Id.* at 168. "He did not in any way seek to arouse public sentiment in his favor and against the [government's] investigation." *Id.* (emphasis added). Accordingly, this was not a scenario where a contemnor "invite[d]" a contempt citation to use such "as a fulcrum to create public discussion" about investigative or prosecutorial methods or conduct. *Id.* Significantly and quite tellingly, Justice Rehnquist also noted as a factual matter that petitioner had, like *Gertz*, see *supra* note 52, never discussed the court proceeding with the media and "limited his involvement to that necessary to defend himself" from the criminal contempt charge, *Wolston*, 443 U.S. at 167 (emphasis added). Justices Blackmun and Marshall correctly construed the Court's exceptionally narrow construction of vortex/limited-purpose public-figure status as strictly limited to scenarios where plaintiff "literally or figuratively 'mounts a rostrum' to advocate a particular view." *Id.* at 169-70 (Blackmun & Marshall, JJ., concurring in the result).

56. Or, more broadly, how should the members of the Duke lacrosse team be characterized in terms of status?

57. TAYLOR & JOHNSON, *supra* note 1, at 98 (noting that a press conference by Joseph B. Cheshire, counsel for David Evans, was a "highly unusual tactic" but "the only way to beat Nifong's savage attacks in the media"); see also *infra* text accompanying notes 138, 488.

58. See *infra* text accompanying notes 180, 214-217.

59. TAYLOR & JOHNSON, *supra* note 1, at 93 (noting that David Evans, one of the co-captains, helped draft a statement of the lacrosse team's innocence that was released by Duke); *id.* at 225-26 (detailing the May 15, 2006, public press statement by David Evans following his indictment that proclaimed his innocence, and noting that Evans's speech "marked a turning point in public perceptions" of the matter); *id.* at 182, 224 (citing the interview of the three accused by Ed Bradley on *60 Minutes* on Oct. 15, 2006); *id.* at 352-53 (citing the press conference on April 11, 2007, by the declared-innocent accused, where all three spoke, following Attorney General Roy A. Cooper's press conference); *id.* at 355 (noting the comments of Finnerty and Evans in the third *60 Minutes* program on the Duke lacrosse case on April 15, 2007).

60. *Wolston*, 443 U.S. at 166.

area by media publicity and who should not be viewed as “open season”⁶¹ targets with little hope of redress?

As I have indicated elsewhere,⁶² a plethora of precedent has followed *Gertz/Firestone/Wolston*⁶³ and showed that mere involvement in litigation—in whatever capacity and however great the ensuing publicity⁶⁴—does *not* automatically grant public-figure status. In the face of such clear precedent, however, a dubious minority line⁶⁵ of cases seems to affirm or contemplate the viability of an *involuntary* public figure status. In the leading case, *Dameron v. Washington Magazine, Inc.*,⁶⁶ the District of Columbia Circuit adopted this curious brooding albatross in cases involving a plaintiff involuntarily subjected to media limelight as long as the plaintiff has a “*central, albeit involuntary, role*” in the controversy.⁶⁷ In *Dameron*, the plaintiff-air traffic controller was defamed in one of a series of brief, interfaced stories (the Mount Weather crash) contained in the eleventh page of a lengthy magazine article on air safety emanating from a highly publicized Washington, D.C. air disaster.⁶⁸ Although not identified in the interface—a factor the court itself viewed as important but paradoxical⁶⁹—the plaintiff had previously testified at length at a National Transportation Safety Board hearing, with the

61. *Id.* at 169.

62. See ELDER, DEFAMATION, *supra* note 3, §5:16, 5-108-111; see, e.g., *Miller v. KSL, Inc.*, 626 P.2d 968, 972 (Utah 1981) (noting that through an accusation of criminality, plaintiff was “plucked by the defendant from the anonymity of private life and thrust against his will into the limelight”).

63. See ELDER, DEFAMATION, *supra* note 3, §5:16. A fourth Court decision, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), did not involve a libel plaintiff involved in a legal proceeding. However, the Court’s construction of public figuredom was equally restrained. The plaintiff was a research scientist whose federal-government grants had resulted in bestowal by defendant-Senator of his “Golden Fleece” award. *Id.* at 114. The Court rejected vortex public-figure status even though he had received some access to the media as a result of the award. *Id.* at 134-36. This did not demonstrate he was a public figure “*prior to the controversy*” precipitated by the award. *Id.* at 134-35. His writings became controversial *only* as a result of the award. *Id.* The Court strongly rejected any such media bootstrapping: “[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” *Id.* at 135 (emphasis added). Lastly, his press access was *purely responsive* to the defendant-generated controversy, and he did not have that “regular and continuing access” that is an attribute of public figuredom. *Id.* at 136.

64. See *Pendleton v. City of Haverhill*, 156 F.3d 57, 68 (1st Cir. 1998) (concluding that it is “apodictic that an individual’s involvement in a criminal proceeding—even one that attracts substantial notoriety—is not enough, in itself, to ingeminate public figure status”); ELDER, DEFAMATION, *supra* note 3, §5:15, 5-107-111.

65. ELDER, DEFAMATION, *supra* note 3, §5:8, 5-71-74.

66. 779 F.2d 736 (D.C. Cir. 1985).

67. *Id.* at 741 (emphasis added).

68. *Id.* at 737-38.

69. *Id.* at 742.

net result being that he and his role in the Mount Weather crash had received extensive preexistent publicity.⁷⁰

The *Dameron* court held that while a plaintiff's self-propulsion into a controversy was the "primary and most frequent route"⁷¹ to vortex/limited-purpose public-figure status, it was not the exclusive course.⁷² It cryptically distinguished Justice Rehnquist's powerful majority opinion in *Firestone* as involving a "voyeuristic interest" wholly different from an interest in air-traffic safety⁷³ and differentiated Justice Rehnquist's equally potent *Wolston* majority opinion on the ground that the claimant therein was not defamed as to the *specific* controversy to which he was central—his refusal to provide subpoenaed grand jury testimony—but as to a separate, "at most tangential role" in the governmental investigations of Soviet espionage in general.⁷⁴

Dameron's cryptic *Firestone/Wolston* discussions were shallow and unpersuasive, as was its ultimate conclusion that such a broad involuntary-public-figure category is defensible. It is clear from a reading of *Firestone* that a litigant's involuntariness was a co-equally important focus.⁷⁵ And it is extremely doubtful that the Court's result would have been any different had the husband-counterclaimant sought exclusive custody *and* alleged that the wife-claimant had abused their child—an undoubted matter of public interest.⁷⁶ As few publicized matters would fall within the "voyeuristic interest" category, a huge and reputation-devouring maw of an exception would be superimposed on the Court's jurisprudence under such an approach—including *all* criminal charges and accusations since they have been invariably deemed *per se* matters of public concern.⁷⁷ This would, of course, boldly, baldly, and incongruously fly in the face of *Firestone* and *Wolston*.

70. *Id.* Plaintiff's concession as to his continuing recognizability may relegate *Dameron* to marginal value as precedent. See ELDER, DEFAMATION, *supra* note 3, §5:8, 5-69, n.33.

71. *Dameron*, 779 F.2d at 741.

72. *Id.* at 740-43.

73. *Id.* at 742.

74. *Id.* at 742-43.

75. See *supra* text accompanying note 54.

76. See *infra* text accompanying notes 116-135.

77. See ELDER, DEFAMATION, *supra* note 3, §6:11, 6-73-74, n.33; *infra* text accompanying note 84. The same broad treatment applies to *true* matter under the common law/First Amendment legitimate-public-interest privilege in public disclosure of private facts cases. See DAVID A. ELDER, PRIVACY TORTS §3:17 (West Group 2002 & Supp. 2008) [hereinafter ELDER, PRIVACY].

In addition, *Dameron's* central-versus-tangential dichotomy is easily met and more facily manipulated, depending on how the court chooses to characterize the controversy. The *Dameron* court itself reflected some ambiguity on this issue.⁷⁸ Another court could just as easily have focused on the Mount Weather crash as merely tangential to the particular controversy relating to air safety concerns emanating from the Washington, D.C. crash. Under this characterization, the Mount Weather crash would be merely illustrative, a minor or tangential part, of a broader concern about air controller responsibility—just as *Wolston* involved a specific but limited exemplar of the broader concern about Soviet espionage in general.⁷⁹

In *Wells v. Liddy*,⁸⁰ the Fourth Circuit, whose precedent would be applicable in any Duke lacrosse North Carolina-based federal litigation, savaged *Dameron* as creating a class of public figures “equivalent to” and “indistinguishable” from that in *Rosenbloom*.⁸¹ Rejecting *Dameron's* *c'est la vie*/public figuredom by a “sheer bad luck”/“centrality” approach,⁸² the *Wells* court attempted—not very successfully—to provide more specific guidelines for involuntary public figuredom. Noting the concept's sparse underpinnings in *Gertz*⁸³ (but attempting to apply its two rationales), the court required defendants to prove the plaintiff's “central[-]figure” status in a broadly defined “significant public controversy”⁸⁴ and that the defamatory

78. *Dameron*, 779 F.2d at 741 (referencing “the question of controller responsibility for air safety *in general* and the Mount Weather crash in *particular*” in discussing the germaneness issue) (emphasis added); *id.* at 740 (noting, in its discussion of fair report, that the defamatory passage was “part of a very brief factual piece about *safety at National Airport*, which in turn is *part of a larger inquiry* into the circumstances surrounding the crash of Flight 90,” which was the later Washington crash that precipitated the article) (emphasis added).

79. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167 (1979) (noting *Wolston* played only a “minor role” in any public controversy that existed regarding Soviet espionage).

80. 186 F.3d 505 (4th Cir. 1999).

81. *Id.* at 538-39.

82. *Id.* at 539 (“[U]nfortunately, bad luck is relatively common” and *Dameron* “created a class . . . equivalent to the class in *Rosenbloom*.”); see also *Flowers v. Carville*, 310 F.3d 1118, 1129 n.7 (9th Cir. 2002) (characterizing *Dameron* as “stating that people can become public figures through sheer bad luck”). Having sold her story to a tabloid, the plaintiff's decision to respond to the candidate's public denial by holding a press conference and playing secretly taped conversations did not make her an “involuntary” public figure—she “voluntarily injected herself into the fray, or at least threw kerosene on the flames once the conflagration was under way.” *Flowers*, 310 F.3d at 1129 n.7.

83. *Wells*, 186 F.3d at 539.

84. *Id.* at 539-40; see also *id.* at 540 (“A significant public controversy is one that touches upon serious issues relating to, for example, community values, historical events, governmental or political activity, arts, education, or public safety.”). The controversy must have pre-existed the defamatory statements' publication. *Id.* at 540.

matter arose “in the course of discourse” thereon, making the plaintiff the media’s “regular focus.”⁸⁵

Defendants must also show that a plaintiff acted or failed to act under “circumstances in which a reasonable person would understand that publicity would likely inhere”⁸⁶—a “course of conduct” with the plaintiff as a foreseeable “central figure.”⁸⁷ The court took considerable pains to emphasize that a bootstrapped public interest could not function as a “surrogate” for a plaintiff’s voluntary participation,⁸⁸ and that courts must reject the powerful inducement to transfer those hauled into important and notorious controversies (such as Watergate) into public figure status.⁸⁹ Ultimately, the court did not have to delve into its exceedingly amorphous criteria in detail or demonstrate how they were consistent with the Supreme Court’s jurisprudence,⁹⁰ as it found that the threshold “central figure”/“principal” requirement had not been met—the plaintiff was a “minor figure”/“footnote” in the Watergate burglary.⁹¹

The *Wells* decision is only marginally superior to *Dameron* and continues to foster a revived *Rosenbloom* of major proportions in any setting where a defendant can demonstrate that the plaintiff engaged in some undefined “course of conduct” (or oxymoronic non-conduct!) that precipitated the plaintiff into centrality in a “significant public

85. *Id.* at 539-40 (“[A]n involuntary public figure need not have sought to publicize her views on the relevant controversy”). However, the amount of media coverage sufficient to make plaintiff central to the controversy would “vary greatly” with the breadth of the controversy. *Id.* at 540 n.26. As to a community-limited controversy, a defendant may focus on local print and electronic outlets. *Id.* Where a defendant tries to demonstrate centrality on a broader basis, be it international or nationwide, media treatment thereof must be shown to be “significantly broader.” *Id.*

86. *Id.* at 540.

87. *Id.* (“[A]n involuntary public figure has pursued a *course of conduct* from which it was reasonably foreseeable, at the time of the conduct, that public interest would arise.”) (emphasis added). Unlike a vortex/limited-purpose public figure, no showing is required that the plaintiff had “specifically taken action through which he has voluntarily sought a primary role in the controversy to influence the outcome of debate on the matter.” *Id.*

88. *Id.* at 541. The court was confident this would not be equivalent to a resuscitated *Rosenbloom*, entrapping anyone “linked in the media to a matter of public concern.” *Id.* at 540.

89. *Id.* at 541.

90. *See Wells*, 186 F.3d. at 541-42 n.28; *see also* ELDER, DEFAMATION, *supra* note 3, §5:12, 5-90 (strongly criticizing the “broad swathe” of the “course of conduct”/“centrality” decisions, and concluding that it would be the “relatively rare” plaintiff who could meet private plaintiff status where the individual’s “views, actions, or activities were sufficiently newsworthy to have generated prior publicity (avoiding, thereby the bootstrapping problem.”).

91. *Wells*, 186 F.3d at 541. Thus, the court did not have to delve into the issue of whether the plaintiff had engaged in “any action from which public interest was a reasonably foreseeable result.” *Id.* at 541-42, n.28.

controversy.”⁹² Of course, this approach ignores the fundamental thrust of *Gertz* and its progeny—that a generalized assumption of risk based on a “course of conduct” did not and does not suffice for vortex/limited-public-figure status of the *voluntary* variety.⁹³ It strains credulity to conclude that the Court contemplated the perverse result that such rejected generalized assumption of risk would be backdoored into *involuntary* public figuredom!⁹⁴

The other decision cited by *Wells*, *Khawar v. Globe Intern., Inc.*,⁹⁵ is no more defensible. In *Khawar*, the California Supreme Court opined that, *if* available at all,⁹⁶ involuntary public figure status would be limited to those who have “acquired such public prominence” regarding the controversy into which they are dragged as to provide “media access sufficient to effectively counter” media-disseminated defamation.⁹⁷ The court noted in this respect that no one had interviewed the plaintiff, a Pakistani journalist at the Ambassador Hotel at the time of Robert F. Kennedy’s assassination, prior to the book’s publication, and that only a single local television station interviewed him afterwards. This was deemed insufficient to qualify him for involuntary public figure status.⁹⁸

Consider the proffered perversion of *Gertz* inherent in *Khawar*’s position—the primary “normative” and “compelling” assumption-of-risk justification⁹⁹ is totally ignored, and *Gertz*’s policy

92. *Id.* at 539.

93. *See supra* text accompanying notes 52-55; *see also* ELDER, DEFAMATION, *supra* note 3, §5:8, §5:12.

94. *See Wells*, 186 F.3d at 541. *But see id.* at 540 (broadly constructing the criteria’s effect—it “captures that ‘exceedingly rare’ individual who, *although remaining mute* during public discussion of the results of her action nevertheless *has become a principal in an important public matter*”—but excluding those “mentioned peripherally” or “merely . . . named” in a media account) (emphasis added).

95. 965 P.2d 696 (Cal. 1998).

96. *Id.* at 702.

97. *Id.*

98. *Id.* The single interview in response to the book evidenced “some access” by Khawar but was no more than any private person would have in the face of “sensational and defamatory accusations” in a key media entity with significant national distribution. *Id.* at 702-03. The Supreme Court had “consistently declined” to permit this circumstance as the basis for public-figure status. *Id.* at 703. The California Supreme Court also rejected vortex/limited-purpose public-figure status. *Id.* at 702. Although Khawar had been filmed near RFK’s podium just before the assassination, this fact arose pre-assassination twenty years before the book implicating him in the assassination and was irrelevant to the libel litigation. *Id.* at 703-04. Moreover, even as to RFK’s candidacy, plaintiff’s voluntariness in standing near RFK played at most a “trivial” role therein. *Id.* at 703. Lastly, Khawar’s proximity to RFK was for souvenir purposes and he had no intention of bringing attention to himself or influencing public perception regarding any controversy or issue. *Id.* at 703-04.

99. *See supra* text accompanying notes 46, 52-55.

hierarchy is inverted, making its minor, subsidiary rationale *alone* sufficient for involuntary public figure status.¹⁰⁰ The ability of the media to bootstrap themselves within the *New York Times Co.* panoply of protection is given a huge, self-interested, illimitable inducement, particularly in cases like the Duke lacrosse scenario, where modern media's twin combustibles of political correctness¹⁰¹ and voracious sensationalism¹⁰² combine to pour fuel on a story of minor, inherent newsworthiness.¹⁰³

In sum, neither *Dameron, Wells*, nor *Khawar* are consistent with *Gertz* and its progeny, but rather involve a concept that can only be described as a constitutional non sequitur—a calculated, “essentially standardless and open-ended”¹⁰⁴ circumvention device¹⁰⁵ at odds with a plethora of contradictory precedent¹⁰⁶ and the Court's aforementioned elemental philosophy.¹⁰⁷ One court made this point clear by rejecting public-person status based on a single interview after the defendant's conviction was reversed. Imposition of public-figure status in such cases would allow for the unilateral bestowal of public figure status via “excessive coverage of a private person.”¹⁰⁸ In

100. *Id.*; see also ELDER, DEFAMATION, *supra* note 3, 5-78-79 (noting that most opinions appropriately consider the access/absence-thereof factor as “an underlying subsidiary rationale” but *not* an *element* of public-figure status).

101. See *supra* text accompanying notes 2, 6-13, 22-27, 30; *infra* text accompanying notes 363-544.

102. See *supra* text accompanying notes 9-10, 21-27, 30, 31, 35; *infra* text accompanying notes 363-544.

103. See *infra* text accompanying note 383.

104. ELDER, DEFAMATION, *supra* note 3, §5:8, 5-74. This is aptly and amply evidenced by the prototypical exemplar referenced in some quarters, i.e., the private individual snared in a police raid. *Id.*; see, e.g., *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 49 (Wis. Ct. App. 1988) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 880 (1988)). Of course, this is *exactly* the factual setting in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). See *supra* text accompanying notes 55, 81-82, 88, 92; *infra* text accompanying notes 105, 198, 351.

105. See ELDER, DEFAMATION, *supra* note 3, 5-73-74 (“[I]t is difficult not to conclude that this minority view. . . constitutes an attempt by courts and commentators . . . though formalistically and technically adhering to *Gertz*, to substantially reintroduce and rejuvenate the repudiated *Rosenbloom*-general public interest doctrine under an only slightly less open-ended and amorphous involuntary public figure classification . . .”). Of course, the media is quite creative and exceptionally aggressive in conjuring up ways to circumvent even the extraordinarily generous protections accorded under the *New York Times Co.* standard. See David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempt to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 551-830 (2007) [hereinafter Elder, *Media Jabberwock*].

106. See ELDER, DEFAMATION, *supra* note 3, §5:8, 5-71-74.

107. See *supra* text accompanying notes 40-55, 60-61; Elder, *Media Jabberwock*, *supra* note 105, at 550-627.

108. *Jacobson v. Rochester Commc'ns Corp., Inc.*, 410 N.W.2d. 830, 835-36 (Minn. 1987).

other words, a compelling case can be made that involuntary public figuredom is not merely extraordinarily rare but is (or should be) extinct¹⁰⁹ in light of the Court's jurisprudence.

But what of the Duke accuseds' counsels' ultimately eminently successful strategy—via counsel interviews, press conferences, legal motions, and very limited personal contact of the accused with the media—to counter and respond to Nifong's highly inflammatory public condemnations? Did these collective activities make the Duke-lacrosse accused public figures? Significant precedent¹¹⁰ has adopted the view that “purely defensive, truthful statements”¹¹¹ in response to press inquiries made by those involuntarily thrust into the public limelight—as litigants or otherwise—do not suffice. The case law has correctly interpreted Court precedent as rejecting the between-a-rock-and-a-hard-place, plaintiff-as-accused dilemma, i.e., loss of private status by defending oneself or permitting the public to believe in the charges' substantial truth through non-denial.¹¹² This rule applies at

109. See *Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 895 n.1 (Iowa 1989); ELDER, DEFAMATION, *supra* note 3, §5:8, 574. Other decisions also question or reject the concept's continuing validity in light of later Court precedent. See *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1115 n.6 (N.D. Cal. 1984); *Franklin v. Benevolent & Protective Order of Elks*, 159 Cal. Rptr. 131, 139-41 (Cal. Ct. App. 1979); *Schultz v. Reader's Digest Ass'n.*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (noting that *Firestone* “forecloses the possibility” of involuntary public figuredom); *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999) (suggesting that “[s]o rarely have courts determined that an individual was an involuntary public figure that commentators have questioned the continuing existence of that category”); see also RODNEY A. SMOLLA, LAW OF DEFAMATION 2:33-35 (2008) (concluding that the post-*Gertz* triumvirate of *Firestone/Wolston/Hutchinson* “appears to take virtually all of the oxygen out of the one-sentence musing in *Gertz* hypothesizing the possibility of involuntary public figures”); Dale K. Nichols, Comment, 14 U. MICH. J.L. REFORM 71, 80, 83-84 (1980) (finding a strong argument that this trio “may have abolished the involuntary public-figure class sub silentio”). For other parallel citations, see Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 KY. L.J. 649, 673, nn. 125-26 (2006-07). Even a distinguished author sympathetic to a broadened swath of *New York Times Co.* has suggested in his extensive analysis of involuntary and other public figure case precedent that the “boundaries and outlines” of public figuredom have been “formless and ill-defined” with the “hirsute contours ... especially vague for the involuntary public figure subcategories.” King, at 712-13 (suggesting a total constitutionalization of all defamation law under the knowing or reckless disregard standard regardless of status or the subject matter content of the defendant's statement).

110. ELDER, DEFAMATION, *supra* note 3, §5:15, 5-110-111.

111. *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990).

112. *Waicker v. Scranton Times Ltd. P'ship*, 688 A.2d. 535, 541 n.4 (Md. 1997); see also *Clyburn*, 903 F.2d at 32 (noting that there is little justice in concluding that an individual “dragged into a controversy should be able to speak publicly only at the expense of foregoing” private-person-status protection); *Foretich v. Capital Cities ABC, Inc.*, 37 F.3d 1541, 1564 (4th Cir. 1994) (noting the same proposition at *Clyburn*). Indeed, a failure to respond may be an “adoptive admission” under state evidence law. *Gallagher v. Connell*, 20

least where the plaintiff is not attempting to “gain public attention in an attempt to influence the outcome”¹¹³ of the proceeding.

But is the defensive-responsive versus “attempt to influence the outcome” dichotomy practical, feasible, or fair to the accused-later libel plaintiff, particularly in the context here, where a “rogue prosecutor” manipulated and inflamed the local populace and local and national media by filing serious felony charges based on no substantial evidence?¹¹⁴ Under such unconscionable circumstances, can the law conscionably relegate a criminal defendant to the status of “quietly seeking to exert his legal rights”?¹¹⁵ In these cases, the best defense may be a calculatedly aggressive offense. Depriving the wrongfully charged of his or her private-person status because of an attempt to mitigate the damage, even the playing field, or precipitate reconsideration by a wrong-headed, stubborn, or unethical prosecutor (or a Nifong-like multiple-defect equivalent) functionally allied with a politically biased and complicit media engaged in a collective “feeding frenzy” would pervert and subvert logic, fundamental fairness, and common sense.

Fortunately for the Duke-lacrosse plaintiffs and those similarly situated, the Fourth Circuit reaffirmed an earlier precedent with many parallels, *Foretich v. Capital Cities/ABC, Inc.*,¹¹⁶ as a “self-defense”/non-vortex public-figure rule¹¹⁷ with equal validity in involuntary public-figure cases.¹¹⁸ In *Foretich*, the media extensively publicized a former daughter-in-law’s charges that the plaintiff-grandparents had physically and sexually abused their grandchild, were complicit in the father’s abuse, and had threatened to kill their grandchild if she informed anyone.¹¹⁹ In a groundbreaking and

Cal. Rptr. 3d 673, 683-84 (Cal. Ct. App. 2004) (holding that a single statement by a priest after defendant’s accusation did not make him an “involuntary” public figure).

113. *Steere v. Cupp*, 602 P.2d 1267, 1274 (Kan. 1979); see ELDER, DEFAMATION, *supra* note 3, 5-113-20 (analyzing the “participation plus” rule in cases involving legal proceedings).

114. See *supra* text accompanying notes 11-14; *infra* text accompanying notes 363-544.

115. *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1108 (Colo. 1982) (quoting *DiLeo v. Koltnow*, 613 P.2d 318, 322 (Colo. 1980)).

116. 37 F.3d 1541 (4th Cir. 1994).

117. *Id.* at 1543, 1546-64.

118. See *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999).

119. *Capital Cities/ABC, Inc.*, 37 F.3d at 1543 (describing the controversy in which plaintiffs became embroiled as “one of the most notorious child-custody battles in American history”); *id.* at 1548 (quoting the transcript of *The Phil Donohue Show*). As a result of the mother’s obstreperous behavior in frustrating the father’s visitation rights, she was held in civil contempt, became a cause célèbre in feminist circles, and precipitated a debate and an act of Congress restricting contempt in District of Columbia child custody cases. *Id.* at 1544, 1555, 1561.

scholarly opinion by Judge Murnaghan, the court indicated that it was “extremely reluctant” to impute public figuredom based on an accused’s reasonable public responses¹²⁰ in an attempt to vindicate his or her reputation. The court relied on the wisdom of the common-law publisher’s privileged right of reply¹²¹ as justifying an “uninhibited, robust, and wide-open”¹²² public retort to such devastating public accusations. The court applied broad standards of proportionality and concluded that responses to such reputation-savaging attacks¹²³ would have to be “truly outrageous” before it would view them as “altogether disproportionate to the occasion.”¹²⁴ The court analogized the grandparents’ highly visible responses to “the use of fists in response to firearms.”¹²⁵

120. *Id.* at 1558-64. The court followed its presumption that the plaintiff was a private individual, and that the defendant carried the burden of proving that rule of *New York Times Co.* applied. *Id.* at 1550. The court also noted that the Fourth Circuit’s test was “relatively stringent” compared to the District of Columbia Circuit’s “sufficiently central role” test. *Id.* at 1554 n.11. The Fourth Circuit didn’t follow a federal opinion from the District of Columbia Circuit, *see id.* at 1555, 1556 n.13 (citing and discussing *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1108 (D.D.C. 1991)), that held that a plaintiff was a public figure because her press responses went beyond “flat denials” and constituted a “course of conduct . . . likely to attract substantial attention.” *Advance Magazine Publishers, Inc.*, 765 F. Supp. at 1108 (D.D.C. 1991)); *see also supra* text accompanying notes 55, 87, 90 (discussing the “course of conduct” test).

121. *Capital Cities/ABC, Inc.*, 37 F.3d at 1559-64.

122. *Id.* at 1560 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

123. *Capital Cities/ABC, Inc.*, 37 F.3d at 1558-60, 1562-64, 1558 n.15 (finding public accusations of child sexual abuse defamatory per se); *see also id.* at 1562 (denominating the charges “as destructive to reputation as virtually any charge imaginable”). The addition of an “s” to an actress-accuser’s docudrama statement was apparently inadvertent. *Id.* at 1550. Accordingly, had the plaintiffs been held to be public figures, that conclusion would have been result-determinative under the negligence-is-never-enough corollary of constitutional malice. *See infra* text accompanying notes 401-409. As private figures, Virginia law, like that of most jurisdictions, *see ELDER, DEFAMATION, supra* note 3, §6:2, would subject the plaintiffs to a negligence standard. *Capital Cities/ABC, Inc.*, 37 F.3d at 1552. They would also have the burden of proving falsity, or more specifically, that they had not abused their grandchild. *Id.* at 1560 n.20.

124. *Capital Cities/ABC, Inc.*, 37 F.3d at 1562 (quoting *Montgomery Ward & Co. v. Watson*, 55 F.2d 184, 188 (4th Cir. 1932)); *see also Capital Cities/ABC, Inc.*, 37 F.3d at 1559 n.19 (citing *W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS* § 115, at 825 (5th ed. 1984) (“[A defendant] may publish, in an appropriate manner, anything which reasonably appears to be necessary to defend his own reputation against the defamation of another . . .”) (emphasis added) [hereinafter *KEETON ET AL.*]). The court broadly defined this right of response, i.e., that it must “clearly relate to its supposed objective—blunting the initial attack and restoring one’s good name.” *Capital Cities/ABC, Inc.*, 37 F.3d at 1560.

125. *Capital Cities/ABC, Inc.*, 37 F.3d at 1562. The court noted that plaintiffs never “actively sought” press interviews but had acquiesced in several interviews with newspapers, attended a minimum of three press conferences or rallies for their son, and appeared on at least two television programs. *Id.* at 1545-50 (analyzing this topic in detail).

The *Foretich* court conceded that plaintiffs' public responses were likely "intended (at least in part) to influence the outcome of the custody dispute" and congressional debate on the mother's civil contempt citation,¹²⁶ but concluded that the circumstances therein made it "almost impossible" to disentangle self-defensive statements from those calculated to influence the resolution of the controversies.¹²⁷ Applying a "primary"¹²⁸ or "predominant"¹²⁹ motive test, the court viewed the totality of the record as evincing "measured defensive replies."¹³⁰ The court concluded that a desirable resolution of the custody/visitation issue would have a greater vindicatory effect than any mere reply.¹³¹

Finally, the court reformulated the self-censorship-of-the-press argument and redirected it against the media, concluding that imposing public-figure status would have "unsettling breadth"¹³² and provide an "open season"¹³³ to defame the plaintiffs and others similarly situated—the wrongfully accused from the Duke lacrosse team—by "muzzl[ing]"¹³⁴ the falsely accused. By contrast, protecting the plaintiffs' responses without forfeiting private-person status would encourage First Amendment interests in individual self-expression and the societal interest in the dissemination and discussion of truth.¹³⁵

126. *Id.* at 1563.

127. *Id.*

128. *Id.*

129. *Id.* at 1543, 1559.

130. *Id.* at 1563; *see* Wells v. Liddy, 186 F.3d 505, 536-37 (4th Cir. 1999) (holding that a letter to the editor in response to a book review in which the plaintiff was identified was covered by her right of self-help/reasonable response). As a corollary, the plaintiffs had not "voluntarily assumed a role of special prominence" in the inter-parental contretemps "in order to influence its outcome . . ." *Capital Cities/ABC, Inc.*, 37 F.3d. at 1556 (emphasis added); *see also id.* at 1560, 1563. The court rejected the suggestion that the plaintiffs' press contacts and interviews were "aimed at swaying public opinion" and that they were used as "props" by their son. *Id.* at 1558-59. Defendants paid "inadequate attention to the context" of their public statements and "undervalue[d]" their personal interests in defending themselves against the "extraordinary attacks launched" by their former daughter-in-law. *Id.* at 1557-58.

131. *Capital Cities/ABC, Inc.*, 37 F.3d at 1563.

132. *Id.* In order to collect damages public figuredom would require plaintiffs to comply with the *New York Times Co.* criterion in litigation against defendant and any and all potential media and non-media defendants that repeated the abuse accusations. *Id.*

133. *Id.* at 1563-64 (quoting *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 169 (1979)) ("We see no reason to expose the [plaintiffs], or other similarly situated persons, to such a potential barrage.") (emphasis added).

134. *Capital Cities/ABC, Inc.*, 37 F.3d at 1564.

135. *Id.* ("By freely permitting the Foretiches to respond to Dr. Morgan's charges against them—charges that have never been proved in any court of law—we foster both the individual interest in self-expression and the social interest in the discovery and

Viewed against the backdrop of the Court's jurisprudence and the close parallels with the *Foretich* opinion, the Duke lacrosse accused could make persuasive arguments that they and their lawyers' forceful but measured responses to Nifong and an equally complicit press were reasonable, proportionate replies not exceeding¹³⁶ that necessary to vindicate the accuseds' reputations. Any other result would not "hold[] the balance true."¹³⁷ Indeed, any other result would devastate personal reputations and reward a "rogue prosecutor" and a largely run-amuck media for a politically correct, complicit public lynching.¹³⁸ In this case, the savagery was ultimately ameliorated *only* by accuseds' counsels' very effective use of freedoms of expression that precipitated wide-ranging criticism of both prosecutorial and media ethics,¹³⁹ and provided a much deserved "checking function"¹⁴⁰ on the misfeasance and malfeasance of both.

II. ACCURACY, FAIR REPORT AND NEUTRAL REPORTAGE

The *New York Times* and other media republished defamatory statements of third parties in a variety of contexts: police investigation file matter, numerous public statements by prosecutor Nifong both in the campaign and non-campaign contexts, including press conferences, and statements by private parties, including but not limited to, Duke faculty and students. Traditional black letter law holds a republisher liable to the same extent as the originator of the defamation.¹⁴¹ Any libel defendant in the Duke lacrosse or parallel scenario would likely attempt to defend, at least in part, by using one or both of the major proffered exceptions to republisher liability – fair report and neutral

dissemination of truth—the very goals that animate our First Amendment jurisprudence.”) (emphasis added).

136. See *id.* at 1563 (“[W]here the original attack was widespread, the response can be widely disseminated as well. . . . the counterattack must be made primarily in the forums selected by the original attacker.”).

137. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990).

138. TAYLOR & JOHNSON, *supra* note 1, at 123. “We knew that unless we turned this lynch mob mentality around, our clients might have to endure the worst of all fates for an innocent person, a trial.” *Id.* (quoting Joseph B. Cheshire, counsel for David Evans); *id.* at 198-99 (concluding that counsels' media tactics were necessary to “counter Nifong's unprecedented, falsehood-filled media offensive,” and were well within the rules of the state bar's Code of Professional Conduct, which allowed such responsive comments if they are necessary “to protect a client from the substantial undue prejudicial effect of recent publicity” precipitated by others).

139. See *infra* text accompanying notes 363-544.

140. See *infra* text accompanying note 167.

141. Elder, *Media Jabberwock*, *supra* note 105, at 723-28.

reportage. This section will analyze these doctrines in the setting of the *New York Times* coverage of the Duke lacrosse case.

A. Fair Report

A very controversial area of the doctrine of fair report is aptly and compellingly showcased by the *New York Times* article of August 25, 2006,¹⁴² generally viewed as “the single-most-derided substantial look at the Duke case”¹⁴³ in all the media reportage on the subject.¹⁴⁴ This article relied extensively on the newspaper’s exclusive access¹⁴⁵ to both typed and handwritten notes by police sergeant chief investigator Mark D. Gottlieb, which magically corrected major defects in Nifong’s case that were highlighted by defense counsel motions. Defense counsel for one co-defendant termed the compilation of Gottlieb’s notes a “make-up document.”¹⁴⁶

Should such investigative file matter be nonetheless treated as covered by fair report and protected if fairly and accurately synthesized?¹⁴⁷ The black letter rule in Section 611 of the *Restatement (Second) of Torts* appends a major qualification to protected coverage of the fact-of-arrest/charge-of-crime¹⁴⁸ scenario: “[S]tatements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged”¹⁴⁹ These unofficial statements or file matter are fortunately treated as not entitled to fair-report status by the majority of federal circuits and the “overwhelming majority” of state and federal decisions.¹⁵⁰ In a leading, authoritative opinion, *BuFalino v. Associated Press*,¹⁵¹ the Second Circuit succinctly reflected this view: “Only reports of *official statements or records made or released by a public agency are*

142. See *infra* the text accompanying notes 363-458.

143. Rachel Smolkin, *Justice Delayed*, AM. JOURNALISM REV., Aug.-Sept. 2007, <http://www.ajr.org/Article.asp?id=4379> (hereinafter, Smolkin).

144. See *id.* (providing a balanced overall critique of the media with respect to the Duke lacrosse case).

145. *Id.*; see *infra* text accompanying notes 448-458.

146. See *infra* text accompanying note 452.

147. See DAVID A. ELDER, THE FAIR REPORT PRIVILEGE §2:00-:08 (1988) (reviewing fair report standards of fairness and accuracy) [hereinafter ELDER, FAIR REPORT]; ELDER, DEFAMATION, *supra* note 3, §§3:18-26.

148. RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (1977).

149. *Id.*

150. Elder, *Media Jabberwock*, *supra* note 105, at 786-87.

151. 692 F.2d 266 (2d Cir. 1982).

protected by . . . [Section] 611 Statements made by lower-level employees that *do not reflect official agency action cannot support the privilege.*"¹⁵²

Another leading decision, *Wynn v. Smith*,¹⁵³ delved further into both the potential for abuse of and *raison d'être* for fair report. In *Wynn*, the Nevada Supreme Court rejected a confidential Scotland Yard report portraying plaintiff-Wynn (a high profile business executive in the Las Vegas casino gambling industry) as "a front man for the Genovese family."¹⁵⁴ An amicus curiae *Chicken Little* brief was

152. *Id.* at 272 (emphasis added); see also *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-89 (D.C. Cir. 1980) (noting that a "police log" accessible to the media did not involve information of sufficient "dignity and authoritative weight" to be "official," and did not involve "official agency action" since the log was "little more than an informal arrangement between the police and the media, a joint venture, which consist[ed] of nothing more sanctified than unofficial statements of police regarding a crime"); see generally *Doe v. Doe*, 941 F.2d 280, 288 n.9 (5th Cir. 1991) ("[D]ata proffered by police officers in connection with an arrest are likely not [privileged]. . . . [T]he data . . . were provided to the media in guises almost assuredly unofficial and undeserving of public record status") (dictum); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 537 n.14 (7th Cir. 1982) ("A secret police file hardly qualifies as a report on a public proceeding. Nor does the repetition of this information by a public official, a police officer, make this a report of a public proceeding."); *Stone v. Banner Publ'g. Co.*, 677 F. Supp. 242, 246 (D. Vt. 1988) (holding that statements attributed to a police inspector and his investigative report did not justify fair report—such reports *sans* judicial action do not have "the same quality of fairness or truthfulness as statements of fact resulting from a judicial investigation"); *Kelley v. Hearst Corp.*, 157 N.Y.S.2d 498, 501-02 (N.Y. App. Div. 1956) (stating that what "police said" privately to the media about "acts of other persons" did not constitute a "public and official proceeding" under the New York statute, as the term "proceeding" could not be easily found to encompass "merely informal statements or assertions by public officers concerning their investigations"); *Lancour v. Herald & Globe Ass'n*, 17 A.2d 253, 256-59 (Vt. 1941) (describing the court's rationale in refusing fair report to information resulting from an interrogation of plaintiff's co-defendant). "No doubt it is desirable that the public may know that the police and other officials charged with the duty of detection and arrest . . . are acting upon reasonable grounds But, weighing the social values involved, it seems better to confide in the diligence and discretion of such officials, rather than that any person should be subjected to unmerited obloquy through the publication of false accusations made to them in the course of their investigations, the tendency of which is . . . 'to prejudice those whom the law still presumes to be innocent and to poison the sources of justice.'" *Id.* at 259 (quoting *Rex v. Fisher*, 2 Camp. 563, 571); *Norfolk Post Corp. v. Wright*, 125 S.E. 656, 657 (Va. 1924) (holding that the information provided the media by detectives was not entitled to fair report); see also generally *Elder, Media Jabberwock*, *supra* note 105, at 786-88; ELDER, FAIR REPORT, *supra* note 147, §1:10.

153. *Wynn v. Smith*, 16 P.3d 424 (Nev. 2001).

154. *Id.* at 431. Defendant-book publisher's catalogue ad was published despite voluminous data tendered by the author of the proposed book persuasively evidencing the falsity of the imputation and indicating that the report was created by hostile and biased persons. Respondent/Cross-Appellant's Answering Brief at 3-10, *Wynn v. Smith*, 16 P.3d 424 (Nev. 1999) (No. 31063). At trial, the defendant conceded the absence of any factual basis for the charge. *Id.* at 6-7. Had Scotland Yard been asked, the commander would have informed the defendant the defamatory statements were "unattributed, unsubstantiated, prepared to serve a political purpose, and rejected as substandard" by Scotland Yard. *Id.* at

filed—stating that denial of fair report “could fundamentally affect what amici and every other news organization report, as a matter of routine, every day of the week.”¹⁵⁵ However, the *Wynn* court viewed this republished matter as little more than the “spread[ing] of common innuendo.”¹⁵⁶ The court emphasized that the purpose of fair report is to “obviate any chilling effect on the reporting of statements *already accessible to the public*”¹⁵⁷ and that extension of protected status to such “substandard and unsubstantiated” matter would “directly conflict” with the protections of defamation law and “undermine the basis”¹⁵⁸ for the fair-report privilege.

As I have suggested elsewhere, this accessible-to-the-public criterion is a pivotal and necessary justification¹⁵⁹ for fair report. The minority view mainly relies on a dubious line of California decisions that accorded exceptionally questionable interpretation to the California fair-report statute¹⁶⁰ and the Third Circuit decision in *Medico v. Time, Inc.*,¹⁶¹ which involved “tentative and preliminary conclusions.”¹⁶² These cases take a much broader and essentially open-ended, standardless view that would treat almost all government file matter¹⁶³ as fair-report-protected. Conceding that the “agency”-public

8. The commander rejected the argument this was Scotland Yard’s “official position.” *Id.* at 15-16.

155. The amici self-portrayed themselves as national and local newspapers, wire services, magazines, book publishers and the leading associations representing them. Brief for the New York Times Co. et al. as Amici Curiae Supporting Appellants at 1-2, *Wynn*, 16 P.3d 424 (Nev. 2001) (No. 31221).

156. *Wynn*, 16 P.3d at 430.

157. *Id.* at 429-30 (emphasis added) (citing the media’s agency function because the citizenry is “unable to monitor all official acts in person”); see *infra* text supported by notes 164, 177-79, 202-203, 266, 295-96, 217 (discussing the “agency” rationale).

158. *Wynn*, 16 P.3d at 430.

159. Elder, *Media Jabberwock*, *supra* note 105, at 756-802.

160. *Id.* at 780-87 (concluding that the courts’ commingling of the judicial proceedings’ privilege and fair report is indefensible and contrary to not only strong public policy but also case law suggestions in the California Supreme Court’s own jurisprudence).

161. 643 F.2d 134 (3d Cir. 1981).

162. *Medico*, 643 F.2d at 139-40.

163. Elder, *Media Jabberwock*, *supra* note 105, at 761-69, 794-802. Compare *U.S. Dept. of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1980), where the United States Supreme Court rejected FOIA access to “rap sheet” information in another case involving a member of the Medico family, and implicitly repudiated the rationale adopted in *Medico*. There, the Court sharply rejected the argument that identities of individuals with “rap sheets” were information relevant to the FBI’s performance of its law enforcement functions. *Id.* at 773. Promotion of openness about government is “not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.” *Id.* at 773. Even as to alleged corrupt contacts with a congressman, a prior criminal history would disclose nothing about the congressman’s contacts. *Id.* at 774. Although the “rap sheet” information might provide newsworthy story details, that is not FOIA’s “public interest”

access rationale was unavailable,¹⁶⁴ the *Medico* court nonetheless extended the doctrine based on a “public supervision”¹⁶⁵ rationale. This approach “seems perverse.”¹⁶⁶ Moreover, *Medico*’s overall analysis¹⁶⁷ provided “no serious consideration to balancing the

focus: “although there is undoubtedly some public interest in anyone’s criminal history, especially if the history is in some way related to the subject’s dealing with a public official or agency, the FOIA’s central purpose is to ensure that the *government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of government be so disclosed.” *Id.* (emphasis in original).

164. *Medico*, 643 F.2d at 140-41; *id.* at 141 n.23 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (1977) (“It is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law.”)). The latter was “a gratuitous, arbitrary addition” by the *rappporteur* based on a single question, was not found in the earlier Restatement of Torts, and flew in the face of the “nearly unanimous view” of common law precedent. ELDER, FAIR REPORT, *supra* note 147, §1:15, at 139; Elder, *Media Jabberwock*, *supra* note 105, at 763-64.

165. *Medico*, 643 F.2d at 141-42. The court, unfortunately not being tongue in-cheek, concluded that such “public scrutiny” of law enforcement files and investigations may “often have the equally salutary effect of fostering among those who enforce the laws ‘the sense of public responsibility,’” helping thereby to “ensure impartial enforcement of the law.” *Id.* at 141. Perhaps concerned by the “public supervision” rationale’s ambiguity, the court attached a caveat as to republication of *every* FBI file. *Id.* The court narrowed its focus to the “heightened” concern in evaluating the conduct of a former Congressman. *Id.* Compare *infra* note 283. As I have suggested elsewhere, this does not constitute much of a limitation, given the broad swathe of public official status. See Elder, *Media Jabberwock*, *supra* note 105, at 766-67; *id.* at 767 nn. 1408-09.

166. ELDER, FAIR REPORT, *supra* note 147, § 1:10, at 90-91:

How is public responsibility of public agents in performance of their public functions fostered by court sanctioning of unauthorized governmental leaks resulting in public vilification of presumably innocent individuals? Law enforcement personnel generally (including prosecutors *and* local and national police investigative agencies) have a duty to protect the citizenry from unfounded or scurrilous charges not warranting formal prosecution or other public official action—by filtering out bona fide from frivolous or speculative allegations of criminality. Is such a professional sense of public responsibility not inherently undermined by the lesson emanating from the [*Medico*] court’s conclusion – that investigative officers may publicly convict in the public mind any individual linked to any investigation into allegations of corruption of a public official regardless of whether said information is sufficient for or could or will be used in a public forum with a direct or indirect right of replication by the victim of the vilification? Such an impetus to unprofessional disclosure of non-public information regardless of the factual truth or reliability of the information contained therein is an unfortunate but clear lesson emanating from [*Medico*’s] fair report conclusion and seems to run afoul of fundamental values—that is, the presumption of innocence and the quasi-constitutional interest in reputation—and run counter to cherished democratic ideals. (citations omitted).

167. *Medico*, 643 F.2d at 142 (citing the “informational” rationale and the necessity of relying preeminently on governmental acquisitions due to the huge difficulties of corroboration of information about organized crime, and noting that such information was of “legitimate public interest” even without public official involvement). Of course, carving out a special needs “organized crime” exception gives rise to a “cozy, incestuous relationship” between official sources and the media that eviscerates the media’s “checking” function/“public supervisory” rationale and makes the media “easily

important countervailing factors that veritably jump off the pages”¹⁶⁸ and the compelling justifications underlying comment (h).¹⁶⁹

Luckily for plaintiffs, *Medico* has a sparse following,¹⁷⁰ likely did not reflect the Pennsylvania law¹⁷¹ that it purported to apply, and was later disavowed by a Third Circuit opinion, *Schiavone Construction v. Time, Inc.*,¹⁷² involving reportage of statements purportedly coming from an internal FBI memorandum that implicated plaintiffs in Teamsters president Jimmy Hoffa’s disappearance.¹⁷³ The court delved into whether fair report applied at all¹⁷⁴ and then delineated at length its “serious doubts”¹⁷⁵ as to fair report’s application to the case. The *Medico* court had exclusively

manipulable tools—conduits for whatever shaded or distorted view of the facts government wishes to issue.” Elder, *Media Jabberwock*, *supra* note 105, at 766 n.1408.

168. See ELDER, FAIR REPORT, *supra* note 147, § 1:10, at 91. This would include the following:

[T]he incalculable harm to reputation . . . from implication in organized crime, the veil of authenticity and credibility that attends disclosure of a government ‘source’ . . . (particularly where such [source] is shorn of its prefatory legend indicating the tentative nature of [its] conclusions therein), the questionable reliability of information that the . . . FBI . . . presumably [found] insufficiently persuasive to justify public disclosure or other official action, the unauthorized nature of the disclosure and the public interest in discouraging (or at least not encouraging) such lawless disclosures, the extremely limited interest of the public in inculpatory, defamatory matter disseminated outside of normal judicial, legislative, and executive channels, and the absence of an identifiable authoritative decisionmaker taking legal and/or political responsibility for his or her ‘official action.’

Id. (citations omitted).

169. See *id.* at 88. I have suggested the following, among others:

[E]x parte communications not ‘buttressed by judicial action’ constitute a ‘grave hindrance to the administration of justice’ by undermining the presumption of innocence and encouraging improper or unethical action by law enforcement personnel . . . [T]hese reports, which have the clearly tendency and likely effect of ‘looking toward [the suspect’s] guilt,’ ‘maximize the potential harm’ to the suspect’s reputational interest without measurably advancing or enhancing the public’s interest in detection or reduction in crime.

Id. (citations omitted). As the author has repeated more recently, *Medico*’s anti-democratic values should be carefully assessed:

In light of ‘our increasingly bureaucratized, technocratic society with its push-button retrieval ability to recall information from innumerable governmental files’ and the broad definition of ‘public official,’ *Medico* should provide ‘considerable food for thought’ to civil liberties aficionados cherishing ‘fundamental values’ other than freedom of expression.

Elder, *Media Jabberwock*, *supra* note 105, at 769 (synthesizing ELDER, FAIR REPORT, *supra* note 147, at 92).

170. Elder, *Media Jabberwock*, *supra* note 105, at 780-87.

171. *Id.* at 758-73.

172. 847 F.2d 1069 (3d Cir. 1988).

173. *Id.* at 1072.

174. *Id.* at 1086.

175. *Id.* at 1086 n.26.

focused on “broad policies” promoting “report[age] on public affairs and . . . promot[ing] an informed public”¹⁷⁶ while ignoring state-law emphasis on the “importance of open proceedings.”¹⁷⁷ The *Schiavone* court adopted a scathing critique of *Medico* offered by a “leading secondary authority” that stated that *Medico* was “not in harmony with the mainstream of the common law”¹⁷⁸ and emphasized that unauthorized law enforcement leaks “could become powerful tools for injuring citizens with impunity.”¹⁷⁹

Another highly controversial and important fair-report issue involves the wide reportage by the *New York Times*¹⁸⁰ and other media entities of exceedingly defamatory statements made by Nifong in his candidate-for-election capacity.¹⁸¹ Do media entities have fair report

176. *Id.*

177. *Id.* (following the common law “historical justification” that the report was “already in the public domain”).

178. *Id.* (quoting F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* §5:24 n.34 (2d ed. 1986)). The authors’ excoriation is worth quoting at length:

These are, in fact, precisely the circumstances in which it would ordinarily be thought that the dissemination of falsehoods should *not* be privileged. There is nothing about the fact that a wiretapped criminal has lied about an honest person in a telephone conversation, or that a detective or congressional investigator or similar minor functionary has erroneously (or maliciously) defamed someone in an unpublished memorandum, that gives rise to such a public need for the reporting of these events (with their underlying defamation uncorrected) as to outweigh an innocent victim’s interest in the protection of his reputation. Apart from an independent public interest in the reporting of these other events, which is non-existent, the publication of the imputation is at most an ordinary republication of the defamation. The normal liability of republishers . . . should not be evaded by the patently spurious pretense that what is being reported is not the defamatory imputation itself, but instead an ‘official action or proceeding.’ Neither an ordinary wiretap nor the composition of a routine working memorandum is an event of sufficient moment to qualify as such an ‘action or proceeding’ for purpose of the fair report privilege.

F. HARPER, F. JAMES & O. GRAY, *supra* note 178, §5:24, at 245 n.33 (emphasis added).

179. *Schiavone Construction v. Time, Inc.*, 847 F.2d 1069, 1086 n.26 (3d Cir. 1988).

180. *See infra* text accompanying note 181.

181. *See, e.g.*, Duff Wilson & Juliet Macur, *Lawyers for Duke Players Say DNA Clears Team*, N.Y. TIMES, Apr. 11, 2006, at 1 (quoting the *News & Observer* of Raleigh as quoting Nifong at a candidate forum (“I believe a sexual assault took place”); as paraphrasing Nifong that “most rape cases do not depend on DNA testing”; and as noting Nifong’s comment that the case was not over (“If that’s what they expect, they will be sadly disappointed.”)) [hereinafter Wilson & Macur, *Lawyers*]; Juliet Macur & Duff Wilson, *Duke Inquiry to Continue, and So Will a Campaign*, N.Y. TIMES, Apr. 12, 2006, at 1-3 (citing plaudits and Nifong’s criticisms and quoting Nifong’s statements to a panel of students and community leaders in a gym at North Carolina Central University, the historically black university where the accuser was a student: “My presence here means this case is not going away.”) [hereinafter Macur & Wilson, *Duke Inquiry*]; Calame, *Covering*, *supra* note 23, at 2 (repeating the “[m]y presence here” statement in the context of mild criticism for failure to introduce the political-campaign/racial context of the primary earlier); Duff Wilson & Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at 3-9 (citing Nifong’s statement at a press conference about his

protection for reportage of such comments? The *Restatement (Second) of Torts* modified¹⁸² its predecessor and expanded fair report *absolutism* to accounts of “any meeting, assembly or gathering . . . open to the general public and . . . held for the purpose of discussing or otherwise dealing with matters of public concern.”¹⁸³ Surprisingly, the drafters cited *no* precedent for this absolute protection even in the context of “core political speech.”¹⁸⁴ Why? Because there was then and is now no direct authority for such protection,¹⁸⁵ absent a protective state statute.¹⁸⁶ Illustration Three to comment (i)¹⁸⁷ synthesized and relied on pre-*New York Times Co.* decisions,¹⁸⁸ which forfeited fair report where common-law malice¹⁸⁹ was proved.

campaign—“I have not backed down from my initial assessments”—and his statements at a North Carolina Central University “forum” about handling rape prosecutions “the old-fashioned way”) [hereinafter Wilson & Glater, *Files from Duke Rape Case*].

182. ELDER, FAIR REPORT, *supra* note 147, § 1:11, at 111 (noting that by the time of the issuance of the new Section 611, a “modest consensus” favoring a *qualified* privilege had developed in candidate or public-official public-speech cases); *see, e.g.*, Pulverman v. A.S. Abell Co., 228 F.2d 797, 802 (4th Cir. 1956) (noting a “well recognized” “right and duty,” absent which “popular government could hardly function” modernly).

183. RESTATEMENT (SECOND) OF TORTS § 611 cmt. i (1977). As with § 611 generally, this subsection accords *absolute* protection. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 611 (1977); *see also infra* text accompanying notes 309-326.

184. ELDER, DEFAMATION, *supra* note 3, §3:11, at 3-35. The campaign cases do support a general rule of qualified privilege. *Id.* at n.4; *see also supra* note 182. As to cases involving public meetings/matters of public concern more broadly, *see* ELDER, FAIR REPORT, *supra* note 147, §1:11, at 113-14; ELDER, DEFAMATION, *supra* note 3, §3:11, 3-34-36.

185. ELDER, FAIR REPORT, *supra* note 147, at 111; ELDER, DEFAMATION, *supra* note 3, §3:11, 3-35-36.

186. ELDER, DEFAMATION, *supra* note 3, § 3:11, 3-36 n.6. *Compare id.*, with Kilgore v. Younger, 640 P.2d 793, 796 (Cal. 1982) (involving a press conference where a state attorney general issued an *official* report applying the absolutist California statute). *Kilgore* is eminently distinguishable. *See infra* text accompanying notes 232-239.

187. RESTATEMENT (SECOND) OF TORTS § 611 cmt. i, illus. 3 (1977) (“During an election campaign a political party holds a public meeting at which candidates for office and their supporters speak. In the course of a speech A, a candidate for office, makes defamatory statements concerning his opponent, B. C then publishes in his newspaper a complete and accurate report of the meeting, including these statements. The report is privileged.”). Illustration Four involves a public meeting called by citizens to urge a grand jury investigation of law enforcement. *Id.* at e.g. § 611 cmt. i, illus. 4. During that meeting, a speaker defames the chief of police. *Id.* The media entity publishing “a complete and accurate account” of the meeting, including the defamatory statements, is held to have an absolute privilege. *Id.* (based on Borg v. Boas, 231 F.2d 788 (9th Cir. 1956)); *see infra* text accompanying notes 288-90.

188. *E.g.*, Jackson v. Record Publ’g Co., 178 S.E. 833, 835-37 (S.C. 1935).

189. *Id.* at 837 (finding no “express malice”); Pulvermann v. A.S. Abell Co., 228 F.2d 797, 802-03 (4th Cir. 1956) (same); Phoenix Newspapers, Inc. v. Choisser, 312 P.2d 150, 153-55 (Ariz. 1957) (finding no “actual malice”); Abram v. Odham, 89 So. 2d 334, 335-38 (Fla. 1956) (finding no “express malice”); *see also* Palmer v. Seminole Producer, 9 Media L. Rep. (BNA) 2151, 2152 (Okla. Civ. App. 1983) (noting that the mixed fair-report/neutral-

In addition, the candidate-reportage cases relied on involved scenarios where the plaintiffs—candidates for public office, other public figures, or public officials—would undoubtedly or likely be deemed public persons¹⁹⁰ who could be legitimately treated under controlling Supreme Court precedent¹⁹¹ as having assumed the risk of defamation¹⁹² and who thereby must meet the threshold requirements of the demanding *New York Times Co.* standard.¹⁹³ I have found *no* case involving the scenario presented in the Duke lacrosse case, i.e., no case involving reports of a prosecutor-candidate's statements defamatory of clearly private individuals linked to matters of public concern.¹⁹⁴ Yet Section 611 implicitly rejects any such limitation¹⁹⁵

reportage for an account of a candidate's statement is forfeited if the opponent demonstrates "knowledge of probable falsity" (quoting *Jurkowski v. Crawley*, 657 P.2d 56, 60 (Okla 1981)).

190. *Pulvermann*, 228 F.2d at 800-02. The court held that one co-plaintiff, an assistant chair of the Democratic National Committee who was a "high official" in the party and "actively engaged" in the presidential campaign of Governor Adlai Stevenson was not defamed by an Associated Press report quoting a charge of "crookedness" by presidential candidate Dwight Eisenhower because of plaintiff's involvement as an intermediary between the U.S. and Portugal while functioning as a committee member. *Id.* at 802. The other plaintiff in *Pulvermann* was a partner on the contract, which was "a matter of public business," as it involved the purchase of tungsten, a requisite element in producing steel. *Id.* The latter's independent-contractor/intermediary status in a substantial international commercial transaction might well make him a public official under the Court's criteria. See ELDER, FAIR REPORT, *supra* note 147, at 115-16 n.11; *cf.* *Arctic Co., Ltd. v. Loudoun Times Mirror*, 624 F.2d 518, 522 (4th Cir. 1980) (identifying factors that confer "public official" status on government contractors); see generally ELDER, DEFAMATION, *supra* note 3, § 5:1, at 5-30 n.200 (discussing independent contractors as public officials); see also *Phoenix Newspapers, Inc.*, 312 P.2d at 152-53 (holding that candidates on ticket for city mayoral council were defamed in accounts of other candidate's defamatory statements based in rumor); *Abram*, 89 So. 2d at 335-37 (stating that pollster-prognosticator-commentator who "injected" himself into a gubernatorial campaign may have been defamed by reportage of gubernatorial candidate's statements); *Jackson*, 178 S.E. at 834, 837 (holding that a candidate for state senate was not defamed by report of gubernatorial candidate's statements).

191. See *supra* text accompanying notes 36-38, 46-55, 60-61.

192. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (recognizing such assumption of risk as a "compelling normative consideration" distinguishing public from private persons); see *supra* text accompanying notes 46-55; see also ELDER, FAIR REPORT, *supra* note 147, at 115-16 n.11.

193. See *supra* text accompanying note 36.

194. ELDER, DEFAMATION, *supra* note 3, § 3:11, 3-35 n.4 (noting that no decision has ever raised or discussed the issue of whether a non-public person defamed in a candidate's speech would be subject to a different standard than public persons so defamed); ELDER, FAIR REPORT, *supra* note 147, at 115-16 n.11; see *supra* text accompanying notes 187-190. The brief opinion in *Hayes v. Newspapers of New Hampshire, Inc.*, 685 A.2d 1237, 1238-39 (N.H. 1996), is not inconsistent with this analysis. While the case involved a private individual, the meeting was held by the board of selectmen, a local legislative entity. See *id.* at 1238. Presumably, the board exercised control over the meeting. See *id.* In any event, the court's adoption of Section 611 did not involve any discussion of the absolute versus

and would extend fair report absolutism to *all* plaintiffs regardless of status. This approach seems indefensible.

The only post-1977 case discussing Section 611's absolutist posture, *WKRG-TV, Inc. v. Wiley*,¹⁹⁶ involved republished statements from a meeting held at a church imputing possible corruption to a plaintiff serving as president of a county commission.¹⁹⁷ The court rejected Section 611's republication absolutism based on the public-concern/public-meeting criteria, citing the Supreme Court's repeated repudiation of a "newsworthiness" standard¹⁹⁸ and the sufficient media protection provided by the high burden¹⁹⁹ imposed on the plaintiff-public official²⁰⁰ under *New York Times Co.* The facts are wonderfully illustrative of why courts should view constitutional absolutism as exceedingly suspect in public-meeting contexts: the source of the defamatory statement was an anonymous, self-styled rumor that the defendant had previously investigated; this investigation gave the defendant clear grounds for seriously doubting falsity under the Court's constitutional malice jurisprudence.²⁰¹

qualified dichotomy. *See generally id.* On remand, the "extent to which the privilege should apply, if at all," remained open for further analysis. *Id.* at 1239.

195. *See* RESTATEMENT (SECOND) OF TORTS § 611 cmt. i (1977).

196. 495 So. 2d 617 (Ala. 1986). Another case rejected in toto fair report in the context of reportage of a campaign debate for sheriff on the ground that neither state common law nor statutory law had adopted such a practice. *See Freedom Newspapers of Tex. v. Cantu*, 126 S.W.3d 185, 193-95 (Tex. App. 2003). The *New York Times Co.* standard applicable to public figures controlled. *See id.*

197. *WKRG-TV, Inc.*, 495 So. 2d at 618-19.

198. *Id.* at 619 (citing *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 337-48 (1974) (rejecting the plurality view of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), which implied the *New York Times Co.* standard applied to all plaintiffs, regardless of status, as to all matters of general or public concern); *see supra* text accompanying notes 36-45.

199. *See supra* text accompanying notes 39, 193.

200. *WKRG-TV, Inc.*, 495 So. 2d at 619-21.

201. The court noted that the defendant had not mentioned substantial pre-publication information evidencing that the statements were untrue. *Id.* at 621. The original source was an anonymous rumor sheet that another reporter investigated at the time, including an interview with the company with which plaintiff had the allegedly corrupting, part-ownership interest and the company's attorney, who offered refutatory documentary proof. *Id.* In addition, the county attorney called the reporter and told her the rumor was false, and the rumor was *not* referenced in the *initial* broadcast. *Id.* The plaintiff denied ownership and called the prior investigation to the reporter's attention. *Id.* The report conceded the denial of any ownership interest of the plaintiff by the corporation president. *Id.*; *see also* ELDER, DEFAMATION, *supra* note 3, § 7:12 (discussing the issue of contradictory evidence ignored by defendant as compelling evidence of constitutional malice). Indeed, publication of rumor is generally viewed as alone sufficient for demonstrating constitutional malice. *Id.* § 7:2, 7-45; *see also* *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (noting that statements "based wholly on an unverified anonymous telephone call" would not be likely to persuasively support an argument that a publication was made in good faith).

Clearly, two of the classic fair-report rationales are met in public-meeting/public concern cases: "informational" and "agency."²⁰² Section 611 relies explicitly thereon in its rationale for its public meeting extension, i.e., "to protect those who make available to the public information concerning public events that concern or affect the public interest and that any member of the public could have acquired for himself by attending them."²⁰³ In some of the cited supporting authority, a very indirect type of "public supervisory" function²⁰⁴ may be coincidentally (but not necessarily) involved—where rumored allegations of corruption were raised and reported, as with *Wiley*.²⁰⁵ But it is doubtful that this addendum would justify fair report *absolutism*.²⁰⁶ *Wiley* clearly rejected such an approach. The court's determination seems undeniably correct. In assessing the depth of constitutional protection in light of the equally strong interest in redressing reputation in such settings, it needs to be emphasized that these types of nongovernmental proceedings "often provide fewer and less effective restraints on the dissemination of scurrilous charges than do 'official' proceedings . . ."²⁰⁷

In sum, it appears highly unlikely that the Supreme Court would extend absolute protection to a fair and accurate account of statements by a "rogue prosecutor"/public official/candidate for public

202. See generally ELDER, FAIR REPORT, *supra* note 147, § 1:00, at 3-4 (discussing the two "primary" rationales—"agency" and "supervisory"—and the "incidental," "almost symbiotic" "informational" rationale).

203. RESTATEMENT (SECOND) OF TORTS § 611 cmt. i (1977).

204. ELDER, FAIR REPORT, *supra* note 147, at 123 n.67.

205. *WKRQ-TV, Inc.*, 495 So. 2d at 618-19 (noting that the statements implied abuse of public office); see *infra* text accompanying note 288 (discussing *Borg v. Boas*, 231 F.2d 788 (9th Cir. 1956)).

206. ELDER, FAIR REPORT, *supra* note 147, at 123 n.67 (suggesting such may justify only a qualified privilege).

207. ELDER, FAIR REPORT, *supra* note 147, at 6.

("[T]he discussions do not involve the 'forensic debate [or] legislative or administrative deliberation or determination' that 'official' reports and proceedings normally engage in; many participants therein will . . . not be subject to the normal restraints of the political or electoral processes that apply to official acts or proceedings; the direct or indirect opportunity for response of defamed persons will often be less effective or meaningful; the professional ethical restraints and sanctions that apply in many official proceedings may be inapplicable in the nongovernmental context; the presiding authority in such a meeting (if there is one) will normally not have the same authority to maintain order and restrain, within reasonable parameters, the subjects under discussion; such meetings, unlike many official reports or proceedings, do not operate under rules of procedure or evidence and do not require that allegations be made in any formal manner (such as under oath).") (citations and footnote textual analyses omitted); see *also id.* § 1:11, at 114, 123 n.67; ELDER, DEFAMATION, *supra* note 3, § 3:11, 3-37, n.9.

office acting clearly outside his *official* capacity.²⁰⁸ Even in such areas as elections, the Court has rejected First Amendment absolutism in “newsworthiness” settings:²⁰⁹ “We have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures or elections.”²¹⁰ The aforementioned lack of controls and restraints makes First Amendment absolutism particularly inappropriate. Some form of qualified privilege is consistent with clear precedent.²¹¹ Where the defamed plaintiff is a public person, forfeiture by constitutional malice-regarding-substratal-falsity would be appropriate and constitutionally compelled.²¹² The jury remains out as to defamed private individuals (such as the defamed Duke lacrosse players) and whether a negligence-regarding-substratal-falsity standard would be constitutionally permissible and appropriate.²¹³

208. See *supra* text accompanying notes 180-81.

209. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (rejecting for media and other defendants an “unconditional and infeasible immunity” as necessitating a “total” sacrifice of countervailing values founded in defamation law); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (concluding that absolute immunity had been “regularly found . . . to be an untenable construction of the First Amendment); see Elder, *Media Jabberwock*, *supra* note 105, at 613-27.

210. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). It is worth emphasizing that one of the reportage-of-campaign cases, *Phoenix Newspapers v. Choisser*, 312 P.2d 150 (Ariz. 1957), involving reports of statements of incumbent-candidates for mayor and city council, was cited *twice* by *New York Times Co. v. Sullivan*. 376 U.S. 254, 280 n.20, 288 (1964) (citing the case as an example of an “oft cited . . . like rule” supporting its constitutional malice holding). The Arizona Supreme Court has subsequently characterized *Phoenix* as a “qualified” privilege case. See *Green Acres Trust v. London*, 688 P.2d 617, 620 (Ariz. 1984).

211. *Pulvermann v. A.S. Abell Co.*, 228 F.2d 797, 802 (4th Cir. 1956) (“The right and duty of newspapers to publish for the benefit of the public matters of this character is well recognized; and, in the age in which we are living, popular government could hardly function if this were not true.”); *Phoenix Newspapers*, 312 P.2d at 154 (“There can be no doubt that the publication in question was of public interest and it was communicated by one whose right it was to inform the public of such matters.”); see also *Abram v. Odham*, 89 So. 2d 334, 337 (Fla. 1956).

212. See *supra* text accompanying notes 35-38.

213. Cf. *Hutchinson v. Proxmire*, 443 U.S. 111, 115-16, 133-36 (1979) (rejecting Speech and Debate Clause *absolute* protection regarding defendant-U.S. Senator’s accurate republication of information first published in a speech either given by him or published in the Congressional Record). The Court declined to apply *New York Times Co.* and instead applied the *Gertz* negligence standard to plaintiff-private person, and in doing so rejected newsworthiness as sufficient for public-figure status. *Id.*; see also *supra* text accompanying notes 40-55. Although the Court did not expressly analyze the fault-regarding-underlying fault issue, its treatment of the litigation below strongly suggested that underlying fault would be the remand focus. See Elder, *Media Jabberwock*, *supra* note 105, at 627 n.539. Interestingly, the Court in *Hutchinson* referred to J. Story’s *Commentaries on the Constitution* as supporting the “long established” English precedent on point in denying the right of a legislator to have absolute Speech and Debate Clause protection for republication, but interpreted one editor’s version as supporting “a qualified” privilege, “akin to that for accurate newspaper reports of legislative proceeding.” *Hutchinson*, 443

Nifong's extensive contacts²¹⁴ with the media in the non-campaign context²¹⁵ similarly raise important issues as to whether such contacts, and in what settings (if any), would entitle reporting media like the *New York Times* to assert fair report rather than mere non-fault-based, responsible reportage. An examination of the *Times* articles shows that their authors did not always carefully delineate the settings in which such contacts might arguably have taken place—whether by telephone or personal interviews, contacts with individual reporters, informal interviews with multiple members of the media, informal press conferences, or pre-announced press conferences.²¹⁶ Media reportage of these largely defamatory statements²¹⁷ raises

U.S. at 128-29, 129 n.13 (citing J. STORY, COMMENTARIES ON THE CONSTITUTION § 863, at 329 (1833)). The *Hutchinson* Court did not specifically reach the fair report issue. See Elder, *Media Jabberwock*, *supra* note 105, at 628-29 (analyzing *Hutchinson* thoroughly).

214. See *infra* text accompanying notes 215-217.

215. See *supra* text accompanying notes 180-213 (discussing the campaign context).

216. *911 Calls Lead the Police to Duke's Lacrosse Team*, N.Y. TIMES, Mar. 30, 2006, available at <http://www.nytimes.com/2006/03/30/sports/30timeline.html?n=Top/Ref> (referencing a television interview) (hereinafter, *911 Calls*); David Barstow & Duff Wilson, *Charges of Rape Against 3 at Duke Are Dropped*, N.Y. TIMES, Dec. 23, 2006, at 1-5, available at <http://www.nytimes.com/2006/12/23/sports/23duke.html?n=Top/Refer> (not disclosing the interview setting) (hereinafter, Barstow & Wilson, *Charges of Rape*); David Barstow & Duff Wilson, *Prosecutor in Duke Case Faces Ethics Complaint*, N.Y. TIMES, Dec. 29, 2006, available at <http://www.nytimes.com/2006/12/29/us/29nifong.html> (referencing Nifong's "long list of public comments" and stating that he "granted dozens of interviews" in the context of ethics charges; also noting that North Carolina courts "traditionally granted" prosecutors "broad leeway in making public comments that 'serve a legitimate law enforcement purpose'"); Viv Bernstein & Joe Drape, *Rape Allegation Against Athletes Is Roiling Duke*, N.Y. TIMES, Mar. 29, 2006, at 1, available at <http://www.nytimes.com/2006/03/29/sports/29duke.html?n=Top.Refer> (referencing a telephone interview) (hereinafter, Bernstein and Drape); Rick Lyman & Joe Drape, *Duke Players Practice While Scrutiny Builds*, N.Y. TIMES, Mar. 30, 2006, at 2, available at <http://www.nytimes.com/2006/03/30/sports/30duke.html?n=Top.Refer> (stating that Nifong "said") (hereinafter, Lyman & Drape); *Officer Describes Woman in Duke Case as Drunk*, N.Y. TIMES, Apr. 14, 2006, available at <http://www.nytimes.com/2006/04/14/sports/sportsspecial1/14duke.html> (not disclosing the statement or setting) (hereinafter, *Officer*); *Official in Duke Players' Case Admits Errors*, N.Y. TIMES, July 29, 2006, available at <http://www.nytimes.com/2006/07/29/us/29duke.html?n=Top/Reference> (referencing a press-conference statement) (hereinafter, *Officer Admits Errors*); Duff Wilson, *Duke Rape Case Shadows an Unusual Campaign*, N.Y. TIMES, Nov. 1, 2006, at 2, available at <http://www.nytimes.com/2006/11/01/us/01duke.html?n=Top/Reference> [hereinafter Wilson, *Duke*] (repeating earlier statements to a local television station); Duff Wilson & Jonathan D. Glater, *Prosecutor's Silence on Duke Rape Case Leaves Public With Plenty of Questions*, N.Y. TIMES, June 12, 2006, at 1, available at <http://www.nytimes.com/2006/06/12/us/12duke.html?n=Top/Reference> [hereinafter Wilson & Glater, *Prosecutor's Silence*] (repeating earlier statements on national television); Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181, at 1 (repetition of statement to Fox News); Wilson & Macur, *Lawyers*, *supra* note 181 (not disclosing the statement or setting).

217. *911 Calls*, *supra* note 216 (quoting Nifong as stating "I am convinced that there was a rape"); Bernstein & Drape, *supra* note 216, at 1 (quoting Nifong's criticism of the Duke lacrosse players collectively for not speaking at the time or later coming forward by

significant issues as to whether such statements are *privileged* reports of “an official action or proceeding”²¹⁸ or “a meeting open to the public that deals with a matter of public concern.”²¹⁹ Alternatively, they might be considered *unprivileged* accounts falling within comment (h)’s heavily majoritarian²²⁰ refusal to extend fair report to statements by prosecutors and others “as to the facts of the case or the evidence expected to be given”²²¹ As indicated above, unlike an arrest or criminal charge, which may be reported, these additional matters are not generally protected by fair report.²²²

An examination of the cases involving statements by governmental attorneys is quite revealing. Cases supporting the comment (h) point of view²²³ have strongly cautioned against according uninvestigated fair-report protection to the prosecutor’s “unfounded and baseless suspicions”²²⁴ and for the necessity of

stating, “The thing that most of us found so abhorrent, and the reason I decided to take it over myself, was the combination gang-like rape activity accompanied by the racial slurs and general racial hostility”); Barstow & Wilson, *Charges of Rape*, *supra* note 216, at 4-5 (quoting Nifong as having an obligation to take the case to a jury unless the accuser doubted her identifications, stating his remorse regarding the “hooligans” statements, and referring to the accuser as “my victim”); Wilson & Macur, *Lawyers*, *supra* note 216 (repeating Nifong’s statement that he believed a sexual assault had indeed occurred); Lyman & Drape, *supra* note 216, at 1-2 (quoting Nifong as having “said” investigators were building a “solid case” which disputed and refuted the players’ contention that no sexual assault had happened, citing a nurse’s corroborating evidence, and speculating that “condoms were used”); *Officer*, *supra* note 216 (repeating Nifong’s statement that he believed a sexual assault had indeed occurred); *Official Admits Error*, *supra* note 216 (quoting Nifong as stating, “That having been said, this case remains a Durham problem, and it demands a Durham solution”); Wilson, *Duke*, *supra* note 216, at 1 (repeating the “no doubt’ a rape occurred” and “bunch of hooligans” comments together with a charge that “daddies could buy them expensive lawyers” when they got into legal trouble; also reporting that Nifong stated, “I’m not going to allow Durham’s view in the minds of the world to be a bunch of lacrosse players at Duke raping a black girl from Durham”); Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181, at 1 (repeating Nifong’s earlier statement that there was “no doubt in my mind that she was raped”); Wilson & Glater, *Prosecutor’s Silence*, *supra* note 216, at 1 (repeating Nifong’s earlier statements (“There’s no doubt in my mind that she was raped and assaulted”) and his depiction of lacrosse players as “hooligans” engaged in an aiding/abetting/cover-up. The authors point out that Nifong’s earlier statements later “come to appear far less robust” when depicting the accuser’s charges and Nifong’s refusal to meet the press after an earlier barrage of press contacts).

218. RESTATEMENT (SECOND) OF TORTS § 611 cmts. d, e, h (1977).

219. *Id.* § 611 cmt. i.

220. *See supra* text accompanying notes 148-152.

221. RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (1977).

222. *Id.*

223. For more detailed analyses, *see* ELDER, DEFAMATION, *supra* note 3, § 3:10, § 1:10; ELDER, FAIR REPORT, *supra* note 147; Elder, *Media Jabberwock*, *supra* note 105, at 756-802.

224. *Hagener v. Pulitzer Publ’g Co.*, 158 S.W. 54, 59-60, (Mo. Ct. App. 1912) (“If an officer should call in a newspaper reporter and relate to him what he expected to do with

constraining fair report within "well-defined"²²⁵ parameters to forestall "disguised malice" or other prosecutorial misconduct or misfeasance.²²⁶ Thus, in a leading case, a Kansas state court rejected fair report as to a prosecutor's volunteered private accusations indicating an intent to prosecute.²²⁷ Even where official conduct was at issue, such a pre-investigation statement did not concern a matter for the "guidance and instruction" of the public or have "a beneficial influence on the conduct of public affairs."²²⁸ Other illustrative cases have denied fair-report protection to, for example, a county assistant prosecutor's "heated colloquy" with the chief of police in court after the state's case,²²⁹ and a scenario where an assistant district attorney charged the plaintiff-attorney with unprofessional conduct while court was not in session in the presence of a court clerk, deputy sheriff, reporter, and other bystanders.²³⁰ Cases like these seem to have relied at least in major part on the absence of the control or restraint mechanisms applicable in judicial proceedings.²³¹

certain persons, naming them, and saying that these persons, though honest men, were thieves and those others, though innocent women, were prostitutes, the publisher should not be allowed the claim of privilege for so great an outrage, even though the officer may have thought he was speaking the truth."). In this particular case, the prosecutor was allegedly "unfriendly" to plaintiff-county sheriff and made such statements without any investigation. *Id.* at 55, 59, 60, 64. No evidence had been shown and the defendant had no basis for assuming that such had occurred. Apparently, the alleged misconduct of plaintiff was a matter for *future* investigation. *Id.* at 65.

225. *Id.* at 60.

226. *Id.*

227. *Id.* (noting that statements made by the prosecutor without investigation "bear[] no approach to an official act or statement the publication of which is privileged").

228. *Id.* at 63-65. Rather than a matter of "great interest affecting the public," the prosecutor's statements were the "unfriendly private opinion[s]" of the prosecutor about the plaintiff's official conduct, which had theretofore not been before the public or of interest to it; these statements were unlike a prosecutor's official notice to the public after a "thorough investigation" of the matter. *Id.*; see also *Yerkie v. Post Newsweek Stations*, 470 F. Supp. 91, 93-94 (D. Md. 1979) (declining to extend fair report to a prosecutor's statements to the media). Occasional cases have extended the same rule to reports of a judge's extrajudicial statements. See, e.g., *Wood v. Constitution Publ'g Co.*, 194 S.E. 760, 764, 767 (Ga. Ct. App. 1937) (holding that reports made of information supplied during a reporter's "customary call" to the office of a federal court commissioner—a judicial official—involved an act "outside of the discharge of any official duty," and thus not covered by fair report); *Henderson v. Evansville Press*, 142 N.E.2d 920, 921, 923-25 (Ind. Ct. App. 1957) (stating that on the record it could not be determined whether a judge's charges of "shysterism" against an attorney were made while the judge was on the bench or during the course of a judicial proceeding; malice was also alleged).

229. *Rogers v. Courier Post Co.*, 66 A.2d 869, 872-74 (N.J. 1949) (noting that the plaintiff was township treasurer and head of the local Republican Party).

230. *Viosca v. Landfried*, 73 So. 698, 700 (La. 1916).

231. *Rogers*, 66 A.2d at 873-74. Compare *id.*, with *supra* text accompanying note 207. The *Rogers* court applied the same analyses to any *pending* judicial proceedings. *Rogers*, 66 A.2d at 874. Such were not made during any prosecution and were not "official

At the other end of the scale are cases extending fair report to state attorneys general who issued detailed written reports at press conferences or otherwise made authoritative pronouncements or issued official notices as chief law enforcement officers of their respective states. For example, fair report was extended to a governor and attorney general's joint, thorough investigations and official determination and announcement²³² that a racing facility was an "open felony" and that attendees would be arrested and prosecuted.²³³ Fair report also applied to an attorney general's adopted and distributed organized crime commission official report.²³⁴ These cases undoubtedly involved official reports²³⁵ in the nature of official legal opinions²³⁶ by a state's highest ranking law-enforcement officer²³⁷ on "matters of great public interest."²³⁸ A comparable decision extended parallel protection to official reports and press releases of the U.S. Department of Justice.²³⁹ All epitomized the prototypical "filing of a report by an officer or agency of the government"²⁴⁰ based on a prior

statement[s]" either as generally viewed or under the state statute. *Id.* The narrow state statute was limited to department heads and county prosecutors as to in-progress or finished investigations. *Id.* The statute's purpose was the centralization of responsibility and did not help a subordinate. *Id.* at 874-75. In addition, no evidence existed that showed that the assistant prosecutor was involved in or had completed any such investigation. *Id.* at 875.

232. *Hagener*, 158 S.W. at 59-60, 64; *Tilles v. Pulitzer Publ'g Co.*, 145 S.W. 1143, 1152-54 (Mo. 1912).

233. *Tilles*, 145 S.W. at 1147, 1150, 1152-54 (stating that the threatened prosecution, including use of the militia, involved the acts of important government officers, which the public was entitled to know about—in part to avoid arrest and prosecution); *see also Hagener*, 158 S.W. at 59-60, 63-64. In such cases, "the good done for the public so far outweighs and overbalances the inconvenience suffered by individuals, that immunity for the publisher is said to rise to the dignity of public policy." *Id.* at 59.

234. *Kilgore v. Younger*, 640 P.2d 793, 795-97 (Cal. 1982) (citing CAL. CIV. CODE § 47(4), (5) (West 2007) as providing absolute protection for any "other public official proceeding" and a "public meeting . . . lawfully convened for a lawful purpose and open to the public," or where the "publication of the matter complained of was for the public benefit"). The court exclusively relied on the Subsection 5 aspect and held that, as to the press, the "legally convened"/"lawful purpose" criteria were met. *Id.* at 796. The court cited Section 611's "parallel privilege." *Id.* at 795-96. All members of the court concurred in the part of the opinion about the media privilege. *Id.* at , 808-09 (Bird, C.J., Tobriner, J. & Tamura, J., concurring and dissenting in part). The court's agreement on the first aspect of the "public meeting" criterion in Section 5 made it "unnecessary to solve the troublesome question" as to whether the "public benefit" alternative was met. *Id.* at 808 n.3.

235. *Hagener*, 158 S.W. at 59-60, 64-65; *Tilles*, 145 S.W. at 1152-54.

236. *Hagener*, 158 S.W. at 59-60, 64-65; *Tilles*, 145 S.W. at 1152-54.

237. *Hagener*, 158 S.W. at 64-65; *Tilles*, 145 S.W. at 1152.

238. *Hagener*, 158 S.W. at 59, 64.

239. *Nanji v. Nat'l Geographic Soc.*, 403 F. Supp. 2d 425, 432, 433-34 (D. Md. 2005) (noting that no constitutional malice had been alleged, but that the "modern view . . . discards the search for malice").

240. RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (1977).

detailed and apparently thorough investigation.²⁴¹ A parallel decision at the local level involved a prosecutor's issuance of an official public warning to attendees at a public auction concerning the depredations of a known check forger.²⁴²

Even a wide-ranging media interview with a state attorney general about a grain theft ring *may* be entitled to *some* level of fair-report²⁴³ protection. An analysis of "open violations of [the] law" by the state's highest ranking law official²⁴⁴ based on a detailed investigation of the facts was found privileged where no proof of common-law malice was shown.²⁴⁵ Yet, the court strongly emphasized the media had no "free rein and immunity to print *unfounded* and unwarranted scurrilous, unscrupulous and defamatory statements about a citizen" in bad faith.²⁴⁶ These concerns remain valid. Note that the Kansas Supreme Court majority preeminently cited *Coleman v. MacLennan*.²⁴⁷ *Coleman* was the minority fair-comment variant on which the United States Supreme Court primarily relied in *New York Times Co. v. Sullivan*.²⁴⁸

241. See *supra* text accompanying notes 232-239.

242. *Woolbright v. Sun Commc'ns, Inc.* 480 S.W.2d 864, 865-68 (Mo. 1972) (stating that the privilege was defeasible by proof of constitutional malice, but none was shown).

243. *Beyl v. Capper Publ'ns, Inc.*, 305 P.2d 817, 818-19, 822-23 (Kan. 1957). The case consisted of almost all direct quotes from or a summary of information provided by the attorney general during a newspaper interview. See *id.* The information was highly inculpatory of plaintiff-public official as the "key man" and provided a detailed analysis of the facts, theories, and evidence. See *id.*

244. *Id.* at 819. The fact that the attorney general was the source seems to have been particularly important in the case. See *id.*

245. *Id.* (defining lack of good faith variously as "express malice," "actual malice," "actual evil mindedness," and "knowledge of . . . falsity") (emphasis added). Note the overlap of the latter with the *New York Times Co.* criteria. See *supra* text accompanying note 35.

246. *Beyl*, 305 P.2d at 819 (emphasis added).

247. 98 P. 281 (Kan. 1908).

248. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-82 (1964); see also *supra* text accompanying note 210. A later Kansas case following *Coleman* and *Beyl*, *Stice v. Beacon Newspaper Corp., Inc.*, 340 P.2d 396 (Kan. 1959), involved the same "open violations of the law" qualified-privilege/fair-comment approach. *Id.* at 398-401. The plaintiff was a public official implicated as a leader in a local burglary gang. *Id.* Most of the sources quoted were police officials. *Id.* However, the attorney general was quoted as saying that he intended to prod the burglary probe and investigate the appropriateness of plaintiff's conduct. *Id.* at 398. *Stice* was also specifically cited as support in *New York Times Co. v. Sullivan*. 376 U.S. 254, 280 n.20 (1964). Note that *Stice* variously indicated that the qualified privilege was forfeited by "actual malice," "evil-mindedness, or specific intent to injure," or absence of "reasonable or probable grounds" for belief in truth. *Stice*, 340 P.2d at 400-01 (emphasis added). Note that the latter was more protective of plaintiffs than the *New York Times Co. v. St. Amant* criteria. See *supra* text accompanying note 35-36; *infra* text accompanying notes 401-404.

A trio of other more modern public-attorney/fair-report cases involved more ambiguous circumstances. One decision adopting a qualified privilege focused on quoted statements made by an assistant attorney general on behalf of the office of the attorney general as to a matter that it had apparently investigated and upon which the office was willing to take a public stance.²⁴⁹ A New York decision involved a press conference by a borough district attorney who issued an official press release exposing a credit card ring, adding oral amplifying and identifying comments.²⁵⁰ In dicta, the court denominated this as an official proceeding under the state fair-report statute²⁵¹ (relying on the perfunctory analysis in a single case)²⁵² but ultimately resolved the

249. *Haueter v. Cowles Publ'g Co.*, 811 P.2d 231, 234, 238-40 (Wash. Ct. App. 1991). After finding that the entire article was true as to plaintiff-private person, a holding that makes the rest of its analyses dicta, the court then accorded press reportage a *conditional* privilege defeasible by knowing or reckless disregard of falsity, which was not proved. *Id. Compare id.*, with *Levine v. CMP Publ'ns*, 738 F.2d 660, 668-69 (5th Cir. 1984) (holding that a press-reported statement to the effect that the state attorney general's office was "considering further legal action" but was concerned about its jurisdiction was not accorded fair-report status because of questions regarding accuracy and also because it was "by no means clear" that such constituted any report of a public proceeding under the statute); *Curran v. Philadelphia Newspapers, Inc.*, 439 A.2d 652, 654, 659-60 (Pa. 1981) (involving a story attributable to "federal sources" in the U.S. Department of Justice, Criminal Division, which were considered reliable sources of information, disproved constitutional malice; fair report was not discussed); *Braig v. Field Comm'ns*, 456 A.2d 1366, 1368-69, 1372, 1374-77 (Pa. Super. Ct. 1983) (applying the public-official standard to statements made about a police misconduct case during defendant's television's program, which quoted statements by co-defendant-assistant district attorney-head of the police misconduct unit; finding the individual co-defendant's acts not "so closely related to his duties as Assitant District Attorney" to provide him absolute immunity and finding an issue of constitutional malice in the media's televised reportage of his charges against plaintiff-judge; not discussing fair report).

250. *Sbarbati v. N.Y. Post*, 10 Media L. Rep. 2190, 2191-92 (N.Y. Sup. Ct. 1984).

251. *Id.* at 2191.

252. *Baumann v. Newspaper Enterprises, Inc.*, 60 N.Y.S.2d 185, 186 (N.Y. App. Div. 1946). The court characterized an "investigation" by the district attorney as an "official proceeding" under New York's fair-report statute without disclosing any details about how the material was disclosed or in what setting. *See id.* Later, the court amplified its ruling somewhat. *Baumann v. Newspaper Enterprises*, 69 N.Y.S.2d 474, 475 (N.Y. App. Div. 1947) (holding that fair report extended to "conversations" with the source, an assistant district attorney). *Baumann* relied on *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers*, *see* text accompanying note 283, and *Farrell v. New York Evening Post*, 3 N.Y.S.2d 1018, 1021-22 (N.Y. App. Div. 1938), which involved an *official* press release after an *official* investigation announcing terminations by the director of a large governmental organization and that the organization would seek federal indictments for payroll padding and "kickbacks." *Id.* The court defined the adjectives "public" and "official" qualifying "proceeding" in the fair report statute *very* broadly. *See id.* at 1021. "Public" connoted "affecting the people at large or the community . . . [as] distinguished from private or personal." *Id.* "Official" meant "pertaining to an office or public trust." *Id.* In light of this interpretation, the press should be "free and untrammelled" in enlightening society as to "matters of public concern." *Id.* at 1022. The court noted the accentuated growth of "bureaucratic secrecy." *Id.* Of course, this interpretation negated any interpretation of

matter *solely* on lack of fault/reasonable reliance on a responsible source.²⁵³ A third decision involved reportage of amplifying comments by a U.S. Attorney at a press conference regarding a filed indictment.²⁵⁴ However, the *only* issue seemed to be fairness and fault as to defendant's report.²⁵⁵

The most detailed analysis of fair report in the press-conference setting is in *Wright v. Grove Sun Newspaper, Inc.*²⁵⁶ In this dubious case, the county district attorney held a public press conference in which he distributed a transcript with an attached

"public" as "publicity in open hearings." *Id.* at 1022. Note that the court emphasized that the acts taken were by an official empowered to do so after *full* investigation and the public had a legitimate right to know the reasons therefore. *Id.* A later case following *Baumann* and *Briarcliff Lodge* involved remarks made by an assistant district attorney concerning testimony before a grand jury. See *Bridgwood v. Newspaper PM*, 93 N.Y.S.2d 613 (N.Y. App. Div. 1949). The *Bridgwood* court reversed a more thoughtful opinion below, *Bridgwood v. Newspaper PM*, 87 N.Y.S.2d 482, 483 (N.Y. Sup. Ct. 1949), which had refused to accord fair-report status to "a conversation with a prosecuting attorney." *Id.* at 483. The court relied on *Jacobs v. Herlands*, where the court provided a compelling analysis: "No prosecuting officer or investigator is justified, in anticipation of finding evidence of wrongdoing, in making a public statement to the press which injures the reputation of any person. With due regard for the right of the public to be informed of the conduct of the officials, the time for such information to be given is after evidence of wrongdoing has been obtained. The rights of the individual, as well as the rights of the public, are to be considered." 17 N.Y.S.2d 711, 712-13 (N.Y. Sup. Ct. 1940). Compare *id.*, with *Keogh v. New York Herald Tribune, Inc.*, 274 N.Y.S.2d 302, 305-07 (N.Y. Sup. Ct. 1966) (citing *Bridgwood* positively, and noting the 1956 deletion of "public" by statute but concluding that references to grand jury did not "purport" to either depict witness testimony or other actions before a grand jury—"[t]hey merely tell a story").

253. *Sbarbati*, 10 Media L. Rep. at 2192 (noting that New York cases have "consistently held" such reliance defeated fault and citing *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 569, 571-72 (N.Y. 1975), which adopted a "grossly irresponsible" conduct requirement in private-person/public-concern cases). For a discussion of the latter, see ELDER, DEFAMATION, *supra* note 3, § 6:10; see also *infra* text accompanying notes 346-347.

254. *Curran v. Philadelphia Newspapers, Inc.*, 439 A.2d at 660-62 (quoting dicta to the effect that if the amplifying comments had been made, fair report would apply).

255. *Id.* at 662 (finding a question of fact as to whether the reporter "consciously ignored the probable falsity" of her interpretation of the U.S. attorney's remarks).

256. 873 P.2d 983 (Okla. 1994). Compare *Mark v. Seattle Times*, 635 P.2d 1081, 1089-92 (Wash. 1981), where the court did not reach the issue of whether any accurately reported remarks of a deputy prosecutor were covered by fair report. The court stated pointedly that its conclusions should not be interpreted as approving the prosecutor's conduct, citing its disciplinary rules and bench-bar-press guidelines, and that it had previously noted such actions "were open to criticism." See *State v. Mark*, 618 P.2d 73, 76 (Wash. 1980). Note that the court treated an affidavit of probable cause and a suspect information form as indistinguishable from an information, as both were required in support of the information by court rule. *Id.* at 1089. The sole issue of fair report related to the prosecutor's remarks at the press conference. Note further, however, that assuming *arguendo*, that the latter were privileged, the court viewed privilege as only *conditional*. It left it open exactly what form of abuse was required, *i.e.*, some form of negligence or knowing or reckless disregard of falsity. *Id.* at 1091-92.

affidavit detailing an informal private conversation between undercover narcotics agents that involved a closed investigation.²⁵⁷ The majority did not deny,²⁵⁸ and at least three dissenters or partial dissenters affirmatively concluded,²⁵⁹ that the distribution of the transcript was politically motivated, released in the context of a hotly contested re-election campaign.²⁶⁰ Emphasizing First Amendment considerations and the public's so-called "right to be informed,"²⁶¹ the court applied a broad, objective²⁶² analysis focusing on whether these acts of the district attorney were within the "penumbras of his official duties."²⁶³ If so, they were conclusively presumed²⁶⁴ "official" because they involved the "investigative function" of his office,²⁶⁵ so long as the news conference was open to the public.²⁶⁶ In essence, the court found

257. *Wright*, 873 P.2d at 985.

258. *See id.* at 988 n.23. The majority seems to implicitly concede this political motivation, concluding merely that comment thereon would be inappropriate because, even if wrongful, they were not "imputable" to the media. *See id.* The court relied on the denial of inquiry into the prosecutor's subjective motivation in evaluating abuse of a qualified executive privilege in constitutional torts cases. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982)).

259. *Id.* at 993 (Simms, J., concurring in part, dissenting in part) (noting that such was the "obvious purpose" of the press conference and agreeing this was not an "official function" of the prosecutor); *id.* at 993-95 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.). A fourth judge dissented without joining any opinion. *Id.* at 993 (Wilson, J., dissenting).

260. *Id.* at 994.

261. *Id.* at 986-88 (emphasizing the media self-censorship that would result if the media had to test the truth for falsity of records and statements that *public officials* made available to the public in an effort to avoid litigation of libel suits, resulting in the choice to "subordinate[]" individual reputation to the larger societal interests protected by fair report).

262. *Id.* at 988 (analyzing only the "critical occasion") (emphasis in original).

263. *Id.* at 988-89, 991.

264. *Id.* at 988 (relying on historical and customary distribution of information by prosecutors at press conferences). Interestingly, the majority emphasized the importance of lawyers disseminating information to the public. *Id.* at 988 n.21 (citing 5 O.S. 1991, Ch. 1, App. 3-A, Rule 3.6(d)). The majority did not explicitly discuss why the *restrictions* contained therein did not countervail. *See id.*

265. *Id.* at 988. The court gave this a very broad interpretation, relying on the absolute privilege accorded federal officials at various levels by the Supreme Court. *Id.* at 988 n.24 (adopting the federal rule, also known as the "outer perimeter" of duty approach) (citing *Barr v. Matteo*, 360 U.S. 564, 572-76 (1959)). The state cases are "strongly divided and quite inconsistent" on the absolute-versus-qualified-privilege issue as to lower ranking state or local officials like Nifong, with the "probable numerical majority" of decisions and the *Restatement (Second) of Torts* according only a qualified immunity. *See* ELDER, DEFAMATION, *supra* note 3, at § 2:14, 2-101 to -112.

266. *Wright*, 873 P.2d at 984-86. The court majority emphasized this open-to-the-public/agency function as the "*underpinning*" of fair report, with the media "as a mere substitute for the public eye and ear." *Id.* at 985 n.1 (emphasis in original). It also cited broader informational functions of fair report:

this press conference to be a hybrid "official"-report/public-meeting/open-to-the-public/matter-of-public-concern²⁶⁷ scenario and accorded fair reportage thereof as an absolute defense.²⁶⁸

A powerful partial dissent eviscerated the five-member majority opinion, suggesting that the majority had not provided *any* legal authority justifying fair-report protection for a press-conference release of private conversations rather than official reports.²⁶⁹ Indeed, this case involved no charges against the plaintiff, no ongoing investigation or prosecution, no completed prosecution, no contemplated charges or contribution, and no contemplated resuscitation of a past investigation. The district attorney was "simply trying to win" a heated election,²⁷⁰ not acting under the prosecutor's official duties or capacity.²⁷¹ This type of inculpatory

Without accurate media coverage of *official public events*, it is highly doubtful that the general public would be able to make informed decisions and participate intelligently in their governance; nor would representatives of government be able to perform their assigned tasks effectively. It is hence *against the backdrop of public interest* in information concerning public and official activities of government that this case juxtaposes the interest of an *individual* in protecting his reputation from harm.

Id. at 986 (emphasis in original) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975)). Importantly, the court did not discuss directly the public-supervisory-function aspect of *Cox Broadcasting* that followed the court's statement that, "With respect to judicial proceedings in particular, the function of the press serves to *guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.*" 420 U.S. at 492 (emphasis added).

267. *Wright*, 873 P.2d. at 988-92. Compare *id.* with *id.* at 996, 999-1000 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.) (disparaging the "public meeting" aspect of Restatement (Second) of Torts Section 611 as a minority view followed by the court majority, which left the private-person-plaintiff remediless). For other discussions of the "public meeting" aspect, see *supra* text accompanying notes 181-189, 194-213, 219, 234, 249-255; see also *infra* text accompanying notes 286, 288-304.

268. *Wright*, 873 P.2d at 985-86, 987, 992. The *only* limitation on any fair and accurate account was the absence of republished information of "general public interest." *Id.* at 989. The court did not reach the quite separate neutral-reportage privilege. *Id.* at 985 n.4, 986 n.7, 989-90, 990 nn.29-30 (noting that neutral reportage goes beyond fair report by extending protection to accurate reportage of statements by *private* individuals). Note that at least two partial dissenters would have rejected neutral reportage because of plaintiff's private status, to which the privilege would not apply. *Id.* at 993 n.1, 1001 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.). This is the overwhelming majority view. See *infra* text accompanying notes 330, 342-351.

269. *Wright*, 873 P.2d at 993, 996, 996 n.6 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.) (noting that the private conversation dealt with future investigative plans and was neither part of any official proceeding nor publicly available).

270. *Id.* at 993-95.

271. *Id.* at 994.

statement, defamatory of a private person,²⁷² was not the type of statement the public needed to know,²⁷³ as it lacked the “dignity and authoritative weight”²⁷⁴ of matters traditionally accorded protection.²⁷⁵ In reaching this conclusion, the partial dissenters relied in part on professional-conduct restrictions on prosecutors,²⁷⁶ the only qualified executive immunity provided to prosecutors in constitutional tort cases that involve extrajudicial functions,²⁷⁷ and the impetus fair report would give to irresponsible “political hacks” with no ingrained sense of social propriety or responsibility.²⁷⁸ Another partial dissenter emphasized the significant and unfair advantage such immune officials would have vis-à-vis their opponents²⁷⁹ by using a fair-report-protected press conference to malign their opponents and garner free publicity with absolute impunity.

The partial dissenters’ criticism of the majority’s use or misuse of precedent²⁸⁰ is well justified. Two cases relied on by the majority

272. *Id.* at 989 (noting that the rule is not limited by the defamed person’s status/character); *id.* at 993 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.).

273. *Id.* at 997-1000 (citing RESTATEMENT (SECOND) OF TORTS § 611 cmt. h as supporting the “general rule” on this issue, and concluding that such a conversation was contained neither in a court proceeding nor a formal, official report and thus was merely “an informal oral communication between police officers”). “[E]xtra-judicial defamation of the citizenry by the police is not a vital process of democratic government.” *Id.* at 997 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.) (quoting KEETON, ET. AL., *supra* note 124, at 206).

274. *Wright*, 873 P.2d at 998-99 (quoting Phillips v. Evening Star Newspaper, 424 A.2d 78, 89 (D.C. 1980).

275. See *supra* text accompanying notes 148-179, 218-231.

276. *Wright*, 873 P.2d at 994 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.) (emphasizing the *constraints* on prosecutors imposed by Rule Section 3:6 as to certain types of “extrajudicial statements to the press,” yet conceding that *some* press conferences *might* fall within the bounds of statutorily authorized duties). *Contra id.* at 988-89, 991.

277. *Id.* at 995; see also *Catalano v. Pechous*, 387 N.E.2d 714, 722 (Ill. 1979) (denying absolute privilege to statements by an elected city clerk to the media). Note that the *Wright* majority repeatedly relied on the constitutional-tort-based qualified immunity of prosecutors. 873 P.2d at 985 n.1; *id.* at 988-89, 988 n.24. Ultimately, however, it did not address any district attorney immunity issues. *Id.* at 992. The district court had earlier ordered the claim against the state dismissed because of noncompliance with the Oklahoma Government Tort Claims Act, but this was not appealed, and the court then also dismissed all other claims. *Id.* at 985-86.

278. *Id.* at 998 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.) (quoting LAWRENCE ELDREGE, *THE LAW OF DEFAMATION* 504-05 (1978)) (hereinafter, ELDREDGE).

279. *Wright*, 873 P.2d at 993 (Simms, J., concurring in part, dissenting in part) (noting that such allows the incumbent to “speak about any matter remotely connected with his office during his campaign with immunity”).

280. See *id.* at 996, 996 n.6, 999-1000 (Summers, J., concurring in part, dissenting in part) (joined by Lavender, V.C.J.); see also *id.* at 985 n.1, 989 n.25 (listing the cases relied

involved extensively investigated official reports²⁸¹ issued by governors on matters of compelling public interest²⁸² after thorough investigation.²⁸³ Another reported an undoubtedly official action taken by a village water board in giving formal notice to a delinquent major commercial customer.²⁸⁴ A fourth was based on press reportage of a legislator's proposals and "what . . . actually happened" in the legislature.²⁸⁵ Three others synthesized speeches by candidates.²⁸⁶ Another applied a media-qualified privilege to defame a public-official sheriff non-maliciously.²⁸⁷ Lastly, the court relied on a public-meeting scenario involving impugning a plaintiff-judge's integrity in the context of an appeal to another judge present at the meeting to

on). The court noted that, in *Buckley v. Fitzgerald*, 509 U.S. 259, 277-78 (1993), the Supreme Court accorded only qualified executive-officer immunity to post-indictment press-conference statements despite the fact they were "integral" to a prosecutor's role and "may serve a vital public function." *Id.* at 988 (quoting *Buckley*, 509 U.S. at 278).

281. *Brandon v. Gazette Publ'g Co.*, 352 S.W.2d 92, 93-95 (Ark. 1961) (stating that reportage of press statements at a specially called press conference involving a detailed, "thorough" investigation of nursing homes and announcing an ordered removal of welfare patients therefrom was privileged when defendant was not alleged nor proved to have acted "solely" for malicious reasons); *Sciandra v. Lynett*, 187 A.2d 586, 587-89, 592 (Pa. 1963) (accordng the press a privilege to fairly report a publicly released report, the "Reuter's Report" ordered by the New York governor into the famous "Appalachin" meeting of organized crime families that had precipitated "immediate nationwide publicity," noting the report involved an "extensive probe," the matter was one of "vital public importance," and the report was not published "solely" for malicious reasons).

282. *Brandon*, 352 S.W.2d at 93-95; *Sciandra*, 187 A.2d at 587-89.

283. *Compare Brandon*, 352 S.W.2d at 93-95, and *Sciandra*, 187 A.2d at 587-589, with *supra* text accompanying notes 231-237.

284. *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 183 N.E. 193, 196-97 (N.Y. 1932) (stating that an account of a formal termination-of-services order directed by the village water board pursuant to an ordinance and sent by the mayor was an "action taken by an official body given as news to the public" on a matter of unpaid assessments, and a "matter quite vital" to the public; emphasizing the obligation of village officials to act fairly and impartially and the press's important function therein: "The fact that the press is ever ready to publish any irregularities or acts of favoritism has a tendency to keep officials up to the high mark of their calling").

285. *Garby v. Bennett*, 59 N.E. 1117, 1117 (N.Y. 1901). The state fair-report statute controlling at the time included a malice-forfeiture privilege. *Id.* This was modified in 1930. See *Gurda v. Orange County Publ'ns Div., Inc.*, 439 N.Y.S.2d 417, 419 (N.Y. App. Div. 1981) ("The privilege set forth . . . is absolute, irrespective of the presence or absence of malice or bad faith, but only when the report is 'fair and true.'") (quoting N.Y. CIV. RIGHTS LAW § 74 (McKinney 1992), *rev'd on other grounds*, 436 N.E.2d 1326 (1982)).

286. *Pulvermann v. A.S. Shell Co.*, 228 F.2d 797, 802-03 (4th Cir. 1956); *Phoenix Newspapers, Inc. v. Choisser*, 312 P.2d 150, 153-55 (Ariz. 1957); *Abram v. Odham*, 89 So. 2d 334, 335-38 (Fla. 1956); see *supra* text accompanying notes 181-195.

287. *Fortney v. Stephan*, 213 N.W. 172, 173-74 (Mich. 1927). The defendant, the ex-mayor, defamed the plaintiff, a public-official sheriff, in a newspaper owned and controlled by the ex-mayor. *Id.* at 173. The privilege was qualified, not absolute, and forfeited by "bad faith, or with actual malice, or without reasonable cause to believe them to be true." *Id.* at 174 (emphasis added).

convene a grand jury.²⁸⁸ That report involved two official actions announced at the meeting: the district judge's refusal to convene a grand jury and his direction to the district attorney to thoroughly investigate the facts so that he might reconsider his decision if the facts so warranted.²⁸⁹ Equally importantly, the case involved only a *qualified* privilege. The court found no evidence of common law malice forfeiting the press's privilege.²⁹⁰

In light of the above, which of Nifong's numerous press contacts²⁹¹ are entitled to fair report, if any? Telephone or personal interviews with individual media reporters seem to only qualify for responsible-reliance protection under the First Amendment or more protective state law standards²⁹² and seem indistinguishable from the comment (h) scenarios discussed in this Article²⁹³ and elsewhere.²⁹⁴ Even the *Wright* majority would apparently not have accorded such fair-report protection.²⁹⁵ It repeatedly emphasized the foundational media as a "mere substitute for the public eye and ear"²⁹⁶ function of fair report. This openness to the public does act as a set of modest partial constraints by allowing those present, both media and non-media, to pose questions, compare written releases with spontaneous comments, suggest alternative hypotheses or conclusions, and assess motivation—in other words, it permits members of the media to act as trained professionals in evaluating the content, bases for, and biases underlying the prosecutor's comments. Of course, the officeholder may decline to entertain questions. This would itself reflect on the authoritativeness, dignity, and officialness of the press conference, and whether it should be accorded fair-report protection.

288. *Borg v. Boas*, 231 F.2d 788, 792-95 (9th Cir. 1956). The meeting was called to look into an incident involving an alleged battery at a private club. *Id.* at 789. The primary speaker and the source of the defamatory charges was a naval officer who was trying to protect the interests of his student, the alleged victim. *Id.* This source acted with an "honest purpose" but apparently much that was said—any and everyone had an opportunity to speak—was *rumor*. *Id.* at 792-94. The court analogized the meeting to a New England town meeting and the press's performance of its "most valuable function" in "reporting proceedings . . . relat[ing] to the administration of law," deeming such reportage "vital" in a representative democracy, because "[o]therwise, there is no guard against maladministration." *Id.* at 794.

289. *Id.* at 794.

290. *Id.* at 792, 795.

291. *See supra* text accompanying notes 214-222.

292. *See supra* text accompanying notes 40-45, 123, 253; *infra* text accompanying notes 346, 347.

293. *See supra* text accompanying notes 148-179, 220-222.

294. *See supra* text accompanying note 223.

295. *Wright v. Grove Sun Newspaper Co., Inc.*, 873 P.2d 983, 985 n.1, 986-90, 992 (Okla. 1994).

296. *Id.* at 985 n.1.

Wright did what other courts have not, and broadly treated politically motivated unofficial disclosures as “official” and entitled to fair report—without even blinking the proverbial eye. In other words, the majority adopted a version of an old adage—if it walks like a duck and quacks like a duck, it must be a duck even if it is obviously and eminently a ravenous fox in thinly veiled duck plumage ready to shred throat. This partisanship was not, the court opined, “imputable”²⁹⁷ to the media. But was the media immune from being required *not* to ignore what was apparently perfectly obvious to all—that the county district attorney therein (like Nifong) was in the midst of a heated election campaign? This was clear to the media in the *Wright* case, as the court seemed to acknowledge.²⁹⁸ It was likewise clear to the local and national media in the Duke lacrosse case (although largely ignored or grossly understated by the latter).²⁹⁹ In such circumstances, can the media not legitimately be required to forego ostrich-head-in-the-sand know-nothingness and intelligently assess whether a public press conference is an “official” act or proceeding rather than a political act indistinguishable from a campaign event? The integrity of the law and the media demand an affirmative response.

As the partial dissenters indicated in *Wright*,³⁰⁰ professional limitations on inflammatory prosecutorial public statements are hugely important to the right of fair trial, respect for the law and the criminal justice system, and the rights of the individual, whether or not formally accused. And in light of the prodigious volume of national publicity given to the Duke lacrosse case and Nifong’s prosecutorial misconduct, accepted restrictions on inflammatory public statements by prosecutors and parallel affirmative duties of fairness imposed on them—always a matter of public record for the *responsible* professional reporter—are now and should remain a prominent fixed star in a reporter’s field of vision, both as a matter of journalistic ethics and legal liability. The North Carolina Attorney General called Nifong a “rogue prosecutor”³⁰¹ while some have suggested his acts were aberrational.³⁰² Others have suggested his

297. *Id.* at 988, 988 n.23; *see also id.* at 985.

298. *See supra* text accompanying notes 257-260.

299. *See infra* text accompanying notes 379-385, 438, 469-471.

300. *See supra* text accompanying notes 269-274.

301. TAYLOR & JOHNSON, *supra* note 1, at 351-52 (press conference on Apr. 11, 2007).

302. Adam Liptak, *The Nation*; *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at 1 (quoting the vice-president of the National District Attorney’s Association as saying that such misconduct was “rarer than human rabies”) [hereinafter Liptak].

varied forms of misconduct are not uncommon,³⁰³ but are rarely disciplined.³⁰⁴ Only time will tell whether this disciplinary desert changes.

In any event, the media has been put on notice: prosecutors *do* act unseemly, unprofessionally, and even corruptly. In the future, when a prosecutor attempts to convict or pillory either an accused or a political opponent through public statements or press conferences, journalistic “red flags” should arise instantly. These “red flags” should create unquestionably important concerns about falsity and fault in assessing responsible reliance thereon. Equally and equitably, they should make the media exceedingly wary of being willingly complicit in facilitating the destruction of lives and reputations. The media does, after all, bear the burden of demonstrating that fair report is applicable.³⁰⁵ One of the few bright sides of the “Nifonging” of the Duke lacrosse players’ reputations is that future courts will likely very closely scrutinize press-conference statements in assessing the justifiability of according them fair-report protection.

If, as suggested above, unofficial public statements and prosecutors’ press conferences, whether involving a Nifong or a scenario similar to *Wright*, should *not* be entitled to fair report, what is the default scenario? Obviously, at minimum the appropriate First Amendment fault-regarding-substratal-falsity rule based on a plaintiff’s status as a public³⁰⁶ or private plaintiff applies³⁰⁷ unless state law accords the plaintiff more extensive protection.³⁰⁸ Assuming, arguendo, that a court decides that some level of fair report *should* apply, what are the options? Discarding the quasi-absolute “made[-]solely[-]for”-malicious-purposes approach of the original *Restatement*,³⁰⁹ Section 611 of its 1977 successor accords *all* matters

303. *Id.* at 1-2.

304. *Id.* at 1 (citing sources as saying discipline of prosecutors was “light or nonexistent” and explaining that the Nifong disbarment was a case of him getting “a taste of something like his own medicine, a trial in the court of public opinion”).

305. RESTATEMENT (SECOND) OF TORTS § 613(2) (1977) (“In an action for defamation the defendant has the *burden of proving*, when the issue is properly raised, *the presence of the circumstances necessary for the existence of a privilege* to publish the defamatory communication.”) (emphasis added); *id.* at cmts. h, i; ELDER, FAIR REPORT, *supra* note 147, at 345-50.

306. *See supra* text accompanying notes 36-38.

307. *See supra* text accompanying notes 40-45.

308. *See supra* text accompanying note 253; *infra* text accompanying notes 345-346.

309. RESTATEMENT OF TORTS § 611 (1938). As the author has opined elsewhere, this limitation would give all defendants a “quasi-absolute privilege” in most fair report cases. ELDER, FAIR REPORT, *supra* note 147, at 306 n.37. Other well-known commentators have reached a parallel conclusion. *See* ELDRIDGE, *supra* note 278, at 421 (“As a practical matter, this gave the news media a complete immunity . . . because a newspaper, for

covered by fair report an absolute privilege.³¹⁰ In other words, a media defendant can ignore known substratal falsity as long as the matter is fairly and accurately reported.³¹¹ Absent any statute,³¹² almost no case law supported this position at the time of its adoption.³¹³ The Supreme Court's limited references on point have

example, would always have one purpose, informing the public."); KEETON ET. AL., *supra* note 124, § 115, at 838 (noting, "as a practical matter," the "made solely for" criterion gave defendants a privilege to report accurately despite absence of belief in truth); *see also* RESTATEMENT (SECOND) OF TORTS app. § 611, 134 (1981) (concluding that there appears to be no decisions defeating fair report under "the purpose to harm" limitation).

310. RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977) ("[T]he privilege exists even though the publisher himself *does not believe the defamatory words he reports to be true* and even when *he knows them to be false.*") (emphases added). Fair report applies to "a report of an official action or proceeding or of a public meeting that deals with a *matter of public concern, even though the report contains what he knows to be a false and defamatory statement.*" *Id.* at cmt. b (emphasis added). Constitutional fault based on status then becomes important *only* in cases of substantial inaccuracy or unfairness. *See id.* cmts. b, f.

311. *Id.*; *see supra* text accompanying notes 182-189.

312. *See* ELDER, FAIR REPORT, *supra* note 147, at 283 (listing available statutes, and concluding that the "well-settled view" of the common law fair report was defeated by "malice").

313. *See* RESTATEMENT (SECOND) OF TORTS app. § 611, 134-35 (1981) (citing *three* Supreme Court opinions as supporting an *absolute* privilege of fair report: *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); and *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970)). As the ALI drafters note, *Pape* and *Firestone* dealt with the appropriate fault standard in *abuse-of-fair-report* cases—negligent misinterpretation for private persons (*Firestone*) and knowing or reckless misinterpretation for public persons (*Pape*). *Id.* at app. § 611, 134-35. Actually, the narrow holding of *Pape* was based on an absence of any *material* inaccuracy in light of the extraordinary ambiguity in the report the defendant attempted to synthesize. *See* Elder, *Media Jabberwock*, *supra* note 105, at 570, 570 n.143. The third case, *Greenbelt Cooperative*, was incorrectly interpreted by the drafters of the *Restatement* as indicating "a constitutional privilege to report an accurate report of an official governmental proceeding." RESTATEMENT (SECOND) OF TORTS app. § 611, 134. No reasonable construction of the Court's opinion supports such an analysis, despite dicta to the effect that public meetings are of "particular First Amendment concern." *Greenbelt*, 398 U.S. at 11; *see also* Elder, *Media Jabberwock*, *supra* note 105, at 564-65. The drafters also referenced as secondary authority *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), and *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977). RESTATEMENT (SECOND) OF TORTS app. § 611, 134-35. Of course, *Cox Broadcasting* involved reportage of true, not false, matter. *See infra* text accompanying note 316. *Edwards* involved a quite different concept—neutral reportage—which did not involve *official* public proceedings or reports, but instead involved acts by private individuals or public officials in an *unofficial* capacity. *See supra* text accompanying note 268 and *see infra* text accompanying 335. The only other case cited by the ALI drafters was *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978), which adopted the recently approved *new* RESTATEMENT (SECOND) OF TORTS § 611, app. § 611 at 134-35. Interestingly, the court cited approvingly the then Pennsylvania law on point, which made fair report defeasible under the "solely for the purpose"-of-malice test articulated in the original *Restatement*. *Mathis*, 455 F. Supp. at 17. However, the plaintiff had not provided a "shred of evidence" to support forfeiture on this ground. *Id.*

been extremely ambiguous.³¹⁴ One case in particular, *Time, Inc. v. Firestone*,³¹⁵ provides terse dictum interpreting *Cox Broadcasting, Co. v. Cohn*,³¹⁶ which involved substantially true matter, that seems to protect “[t]he public interest in *accurate* reports of judicial proceedings”³¹⁷

While there are arguably compelling arguments for absolutism in accurately reporting judicial, legislative, and some other official proceedings,³¹⁸ it is not ineluctably clear that the Court (or courts generally) would or should adopt Section 611’s knee-jerk absolutism in the “public meeting”/“open to the public”/“public concern” setting or in the case of press conferences of the unofficial-statements variety involved in *Wright* and abused by Nifong. Both involve scenarios open to enormous abuse where traditional controls and restraints may not function effectively or are largely absent.³¹⁹ The common law assiduously made such accounts defeasible by some version of common-law malice.³²⁰ The Supreme Court appeared to sanction this qualified-privilege approach in its cited authority in *New York Times Co. v. Sullivan*.³²¹ Moreover, the Court may have somewhat modified its strong defense of trial reportage in its analysis in *Time, Inc. v.*

314. ELDER, FAIR REPORT, *supra* note 147, at 297 (noting that the Court’s jurisprudence on fair report’s constitutional status is “decidedly ambiguous, somewhat confusing, and somewhat confused”); *see also* Rosenbloom v. Metromedia, 403 U.S. 29, 38 (1971) (plurality opinion of Brennan, J.) (citing the Restatement of Torts “made-solely-for” “conditional” privilege for fair report); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 152, n.18 (1967) (plurality opinion of Harlan, J.) (referring in dictum to fair report as “absolute”); *Garrison v. Louisiana*, 379 U.S. 64, 65 n.1 (1964) (footnoting without discussing a state fair-report statute applicable in criminal defamation defeasible by “actual malice” of the common law variety). This was without any suggestion by Justice Brennan, the Court’s most consistent media-protector, that such a limitation “posed any constitutional difficulties.” *See* ELDER, FAIR REPORT, *supra* note 147, at 297.

315. 424 U.S. 448, 457 (1976) (applying the First Amendment minimal-fault negligence standard to the defendant’s *inaccurate* interpretation of plaintiff’s divorce as granted on dual grounds of adultery and extreme cruelty); *see supra* text accompanying note 54; *infra* text accompanying note 322.

316. 420 U.S. 469, 471-75, 489-97 (1975) (according substratally true matter of open public record absolutely protected status in suits based on privacy torts of public disclosure and intrusion upon seclusion); *see also* Elder, *Media Jabberwock*, *supra* note 105, at 576-82, 603-13 (discussing *Cox* and its substratal truth focus); ELDER, PRIVACY, *supra* note 77, chs. 2, 3 (discussing privacy torts).

317. *Firestone*, 424 U.S. at 457 (emphasis added); *see also* *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 169 (1979).

318. *See* ELDER, FAIR REPORT, *supra* note 147, §§ 1:00, 3:01-:02; ELDER, DEFAMATION, *supra* note 3, §§ 3:1-:17.

319. *See supra* text accompanying notes 214-308.

320. *See supra* text accompanying notes 184-189.

321. *See supra* text accompanying notes 187-189, 210, 243-248.

Firestone.³²² It also later compellingly distinguished reportage of judicial proceedings from the more limited public interest in knowing what police release to the public in cases of *true* matter in official-incident reports.³²³ This analogy suggests exceptional caution regarding the level of fair report protection given to publicly released *false* matter in unofficial remarks by a prosecutor and to all matters of public concern at a public meeting.

Taking into account the extraordinary uniformity of the Court's staunch rejection of First Amendment absolutism, it is quite probable that the Court will eventually narrowly limit Section 611's knee-jerk grandiosity or reject it entirely in favor of a constitutional-malice-regarding-substratal-falsity forfeiture standard³²⁴ in the scenarios discussed above—and perhaps beyond. The Court would likely find no First Amendment justification in deceiving the public³²⁵ by accurately reporting “calculated falsehood,”³²⁶ even if found within the four

322. *Firestone*, 424 U.S. at 475 (“The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*.”) (emphasis added). The Court's analysis was in the context of the media's unsuccessful attempt to carve out a *New York Times Co.*-level fault standard for all *inaccurate* reportage of judicial proceedings regardless of plaintiff status. *Id.* at 455, 457. As the author has indicated elsewhere, fair report, with its fairness-accuracy and “public supervisory” functions, is a “quite different and distinguishable” scenario. Elder, *Media Jabberwock*, *supra* note 105, at 581 n.225.

323. Elder, *Media Jabberwock*, *supra* note 105, at 827-28, 828 n.1723; *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (rejecting *Cox Broadcasting* as controlling precedent; suggesting that the latter involved “courthouse records . . . open to public inspection”; and emphasizing “the important role the press plays in subjecting trials to public scrutiny and thereby helping guaranteeing their fairness”). The Court also acknowledged the diminished privacy interest in matter already in the public record and the self-censorship potential resulting from making such “generally available” but then punishing disseminators for their offensiveness. *Id.* at 531 n.7. In the case before it, no such “public scrutiny” was “directly compromised” because the information emanated from a police report “prepared and disseminated” at a time when “not only had no adversarial criminal proceedings begun, but no suspect had been identified.” *Id.* at 352.

324. *Supra* note 35.

325. See Elder, *Media Jabberwock*, *supra* note 105, at 618-20 (citing the Court's “compelling and eloquent defense of a state's authority to sanction . . . pollution of public discourse”) (citations omitted); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776-77, 777 n.6 (1984) (citing the state criminal-defamation statute as illustrative of the state's legitimate interest in “safeguarding its populace from falsehood”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (rejecting protection for “the lie, knowingly and deliberately published about a public official” as “at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected,” and noting both historically and modernly that some are “unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration”).

326. *Garrison*, 379 U.S. at 75 (using “calculated falsehood” as an abbreviation for knowing and reckless falsehoods).

corners of partisan, unofficial prosecutorial statements at a press conference or during a public campaign appearance.

B. Neutral Reportage

Related to but separate from the issue of bestowal of fair report is the highly controversial doctrine of neutral reportage, a doctrine fabricated from whole cloth³²⁷ by Judge Irving Kaufman in *Edwards v. National Audubon Society*.³²⁸ Misusing and abusing precedent, the Second Circuit came to the extraordinary conclusion that media defendants could accurately report statements from “responsible, prominent”³²⁹ sources, at least about public persons,³³⁰ with impunity,³³¹ i.e., despite knowing that the statements are “calculated falsehoods,”³³² or, more colloquially, a pack of lies. This distinctly minority variant³³³ provides absolutist protection from traditional republisher liability³³⁴ under circumstances involving private, unofficial sources that would not otherwise be even arguably covered by fair report.³³⁵

An analysis of the *New York Times* articles on the Duke lacrosse case evidences that the newspaper regularly relied on and accurately quoted statements and sources³³⁶ of dubious objectivity

327. Elder, *Media Jabberwock*, *supra* note 105, at 640-55 (analyzing, in depth, neutral reportage and *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977)).

328. 556 F.2d 113. In light of the court’s absence-of-constitutional-malice, alternative finding, the neutral-reportage aspect has been regularly cited as dicta. See Elder, *Media Jabberwock*, *supra* note 105, at 641-42, 642 n.654.

329. *Edwards*, 556 F.2d at 120.

330. *Id.*; see *infra* text accompanying notes 342-351.

331. *Edwards*, 556 F.2d at 120. The media defendant was not required to “take up cudgels against dubious charges” and was not required to censor such “newsworthy statements” merely because it had *serious doubts* regarding their truth.” *Id.* (emphasis added). The Court referenced neutral reportage in only one case—*Harte-Hanks Communications, Inc. v. Connaughton*—and in doing so noted that the district court had found the source not “responsible, prominent,” and stated that the petitioner had not pursued the issue before the Court. 491 U.S. 657, 660-61, 660 n.1 (1989). Note that neutral reportage clearly and explicitly circumvents the constitutional malice limitation.

332. See *supra* text accompanying notes 35, 325-26.

333. See Elder, *Media Jabberwock*, *supra* note 105, at 627-723.

334. *Id.* at 723-28.

335. Norton v. Glenn, 860 A.2d 48, 52-53, 53 n.6 (Pa. 2004) (noting that neutral reportage is an “animal distinct” from fair report and arises, as in the case before it, from the media’s perceived right to publish accurate accounts of “statements . . . not made in the course of official proceedings”); see also *supra* note 267.

336. See Karen W. Arenson, *Duke Grappling With Impact of Scandal on Its Reputation*, N.Y. TIMES, Apr. 7, 2006, at 2, available at <http://www.nytimes.com/2006/04/07/education/07duke.html>? (quoting Tallman Trask, III, the overseer of athletics at Duke, as aware of the lacrosse players’ fifteen violations over three years and concluding that “[i]t is

and/or knowledge of the facts. Should such accurate depictions be given neutral-reportage protection? Take, for example, the *Times* quotation of then-Duke Professor Houston A. Baker, Jr., a strident multiculturalist/agent provocateur, who lambasted the entire Duke lacrosse team, accusing Duke athletics, like many universities' sports programs (and specifically University of Colorado football), of the "blind-eyeing of male athletes, veritably given license to rape, maraud, deploy hate speech and feel proud of themselves in the bargain."³³⁷ Should the *Times* be accorded absolute protection for accurately republishing such defamatory drivel? Of course, courts generally—

a stretch to get from their previous boorish behavior to gang rape") (hereinafter, Arenson); Nicholas D. Kristof, *Jocks and Prejudice*, N.Y. TIMES, June 11, 2006, available at <http://www.dukenews.duke.edu/mmedia/pdf/kristof611.pdf> (noting the Houston Baker comment in the context of racial stereotyping) (hereinafter, Kristof); Rick Lyman, *New Strain on Duke's Ties With Durham*, N.Y. TIMES, Mar. 31, 2006, available at http://www.nytimes.com/2006/03/31/us/31durham.html?_r=1 (indicating that people were scrutinizing Duke's response by quoting a student who asked, "Is this going to be a team of rich white men who get away with assaulting a black woman?"); Lyman & Drape, *supra* note 216, at 1 (quoting campus marchers as saying, "Out of the dark and into the street, we won't be raped, we won't be beat"); Juliet Macur, *Duke Players' Accuser Finds Ways to Avoid News Media*, N.Y. TIMES, Apr. 3, 2006, available at <http://www.nytimes.com/2006/04/03/sports/othersports/03lacrosse.htm> (quoting the student-government president saying, "We want to let her know that, no matter her occupation, she shouldn't have been victimized"); Juliet Macur, *Three Miles and a World Away, A Vigil for the Accuser*, N.Y. TIMES, Apr. 4, 2006, available at <http://nytimes.com/2006/04/04/sports/othersports/04duke.html?n> (quoting a student who grabbed the mike during hip-hop at a student election rally and stated, "A student here has been raped, don't you know that . . . Wake up. We need to support her"); Juliet Macur, *With City on Edge, Duke Students Retreat*, N.Y. TIMES, Apr. 2, 2006, available at <http://www.nytimes.com/2006/04/02/sports/02duke.html?> (quoting a woman who lived near the accuser as stating, "If she was a white woman raped by black students, the whites would be in an uproar and things would be more out of hand," and claiming that the players were "treated like high class" and "being protected because they have money"); Duff Wilson, *Ethics Hearing for Duke Prosecutor*, N.Y. TIMES, June 13, 2007, available at <http://www.nytimes.com/2007/06/13/us/13duke.html?> (paraphrasing a Durham black activist ejected from the courtroom during a lunch break during the proceedings, as saying to one of the mothers of an accused, "[P]eople still thought her son did something wrong and should have stood trial").

337. Arenson, *supra* note 336; see also David Brooks, *Virtues and Victims*, N.Y. TIMES, Apr. 9, 2006, available at <http://select.nytimes.com/2006/04/09/opinion/09brooks.html?>. Later, after the charges were dropped and North Carolina Attorney General Roy A. Cooper termed the accused "innocent" and Nifong a "rogue prosecutor," the mother of one of the lacrosse team players asked Baker by e-mail to reconsider his defamatory statements. Peter Applebome, *After Duke Prosecution Began to Collapse, Demonizing Continued*, N.Y. TIMES, Apr. 15, 2007, available at <http://select.nytimes.com/2007/04/15/nyregion/15towns.html?n> (detailing the exchange). Incredibly, Baker responded "LIES!" called her a "provocateur . . . trying to get credit for a scummy bunch of white males!," further characterized them as "farm animals," and nastily stated that, "[Q]uite sadly, [she was the] mother of a farm animal." *Id.*; see *supra* text accompanying notes 11-14.

despite some recent aggressive media efforts to the contrary³³⁸—do *not* accord such accurate accounts a truth defense or bar plaintiffs from challenging the statement's underlying falsity.³³⁹ This reflects the Court's own unequivocal view on the issue in *Masson v. New Yorker Magazine*.³⁴⁰ Should the courts nonetheless bypass established Supreme Court jurisprudence on status-based fault regarding underlying falsity³⁴¹ by according neutral reportage protection?

The issue is not merely an academic exercise. Take the situation of a New York-domiciled Duke lacrosse player who legitimately believes that he was defamed by such a statement.³⁴² Should suit be allowed? New York's state and federal courts have taken dramatically different positions on the issue. New York completely rejects neutral reportage under these circumstances, apparently in regard to public and private persons alike.³⁴³ The Second Circuit, author of *Edwards*, has, on the other hand, reaffirmed neutral reportage.³⁴⁴ The court's decisions are unclear as to its extension to private persons.³⁴⁵ Nonetheless, the Second Circuit has taken the bizarre position that New York's more-protective-than-the-First Amendment stance in cases of matters involving a private

338. See Elder, *Media Jabberwock*, *supra* note 105, at 728-55. Under this view, which is not limited to the media, *accurate* reportage becomes truly Orwellian *truth*. See *id.* at 732-40. As noted elsewhere, "[t]his accuracy-pseudo-truth is a stunning concept . . . not justified by 'common sense, the common law, the needs of the media, or the First Amendment.'" *Id.* at 729-30; see also ELDER, DEFAMATION, *supra* note 3, §2:4, 2-24 to -25.

339. See Elder, *Media Jabberwock*, *supra* note 105, at 728-55.

340. 501 U.S. 496, 514-17, 521-25 (1991) (adopting the historical understanding of truth and holding that any deviation therefrom would be an "unnecessary departure from First Amendment principles of general applicability," "essential principles" of the common law since the late sixteenth century, and a "radical change" from the Court's jurisprudence).

341. See *supra* text accompanying notes 36-55, 248, 321, 324, 340; *infra* text accompanying notes 386-388, 402-404, 525-534, 537; see also Elder, *Media Jabberwock*, *supra* note 105, at 555-627.

342. One of the Duke lacrosse accused, Collin Finnerty, is a native New Yorker. Wilson & Glater, *Prosecutor's Silence*, *supra* note 216. The other two, David Evans and Reade Seligman, are from Maryland and New Jersey, respectively. See *id.*

343. See Elder, *Media Jabberwock*, *supra* note 105, at 696-98, 822-26 (interpreting *Hogan v. Herald Company*, 444 N.E.2d 1002 (N.Y. 1982), which adopted the opinion of Simons, J., in *Hogan v. Herald Co.*, 446 N.Y.S.2d 836 (App.Div. 1982), viewing plaintiff's private-person status as "unquestionably irrelevant" to the *Hogan* analysis).

344. *Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc.*, 844 F.2d 955, 961 n.12 (2d Cir. 1988) (noting that New York decisions would not be binding as a matter of federal constitutional law).

345. *Id.* at 961; see also *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11 (2d Cir. 2000) (noting that the circuit had adopted neutral reportage as to public figures); *Levin v. McPhee*, 917 F. Supp. 230, 239 (S.D.N.Y. 1996) (not resolving the issue and rejecting neutral reportage for other reasons).

person and public concern³⁴⁶ may anesthetize the media from suits by private persons because the media could be found not to have acted grossly irresponsibly in neutrally reporting known or suspected lies.³⁴⁷

Aside from New York federal courts and a small minority of other jurisdictions,³⁴⁸ neutral reportage should not be a problem if, the Duke lacrosse players generally, and the three accused specifically, are viewed as private rather than public persons.³⁴⁹ The overwhelming view³⁵⁰ of the decisions rejects neutral reportage in the private-person setting—and appropriately so.³⁵¹ Additionally, it is not altogether clear that a rabble-rousing provocateur such as Professor Baker would be viewed as a “prominent, responsible source” under this exceedingly nebulous criterion.³⁵² Only a small and highly controversial minority view has focused on “prominence,”³⁵³ even in

346. See *supra* text accompanying note 253.

347. *Konikoff*, 234 F.3d, at 104-05 (noting that it would “ordinarily,” but “not necessarily,” be “grossly irresponsible” to publish a knowingly or recklessly false statement, and that New York might well decide to adopt such a stance to “harmonize” “an anomaly” that seems to be “more apparent than real”). As the author has said elsewhere, such a New York development seems “extraordinarily, even laughably, unlikely.” Elder, *Media Jabberwock*, *supra* note 105, at 822. It was conceded that such an interpretation infused a version of “neutral reportage protection” into New York law. *Konikoff*, 234 F.3d at 104 n.11. Of course, this approach also circumvents neutral reportage’s general limitation, where adopted at all, to *public* persons. See *supra* text accompanying notes 268, 330; *infra* text accompanying notes 342-351.

348. Elder, *Media Jabberwock*, *supra* note 105, at 657-64.

349. See *supra* text accompanying notes 132-140.

350. Elder, *Media Jabberwock*, *supra* note 105, at 657-60 (noting that under the “overwhelming consensus” view, neutral reportage does not extend to private persons, despite a “small but dubious and unpersuasive minority view” to the contrary).

351. *Id.* at 659-60 (“The cases reflect an almost visceral antipathy to the illogical suggestion that the Supreme Court, having withdrawn from *Rosenbloom*’s adoption of *Sullivan* to *Gertz*’s minimal fault standard, would precipitously and magically reverse itself and revitalize *Rosenbloom*’s qualified First Amendment privilege into newsworthiness absolutism. This would require a constitutional quantum leap. Even the media, with massive resources at its command, has no success in making this position palatable to the courts.”).

352. See Elder, *Media Jabberwock*, *supra* note 105, at 664-72.

353. *Id.* at 666-69

(“The rationale for this minority view is syllogistic. Source reliability is irrelevant to the purposes fulfilled by neutral reportage—the public interest in all disclosures about public controversies. By definition, then, a ‘responsible’ source/trustworthiness requisite is likewise deemed irrelevant. In other words, the neutral reportage purpose is to shed light on the parties to the controversy, with the citizenry left to judge the merits of their competing positions. The net effect is unconscionable; it provides absolute protection to dissemination of charges by such an exemplar of trustworthiness as a convicted felon who has flunked a lie detector test If adopted, the ‘prominent’ source/public person gets an opportunity via the republisher’s immunity from liability to gain widespread exposure for a calculated falsehood. The public person plaintiff takes a knock-out blow below the belt and is left remediless against the media republisher, all in the interest of letting the public be the ‘ultimate arbiter’ of the

public-person plaintiff cases, as being alone sufficient for neutral reportage protection.

As I have suggested in detail elsewhere, in the now-leading case of *Norton v. Glenn*,³⁵⁴ the Pennsylvania Supreme Court gave a withering, unanswerable critique³⁵⁵ to neutral reportage, refusing to accord a media defendant neutral-reportage protection where a co-defendant borough council member made charges of homosexual misconduct against the public official plaintiffs (the mayor and borough council president) outside the council's chambers following a council meeting.³⁵⁶ The reporter was on notice that there were substantial reasons to seriously doubt the source's credibility³⁵⁷ but nonetheless proceeded to accurately publish his statements. A unanimous court rejected any "blanket immunity"³⁵⁸ based on the purported "special role"³⁵⁹ of the media, emphasizing that this "sweeping privilege"³⁶⁰ would eviscerate much of state defamation law. It emphasized that the constitutional-malice standard, repeatedly reaffirmed by the Court,³⁶¹ would not be "jettison[ed]" by it to "so sharply tilt the balance"³⁶² against reputation.

competing positions. As a distinguished jurist said in another context, "[a]n instinctively felt sense of injustice cries out against such a sharp bargain.").

354. 860 A.2d 48 (Pa. 2004).

355. For an extended discussion, see Elder, *Media Jabberwock*, *supra* note 105, at 627-40.

356. *Id.* at 49-50.

357. Brief in Opposition to Certiorari at 4-5, *Tory Publ'g Co. v. Norton*, 544 U.S. 956 (2005) (No. 04-979), 2005 WL 438008 (including groundless parallel charges of homosexuality directed at the reporter); Brief of Appellee Wolf at 5-6, *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004) (Nos. 18, 19 MAP 2003) (same); Brief of Appellee Norton at 5, 7-8, *Norton*, 860 A.2d 48 (Nos. 18, 19 MAP 2003) (same; indicating "substantial doubts" regarding the source's charges; and detailing evidence, areas of investigation, and sources of information evidencing the source's suspect credibility and information).

358. *Norton*, 860 A.2d at 56-57.

359. *Id.* at 56.

360. *Id.*

361. *Id.* at 55-57; see *supra* text accompanying notes 36-55, 73-76, 99-100, 190-193, 198-200, 324-326; *infra* text accompanying notes 401-405, 525-534, 537.

362. *Norton*, 860 A.2d at 57. The court found no greater protection under the Pennsylvania Constitution. *Id.* at 57-58.

III. THE *NEW YORK TIMES* COVERAGE—THE AUGUST 25TH, 2006 “BODY OF EVIDENCE” ARTICLE AS “CALCULATED FALSEHOOD”

In assessing Taylor and Johnson’s highly critical analysis of the *New York Times*,³⁶³ I took a tripartite approach and examined the newspaper’s own web-available standards, critically scrutinized the articles chronologically and as a collective, and perused selective reviews of the book and the Duke lacrosse scenario generally. A perusal of the *Times* own published standards was quite revealing and provided insight into why the paper’s coverage was so shockingly unprofessional and universally deplored.³⁶⁴ [The manual is filled with

363. For examples see *supra* text accompanying notes 25; *infra* text accompanying notes 365, 373, 383, 385, 397, 399, 413, 417-418, 421, 428-429, 438, 440, 449, 452, 454, 459, 462, 473, 477-478, 481-482, 484, 487-488, 493, 500-501, 504, 508-509, 520, 523-524.

364. See Kristof, *supra* note 336 (imploing the media, and at least in part the *Times*, to engage in “some deep reflection” and to “look beyond race and focus relentlessly on facts”); Clarence Page, *What the Duke Lacrosse Case has Taught Us*, JEWISH WORLD REV., Sept. 10, 2007 (giving the *Times* “a well-deserved skewering”); Andrea Peyser, *Duke Case: Will The Times Apologize?*, N.Y. POST, Apr. 12, 2007, available at http://www.nypost.com/seven/04122007/postopinion/opedcolumnists/duke_case_will_the_times_apologize_opedcolumnists_andrea_peyser.htm; Thomas Sowell, *Duking It Out: Unfinished Business*, NAT’L REVIEW ONLINE, June 19, 2007, available at <http://article.nationalreview.com/?q=ZWFkNzAyZDEwOTJjNjJhNDMOMzQ4MWJjZDYzNTRIMGQ=> (listing the *Times* as among those that “disgraced themselves in hyping a lynch-mob atmosphere” when the case first became public; noting that it was not a “naïve ingénue,” and citing its support for Al Sharpton’s “fraudulent accusations” in the Tawana Brawley matter, with its parallel “politically correct” stature of a black accuser and white accused) [hereinafter Sowell, *Duking*]; Thomas Sowell, *New York Times Buried the Duke Story: The Press is Biased in Reporting University Scandals*, CHARLESTOWN DAILY MAIL, Oct. 3, 2007, available at 2007 WLNR 1950 1144 (noting that Duke President Brodhead’s apology was truncated and placed next to the obituaries on page twenty-eight of the *Times*) [hereinafter Sowell, *New York Times Buried*]; Abigail Thernstrom, *The Massacre of Innocence*, WALL ST. J., Sept. 6, 2007, available at <http://www.opinionjournal.com/la/?id=110010564> (criticizing the paper’s “particularly egregious” coverage and noting that such Nifong “allies—unlike the district attorney himself—paid no price for their shocking indifference to the truth”); William L. Anderson, *Duke*, the *New York Times*, and the *American Political Culture*, LEWROCKWELL.COM, Apr. 27, 2007, <http://www.lewrockwell.com/anderson/anderson183.html> (“[T]he *New York Times*—with the possible exception of the *Durham Herald-Sun*—had the worst coverage of the case of any journalistic outlet in the country.”) [hereinafter Anderson, *American Political Culture*]. The *Times*, “at least as far as the Duke coverage is concerned, has starred in its role as the Newspaper of Walter Duranty, whose prize-winning coverage and positive spin of Stalinist collectivism in the Ukraine during the early 1930s—where ‘[h]istorians note that about seven million people were starved to death,’—did not bar the *Times* from continuing to hang his photo in the office lobby. *Id.* The Duke coverage is “a reminder that the *Times* is all-too-happy to glorify an out-and-out liar as long as his political ideology is in the ‘right place.’” *Id.*; Stuart Taylor, Jr., *Hey Wait A Minute: Witness for the Prosecution?*, SLATE, Aug. 29, 2006, <http://slate.com/toolbar.aspx?action=print&id=2148546> (“The *Times* still seems bent on advancing its race-sex-class ideological agenda, even at the cost of ruining the lives of three young men who it has reason to know are very probably innocent . . .

lofty, haughty, self-congratulatory statements about the duty of “strict” neutrality/impartiality,³⁶⁵ the essentiality of “professional detachment, free of any whiff of bias,”³⁶⁶ the necessity of “step[ping] back and tak[ing] a hard look at whether [they] have drifted too close to sources,”³⁶⁷ the absolute obligation to provide “complete, unvarnished truth as best as [they] can learn it,”³⁶⁸ and a corollary, righteous non-toleration of any “betray[al] [of their] fundamental pact” with readership by publishing any knowingly or recklessly false information.³⁶⁹ In sum, the standards espouse a commitment to “the highest standards of journalistic ethics.”³⁷⁰

Unfortunately, it is hard to conclude that these standards had much, if any, impact on the paper’s Duke lacrosse coverage. Take, for example, its “whiff of bias” self-plaudit. Although the public editor disclaimed “ideological bias” and found gaps attributable to “journalistic lapses,”³⁷¹ his assessment is largely at odds with the record. Starting early in its coverage of the case, its reporters made mean-spirited, highly inculpatory quantum leaps in logic based on almost no evidence other than speculation, stating that the “code of silence . . . threatens to belie [the Duke lacrosse team members’] social

when many other true believers . . . have at last seen through the prosecution’s fog of lies and distortions.”) [hereinafter Taylor, *Witness for the Prosecution?*].

365. N.Y. TIMES, ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS ¶¶ 1, 6, 9, 33-49, 61-62, 65 (2004), available at http://www.nytc.com/pdf/NYT_Ethical_Journalism_0904.pdf [hereinafter HANDBOOK]. Taylor and Johnson savage the *Times* on the neutrality issue, demonstrating how the early balanced coverage by Joe Drape, giving equal treatment to information provided by defense lawyers, resulted in the disappearance of his byline. TAYLOR & JOHNSON, *supra* note 1, at 120. Quoting Drape’s statement that he was “having problems with the editors,” the authors cited sources, including one defense lawyer who had provided extensive evidence of innocence to Drape and talked with him about why an exposé of the hoax would not be forthcoming, and concluded that the prevailing word was that “the editors wanted a more pro-prosecution line. They also wanted to stress the race-sex-class angle without dwelling on evidence of innocence. They got what they wanted from Drape’s replacement, Duff Wilson, whose reporting would become a journalistic laughingstock by summer . . .” *Id.*

366. HANDBOOK, *supra* note 365, ¶ 23.

367. *Id.*

368. *Id.* at ¶ 15.

369. *Id.* ¶ 18.

370. *Id.* ¶ 4.

371. Byron Calame, *Revisiting The Times’s Coverage of the Duke Rape Case*, N.Y. TIMES, Apr. 22, 2007, available at <http://www.nytimes.com/2007/04/22/opinion/22pubed.html> [hereinafter Calame, *Revisiting*]. Almost no one bought this argument, however, viewing it as a whitewash. See, e.g., Anderson, *American Political Culture*, *supra* note 364 (“Who does Calame think he’s fooling? . . . Calame, in short, appears unable or unwilling to consider how the *Times*’ failure in the lacrosse case—and having the thesis of a paper’s major article publicly dismissed as untrue surely constitutes a failure—was attributable to reporters and editors allowing their worldviews to distort the facts.”) (quoting blogger K.C. Johnson).

standing as human beings,”³⁷² analogizing them to “the bold new wardrobe of drug dealers and gang members engaged in an anti-snitch campaign . . .” Under such circumstances, the stigma of “traitor” was “more powerful than the instinct to do what’s right.”³⁷³ Citing illustrative examples, the author concluded: “Whatever the root, there is a common thread: a desire for teammates to exploit the vulnerable without heeding a conscience.”³⁷⁴

372. Selena Roberts, *When Peer Pressure, Not a Conscience, Is Your Guide*, N.Y. TIMES, Mar. 31, 2006, available at <http://select.nytimes.com/2006/03/31/sports/31roberts.html> (alteration in original); see also Harvey Araton, *Do Duke Women Have Nothing to Say?*, N.Y. TIMES, Apr. 2, 2006, available at <http://select.nytimes.com/2006/04/02/sports/sportsspecial1/02araton.html> (analogizing the “made mute” players on the women’s basketball team to “the lacrosse players in the Blue Devils’ wall of silence, which serves only to insulate athletes and convince the reprobates among them that they can get away with whatever”) [hereinafter Roberts, *Peer Pressure*]; Harvey Araton, *At Duke, Coach K Avoids a Trap*, N.Y. TIMES, June 2, 2006, available at <http://select.nytimes.com/2006/06/02/sports/02araton.htm> (responding to his critics who questioned his women’s lacrosse innocence-solidarity stance, where he called “for letting the system work” “without the accused being martyred, considering the long history in this country of black women being abused by white men of means”—without realizing, or acknowledging, of course, the inconsistency of this plea with his own stance as well as that of the paper). Interestingly, Byron Calame, the paper’s public editor, found “ample reason” for Roberts’s “code of silence” charge because players had “volunteered little eyewitness information.” Calame, *Covering*, *supra* note 23. It does not seem to have dawned on either Roberts or Calame that no such evidence was provided because there was none. Blogger and professor William L. Anderson cites the Roberts/Araton missives as illustrative of “the real attitude of the *Times*” toward the Duke lacrosse matter, i.e., that the columnists from the beginning “treated the Duke Lacrosse players as the second coming of the Klu Klux Klan.” Anderson, *American Political Culture*, *supra* note 364. In an exchange of e-mails between Araton and himself, Anderson addressed the armbands-with-“innocent”-stated-thereon controversy and suggested that “these women were close friends of the accused, and they *knew* that the facts were not adding up, and that there was no rape, kidnapping, or sexual assault.” *Id.* However, “Araton never wrote back and...ignored [Anderson’s] subsequent emails.” *Id.* (alteration in original). Anderson chastised Roberts and Araton, among others, for failing to “do even basic research before publishing stories [claiming that] they take the other approach that they are *above* having to do research like other people who may have to get their hands a bit grubby before firing away in print.” *Id.* (alteration in original). He claimed that “[t]he tip-off . . . is that they rarely return e-mails to anyone who criticizes them, and their ‘we are untouchable’ attitudes define their work.” *Id.*

373. See Roberts, *Peer Pressure*, *supra* note 372. In this same article, Roberts made a highly misleading statement: “According to *reported court documents*, she was *raped, robbed, strangled*, and was *the victim of a hate crime*.” *Id.* (emphasis added). As the book’s authors suggest, “[t]he message is clear: lynch the privileged white boys [and] due process be damned.” TAYLOR & JOHNSON, *supra* note 1, at 121 (alteration in original). This overstated interpretation was criticized mildly by Byron Calame as a “nit I would pick,” although “technically correct,” since it suggested that “the case was farther down the road than it was.” Calame, *Covering*, *supra* note 23. Actually, this is more than a “nit,” as it strongly suggests that the documents *demonstrated* that the charges were both *true* and *proved*. This is an error of significance that no experienced reporter should make.

374. Roberts, *Peer Pressure*, *supra* note 372. When the dismissal of all charges was rumored to be imminent, Selena Roberts continued her rants about “the irrefutable culture of misogyny, racial animus and athletic entitlement that went unrestrained that night”

What gave rise to such stereotyped preconceptions presuming guilt? The *Times* (and other media following and emulating³⁷⁵ its unprofessionalism) seized upon a story line “precisely tuned to the outrage frequency of the modern metropolitan *bien pensant* journalist,”³⁷⁶ and “carr[ie]d the standard of modern leftist political culture,”³⁷⁷ thereby defaulting on its “gold standard”³⁷⁸ reputation as the national exemplar of journalistic integrity. Like Nifong, the *Times* absorbed and exemplified “all the clues about the sanctified status”³⁷⁹ of rape charges and accusations of racism and let these “weapons of unequalled power,”³⁸⁰ fueled by a “ratings-driven rush to judgment,”³⁸¹ override the essential question of why a prosecutor continued to pursue rape charges “when DNA evidence of . . . guilt did not materialize.”³⁸² In addition, the *Times* let irrelevant diversions about player immaturity, boorish behavior, and the dark humor e-mail of a

and tried to divorce the “crime” from the “culture.” Selena Roberts, *Closing a Case Will Not Mean Closure at Duke*, N.Y. TIMES, Mar. 25, 2007, available at <http://select.nytimes.com/2007/03/25/sports/othersports/25roberts.html> [hereinafter Roberts, *Closing a Case*]. She ended her diatribe with the following attempt to resuscitate a repudiated thesis: “A dismissal doesn’t mean forget everything. Amnesia would be a poor defense to the next act of athletic privilege.” *Id.* One objective critic correctly described this missive as “mystifying.” See Smolkin, *supra* note 143, at 10; see also Clay Waters, *Selena Roberts Slurs Innocent Duke Lacrosse Players, Again*, Apr. 11, 2007, <http://www.timeswatch.org/articles/2007/20070326114135.aspx> (“When it comes to slurring innocent Duke lacrosse players, sports columnist Selena Roberts is apparently angling to become the Amanda Marcotte of the *New York Times*.”).

375. See *supra* text accompanying note 10.

376. Kurt Andersen, *Rape, Justice, and the ‘Times’*, Oct. 9, 2006, NEW YORK MAGAZINE, available at <http://nymag.com/news/imperialcity/22337> (quoting an unnamed “senior *Times* alumnus”) [hereinafter Andersen, *Rape, Justice, and the ‘Times’*].

377. Anderson, *American Political Culture*, *supra* note 364 (“[N]owhere did that become more apparent than in its coverage of the infamous Duke lacrosse Non-Rape, Non-Kidnapping, and Non-Sexual Assault Case . . . [where the *Times*] managed to become the ‘gold standard’ for biased and inaccurate coverage.”) (alteration in original).

378. *Id.* (noting that it was once “the ‘Newspaper of Record’ and the place where all good reporters wanted to spend their careers”).

379. Dorothy Rabinowitz, *The Michael Nifong Scandal: The Duke Rape Hoax is Redolent of Past Decades’ Phony Child-Abuse Cases*, WALL ST. J., Jan. 11, 2007, available at <http://www.opinionjournal.com/forms/printThis.html?id=110009507> (hereinafter, Rabinowitz).

380. *Id.*

381. Jefferson Flanders, *Journalists and the Duke Lacrosse Case*, Apr. 16, 2007, <http://www.bloggernews.net/16065> (hereinafter, Flanders).

382. *Id.*; see also Andersen, *Rape, Justice, and the ‘Times’*, *supra* note 376 (noting that modern DNA tests are viewed as the “silver bullet that exonerates the unjustly prosecuted”); Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting the “sly formulation” by the authors—whether there is a “body of evidence” to avoid the case being bounced before trial—“while glossing over the more important question as to whether any reasonable prosecutor could believe the three defendants to be guilty and force them through the risk, expense, and trauma of a trial”).

player³⁸³ somehow act as surrogates for real, admissible evidence of guilt. Meanwhile, the *Times* also ignored and/or chronically downplayed the patently political and race-demagogic machinations of Nifong.³⁸⁴ As critics have asked, would the *Times* have “disgustingly advanced the hoax” well after other media had distanced themselves if the case had involved a comparable race-demagogue district attorney in a racially divided district with an alleged *white* victim-accuser with a criminal past and extensive psychological difficulties, along with a nearly pristine alibi for one of the accused, if the alleged perpetrators were African-Americans?³⁸⁵

Of course, such strongly evidenced and unseemly *Times* motivations do not suffice for,³⁸⁶ but are supportive evidence of,³⁸⁷ constitutional malice under Supreme Court precedent, as are deviations from accepted journalistic standards,³⁸⁸ including those of the *Times*.³⁸⁹ Evidence of common law malice and breach of journalistic standards helps explain why the defendants decided to “disregard the most rudimentary precautions before publishing,”³⁹⁰ and suggests a mindset “highly susceptible to the entertainment of

383. See Flanders, *supra* note 381. One player with a sick sense of humor emailed teammates after the lacrosse party that he planned to have some strippers over and kill and skin them. Teammates recognized the “pale imitation” to the book and movie, *American Psycho*, “a point the media *entirely* ignored.” TAYLOR & JOHNSON, *supra* note 1, at 138-39. Except for the e-mail, the negative press portrayal of the Duke lacrosse team was excoriated by a committee led by Duke law professor James Coleman, which looked into the misogynistic/racist stereotypes bantered about in the press and gave the team an overall positive assessment. While the group had issues with alcohol, such was indistinguishable from Duke students as a whole. Of course, this stereotype negation got little press attention—it was “the proverbial tree falling in the forest with nobody around to hear it.” TAYLOR & JOHNSON, *supra* note 1, at 209, 211.

384. Cf. William L. Anderson, *Desperate Times*, Aug. 26, 2006, <http://www.lewrockwell.com/anderson/anderson138.html> [hereinafter Anderson, *Desperate Times*] (referring to Nifong’s case as “bogus”).

385. Andersen, *American Political Culture*, *supra* note 364 (quoting the criticism of blogger K.C. Johnson); Peyser, *supra* note 364 (noting that “[w]orst of all, this story so neatly fit the radical agenda of our ‘newspaper of record’”); see also TAYLOR & JOHNSON, *supra* note 1, at 126-27 (citing examples where minorities were the alleged perpetrators and where the media refrained from creating “a metanarrative styling the accused as personifying broader social ills involving sex, class, or interracial rape” as in the Duke case).

386. See *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 667-68 (1989); ELDER, DEFAMATION, *supra* note 3, §7:3, 7-69.

387. See *Harte-Hanks*, 491 U.S. at 667-68; ELDER, DEFAMATION, *supra* note 3, §7:3, 7-69-7-70.

388. See *Harte-Hanks*, 491 U.S. at 667-68; ELDER, DEFAMATION, *supra* note 3, §7:2, 7-22.

389. See *supra* text accompanying notes 364-370.

390. *Fopay v. Noveroske*, 334 N.E.2d 79, 91 (Ill. App. Ct. 1975).

serious doubts concerning probable falsity.”³⁹¹ Additionally, such evidence indicates why a publisher is “not in the least concerned . . . with the true facts,”³⁹² shows “an atmosphere infected with a disposition to ignore [calculated] falsehood[],”³⁹³ “provide[s] a motive for defaming someone or explain[s] apparently illogical leaps to unsupported conclusions,”³⁹⁴ and demonstrates that the defendant has adopted and would implement a preconceived order of battle “regardless of how the evidence developed and regardless of whether or not [a source]’s story was credible upon ultimate reflection.”³⁹⁵

The aforesaid motivational influences help explain why the *Times*, after acknowledging and detailing the major difficulties with Nifong’s case in both editorial columns³⁹⁶ and a June 12, 2006, Duff Wilson and Jonathan D. Glater article on the “growing perception of a case in trouble”—including detailed analyses of information included in the defense’s motion throwing “the woman’s claims into doubt”³⁹⁷—decided to resurrect and resuscitate Nifong’s fatally flawed case.³⁹⁸ The Wilson and Glater 5600-word first page investigative piece on August 25, 2006, became a laughing stock³⁹⁹ within hours, pilloried by

391. *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d. 1211, 1221 (Ind. App. Ct. 1978).

392. *Arber v. Stahlen*, 170 N.W.2d. 45, 48 (Mich. 1969).

393. *Miller v. Argus Publ’g Co.*, 490 P.2d 101, 111 (Wash. 1971), *overruled on other grounds by* *Taskett v. KING Broad. Co.*, 546 P.2d 81 (Wash. 1976) (alteration in original).

394. *Sharon v. Time, Inc.*, 599 F. Supp. 538, 584 (S.D.N.Y. 1984).

395. *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 684 (1989) (alteration in original).

396. See David Brooks, *The Duke Witch Hunt*, N.Y. TIMES, May 28, 2006, available at <http://select.nytimes.com/2006/05/28/opinion/28brooks.html> [hereinafter Brooks, *Witch Hunt*]; Kristof, *supra* note 336.

397. Wilson & Glater, *Prosecutor’s Silence*, *supra* note 216. Unlike the front-page story on August 25, this story was “buried” on page thirteen. TAYLOR & JOHNSON, *supra* note 1, at 239. The authors largely used the same information later cited in the August 25 article. See *infra* text accompanying notes 409-523. However, the overall tone of the earlier article was much more skeptical about the prosecutor’s case and the accuser’s claims.

398. See Anderson, *Desperate Times*, *supra* note 384 (“With Michael Nifong’s bogus case . . . going further into the toilet, the *New York Times* steps in to try to rescue its ‘prosecutor as hero.’”).

399. See e.g., TAYLOR & JOHNSON, *supra* note 1, at 269, 271 (noting that a mere three hours after publication, “blogs deftly tore the piece to shreds, exposing the reporters’ factual errors, their omission of critical evidence, and their overall pro-Nifong bias” and quoting MSNBC general manager Dan Abrams as characterizing the article as a “shameful” “editorial on the front page of what is supposed to be the news division of the newspaper”); Anderson, *American Political Culture*, *supra* note 364 (referring to the article as an “infamous . . . piece that treated an obviously false report as an Oracle of the Gods from Mount Olympus”); Anderson, *Desperate Times*, *supra* note 384 (“The first thing to remember is that the *Times* is desperate for this story to be ‘true,’ and if the facts don’t warrant its truth, the *Times* will use other methods . . . [because] one can bet that the editors do not want to be burned again [as they had with the Tawana Brawley story], and

one well-respected critic as the “worst single piece of journalism”⁴⁰⁰ he had ever seen in a newspaper. But the *Times* published it. Why? And was it published with constitutional malice or “calculated falsehood,” i.e., knowing or reckless disregard of falsity by clear and convincing evidence?⁴⁰¹

The Supreme Court famously provided detailed guidance as to constitutional malice in the leading case of *St. Amant v. Thompson*,⁴⁰² where the Court indicated that the constitutional-malice standard will be met when a defamatory statement is “fabricated by the defendant” (or “the product of his imagination”), is based exclusively on an “unverified anonymous telephone call,” or is “so inherently improbable that only a reckless man” would publish the defamatory matter.⁴⁰³ Lastly, and most importantly, the recklessness subpart is met where the publishing defendant has “*obvious reasons to doubt* the veracity of the informant or the accuracy of his reports.”⁴⁰⁴

Does the August 25 story qualify for liability under *St. Amant*, or was its publication mere negligence under the “negligence-is-never-enough barrier” to liability in public-person cases?⁴⁰⁵ As I tell students and the occasional client with whom I consult, the first and often most important source of evidence for proof of constitutional malice is what the defendant knew at the time of publication that contradicted its published conclusions.⁴⁰⁶ As courts have acknowledged, a defendant “cannot feign ignorance or profess good faith when there are clear indications present which bring into

what better way to keep things going than to tell readers that Gottlieb’s story is the gospel truth?”) (alteration in original); Flanders, *supra* note 381 (quoting journalists who were “highly critical” of the story); Peyser, *supra* note 364 (“In a case of ‘all the lies fit to print,’ the paper on Aug[ust] 25 affected an air of Timesian authority in a damning article, spoon-fed by DA Nifong. It tried to put to rest some of the alarming inconsistencies in the accuser’s story about the night she was ‘attacked.’”) (alteration in original); Rabinowitz, *supra* note 379 (“[A] close study of [the article]’s wondrous logic . . . should provide rich material for students of the press for years to come”) (alteration in original); Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting that the article’s “flaws are so glaring that it was shredded by bloggers within hours after it hit my doorstep”); *see also* TAYLOR & JOHNSON, *supra* note 1, at 260-71, for a detailed critique.

400. Anderson, *American Political Culture*, *supra* note 364 (quoting Stuart Taylor); *see also* Smolkin, *supra* note 143 (noting that the Wilson and Glater article “emerged as the single-most-derided substantial look at the Duke case”).

401. For discussions of constitutional malice, *see supra* text accompanying notes 386-395; *infra* text accompanying notes 401-409, 429, 525-534, 537.

402. 390 U.S. 727, 732 (1968).

403. *See id.*

404. *Id.* (emphasis added).

405. *See* ELDER, DEFAMATION, *supra* note 3, §7:2, 7-8-7-32 (including a detailed analysis of cases); Elder, *Media Jabberwock*, *supra* note 105, at 615-16.

406. *See* ELDER, DEFAMATION *supra* note 3, §7:12.

question the truth or falsity of defamatory statements.”⁴⁰⁷ Refusing to credit contradictory evidence might indicate that a defendant, “having taken a position[,] . . . was unwilling to retreat . . . despite evidence to the contrary and continued to pursue [the defendant’s] preconceived plan to discredit [the plaintiff].”⁴⁰⁸ Such “hard evidence” is “not simply a failure to investigate, but a failure to consider contradictory evidence already in [its] possession.”⁴⁰⁹

Of what evidence were Wilson and Glater aware prior to the August 25 article? The four corners of the story fleshed out in considerable detail demonstrate the authors’ diagnosed “big weaknesses”⁴¹⁰ or “major problems”⁴¹¹ with Nifong’s case, including the huge problems with the accuser’s varying accounts and credibility.⁴¹² Evidentiary inconsistencies included: (1) variances as to how many perpetrators there were,⁴¹³ who did what,⁴¹⁴ and in what

407. *Hunt v. Liberty Lobby*, 720 F.2d 631, 644 (11th Cir. 1983) (quoting *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982)).

408. *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 563 (La. Ct. App. 1980).

409. *Robertson v. McCloskey*, 666 F. Supp. 241, 250 (D.D.C. 1987) (alteration in original).

410. *Wilson & Glater, Files From Duke Rape Case, supra* note 181.

411. *Id.*

412. One of the most damning was the accuser’s statement that she was dancing with *three* dancers, not *one* other dancer. *See id.* Moreover, she gave them specific names: one name, “Nikki,” was a professional monniker for her co-dancer, and the other two mentioned were “Angel” and “Tammy.” *Id.* True to form, the authors suggest that the accuser may have had a “misunderstanding” of their roles. *Id.* It turns out, and the authors state, that “Tammy” was the dispatcher and “Angel” was the name of the escort service. *Id.* This is a mind-boggling “misunderstanding” which alone should have suggested to responsible reporters that the accuser was not credible. *See id.*

413. *See id.* The authors gave an interesting spin to this: “But the files show that aside from two brief early conversations with the police, she gave largely consistent accounts of being raped by three men in a bathroom.” *Id.* Later in the article, the authors tried to minimize the accuser’s inconsistencies, citing the prosecutor’s file for the following: “[E]xcept in some initial contacts with the police, she gave a *consistent account* during that night and since then of how many men had raped her.” *Id.* (emphasis added). The authors tried to undermine “early reports” relied on by the defense as apparently based on further “misunderstandings.” *See id.* The “version [of the alleged rape] in which she claimed to have been raped by 20 men and changed her story ‘several times’” was based on a written report from a Duke University police officer, Christopher H. Day, after he overheard Sergeant John C. Shelton’s phone conversation. *Id.* (alteration in original). The authors noted that Officer Day had not spoken with either the accuser or Sergeant Shelton, yet they nonetheless added their own observation, the basis for which was not disclosed: “The report of 20 men may have been a reference to an estimate of the number of men at the party.” *Id.* The authors did concede that a reference to five rapists, documented by a woman police officer, Gwendolyn Sutton, who spoke with the accuser at the hospital, “has not been explained.” *See id.* *But cf.* TAYLOR & JOHNSON, *supra* note 1, at 265 (viewing the “largely consistent accounts” conclusion as the “most ludicrous” of Sergeant Mark D. Gottlieb’s lies in light of a “mass of contradictions” in the accuser’s multiple accounts); Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting that after recanting, the accuser “offered a succession of wildly inconsistent stories,” and that while the accuser had

order;⁴¹⁵ (2) whether a rape occurred at all;⁴¹⁶ (3) the sudden transfer to Duke Hospital from another facility when the alleged victim was facing an overnight detention and alleged rape;⁴¹⁷ (4) the fact that Duke medical records did *not* provide documentary evidence that a rape had occurred;⁴¹⁸ (5) whether the accuser suffered other physical injuries and the extent thereof;⁴¹⁹ (6) variances in the descriptions of her three attackers;⁴²⁰ (7) absence of DNA evidence directly connecting the accused to the accuser⁴²¹ or third-party corroboration that a rape

told the sexual-assault nurse a version implicating the second dancer in helping a lacrosse player drag her into the house and stealing her money, three weeks later the accuser settled on a three-player rape in which the players forcibly separated the two dancers “while [holding] onto each other”) (alteration in original).

414. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that the victim had given two different names for the man who allegedly orally raped her).

415. See *id.*

416. See *id.* (providing that the accuser had made statements to Durham Police Sergeant John C. Shelton—who had earlier reported her to be drunk—to the effect that she was “groped, not raped,” which resulted in a call to his watch commander that she was withdrawing the rape charges; that Shelton thereafter heard her repeat her rape charges to her doctor; and that after confronting her, “[s]he told [him that] she did not want to talk to [him] anymore and then started crying and saying something about them dragging her into a bathroom”) (quoting Sergeant John C. Shelton) (alteration in original).

417. See *id.* Sergeant Shelton directed the accused to be taken to an overnight mental-health and substance-abuse center. *Id.* The authors then quoted a police officer as saying that the victim answered affirmatively when asked if something had happened to her and if she had been raped. *Id.* The story noted that she was then taken to Duke University Medical Center. *Id.* The authors did *not* discuss, as others have in some detail, that the accuser only made the rape charges when faced with an overnight stay. *Id.* Indeed, even one of the paper’s leading liberal op-ed columnists had drawn this conclusion. See Kristof, *supra* note 336; see also TAYLOR & JOHNSON, *supra* note 1, at 31.

418. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (stating that the medical report “did not say much [other than that there was] some swelling [but] no visible bruises”) (alteration in original); *cf.* Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting that this was a “crippling weakness” in Nifong’s rape case); see also TAYLOR & JOHNSON, *supra* note 1, at 31-35, for a detailed analysis.

419. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. The authors conceded that the accuser’s “other injury” accounts “changed over time,” and cited both a denial by the accuser quoted in a physician’s notes from the initial emergency room examination and another doctor/sexual assault expert’s conclusion of a normal exam that turned up only three minor scratches on knee and ankle. *Id.* The authors then refer to the nurse’s recollection that later that night the woman claimed of “being held by both legs and pinched, pushed and kicked,” and her claims made at a University of North Carolina hospital the following day of being “knocked to the floor multiple times and [that she] had hit her head on the sink” during a sexual assault with claimed complaints related thereto. *Id.*

420. See *infra* text supported by notes 499-513.

421. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. When the DNA test results were released by Nifong, the authors found people to contradict defense claims that the tests absolved the lacrosse team members. See *id.* (“Outside experts say it is possible for a rapist to leave no DNA evidence.”). One unnamed expert was Peter J. Neufeld of the Innocence Project, which had used DNA to absolve almost two hundred

had occurred;⁴²² (8) the “crock” statement made by the other dancer⁴²³ (who later abruptly modified her stance when Nifong magnanimously dropped her bail on an unrelated probation violation);⁴²⁴ and (9) the accuser’s “troubled personal history,”⁴²⁵ including a diagnosis for depression and bipolar disorder,⁴²⁶ unquestioned drunkenness and/or substance abuse shortly after the alleged attack,⁴²⁷ and a parallel charge of gang rape by three attackers a decade earlier.⁴²⁸ Wilson and

wrongfully convicted individuals. See TAYLOR & JOHNSON, *supra* note 1, at 164. In an earlier article. Neufeld was quoted as citing multiple thousands of rape convictions without DNA. Wilson & Macur, *Lawyers*, *supra* note 181. The use of Neufeld’s quote (implicitly incorporated in the August 25 “[o]utside experts” reference) strongly suggested skepticism about defense lawyers’ DNA claims. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. Neufeld later explained that this resulted from Wilson disclosing no specifics about the Duke lacrosse case. See TAYLOR & JOHNSON, *supra* note 1, at 164.

422. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

423. See *id.* (noting the other dancer’s “contradictory accounts,” including her “crock” statement and her claim that she had been with the accuser-victim the entire time at the party except for five minutes).

424. See *id.* (noting the revised version of the other dancer’s story, as told to National Public Radio, in which she explained that a rape “could have happened,” but that she had neither heard nor seen it, and referencing defense lawyers’ claim that this change in her story was “to suit an opportunity,” i.e., Nifong’s personal reduction of her probation violation bond payment).

425. *Id.* (stating that this history was “sure to be an issue at trial”).

426. See *id.* (citing medical records contained in police files).

427. See *id.* The authors paraphrase the second dancer as saying that “[s]he did not know what to do with her acquaintance, who was incoherent and, she believed, drunk or high.” *Id.* She went to a twenty-four-hour grocery store near campus, where the security guard called Durham police. *Id.* A patrol sergeant, John C. Shelton, told a dispatcher she was “just passed-out-drunk.” *Id.* Since she would not either stand or communicate, he ordered two other officers to take her to an overnight substance-abuse/mental-health facility. *Id.* Later, the authors note “one of the more puzzling aspects of the case”: her intoxication. *Id.* The article cited both her denial to University of North Carolina doctors of pain while in the Duke emergency room because she was “drunk and did not feel pain,” and her “slightly differing accounts” of how much alcohol she had consumed that evening. *Id.* The authors then provide two wholly speculative explanations provided by police for why the alcohol consumed did not explain why she “seemed so profoundly intoxicated” after her dance partner said she arrived “clearly sober” but was “‘talking crazy’ and ‘basically out of it’” within an hour: either a date-rape drug or rape trauma. See *id.* But see Taylor, *Witness for the Prosecution?*, *supra* note 364 (stating that he had had recently received an e-mail from a defense lawyer explaining that they had received notice of a toxicology report the prior week that tested negative for such a drug, and posing the question: “Another deception?”). The accused also had a criminal public record of alcohol abuse—driving while impaired—that the authors did not discuss. See *infra* note 429.

428. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (citing the initial disclosure in *Essence* magazine); see also *id.* (stating the accuser’s explanation to investigators that she had decided to drop the charge because of difficulties in proving it and because the men in question were already in prison for other offenses). In their earlier, more skeptical story, Wilson and Glater had noted that neither the accuser nor police “followed up on th[e] report [of the previous rape].” Wilson & Glater, *Prosecutor’s Silence*, *supra* note 216. This conclusion was open to the inference that police may have thought it meritless or that the four-year delay reflected negatively upon the credibility of the accuser

Glater also ignored but were obviously aware of the accuser's criminal history.⁴²⁹

or the verity of her accusations. In the later story, the authors felt compelled to "throw some light" on this matter, as defense lawyers were publicly using this to attack the accuser's credibility. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. The later article did disclose that the charges were filed four years late and that the alleged rape occurred when she was fourteen, "a runaway and helping [the alleged rapists] sell drugs." *Id.* The explanation given to Durham police and reported by the authors was that a friend "encouraged her to report her secret so she could hold the men accountable and move on with her life." *Id.* The police in question said to the authors they had "no further record of the case." *Id.* The authors' light-shedding attempt to partially rehabilitate or explain the hugely damning and credibility-devastating prior report did little to assist her—or them. The authors also made no reference to another statement—which was disclosed on May 1, 2006, by MSNBC's Dan Abrams—that she made a statement under oath that indicated that her then-husband had taken her into local woods and "threatened to kill her." TAYLOR & JOHNSON, *supra* note 1, at 196 (noting that the accuser "had not pursued that case, either").

429. See TAYLOR & JOHNSON, *supra* note 1, at 19-20, 166-67. This criminal history was not specifically mentioned but was known to the authors, as the lack of disclosure thereof had been specifically criticized by Byron Calame in his April 23, 2006, evaluation of the coverage of the Duke case. Calame, *Covering*, *supra* note 23. He made an "interesting" comparison to a lengthy story about unrelated charges against one of the accused, and rejected the editors' non-germaneness reasoning as to the Duke lacrosse accuser. *Id.* He thought readers "deserve to know about her record," and noted that the *News & Observer* had done an article thereon. *Id.* Interestingly, however, no reference to such public criminal record appears in the August 25 story. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. However, the accuser's "criminal record" was specifically mentioned without further detail by influential *Times* op-ed columnist Nicholas D. Kristof. See Kristof, *supra* note 336. So, undoubtedly, both Wilson and Glater as well as the *Times* editors knew about it and did not disclose it despite the considerable bearing such might have on the accuser's credibility. As noted above, a local paper doing a detailed, and generally highly professional, coverage had disclosed the unnamed accuser's criminal record in an April 7, 2006, article. See Samiha Khanna, *Manager: Scanty Info Delayed Search*, NEWS & OBSERVER, Apr. 7, 2006, available at http://www.newsobserver.com/news/crime_safety/duke_lacrosse/story/426021.html. The issue arose in the context of the city manager's discussion with city council concerning whether the accuser's "criminal record affected police action." *Id.* The article went on to explain that:

The woman has convictions on a record from a single 2002 incident involving drunken driving, a stolen car and an attempt to flee from police. Under a deal with prosecutors, the woman pleaded guilty to four misdemeanors: larceny, speeding to elude arrest, assault on a government official and driving while impaired, according to court records. She was required to serve three consecutive weekends in jail and was placed on two years' probation, which she served without incident.

Id. Note that extensive case law suggests that a source's criminal record is hugely significant as to whether *St. Amant's* "serious doubts"-regarding-veracity/credibility standard is met. See ELDER, DEFAMATION, *supra* note 3, §7:2, 7-36-7-42. Indeed, the Supreme Court has repeatedly cited a source's criminal history as extremely important. See, e.g., *St. Amant v. Thompson* 390 U.S. 727, 732 (1968) ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 157 (1967) (noting that the accuser had a history of bad check charges); see also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692-93 (1989) (noting that *Butts* involved use of an "unreliable informant"). Interestingly, the authors did note the second dancer's criminal history and

Wilson and Glater also cited other major obstacles and concerns with Nifong's case: (1) the "clear[] setback [and] turning point"⁴³⁰ in public perception emanating from the negative findings in the initial DNA tests regarding the Duke lacrosse players collectively;⁴³¹ (2) Nifong's unexplained retrenchment from his prior DNA positions⁴³² to one where he tried to do blunderbuss damage control reaching for straws⁴³³ (the accuser's no-condoms-were-used⁴³⁴ admission was not controlling; she'd given different accounts of ejaculations within her;⁴³⁵ she might not have noticed the condoms;⁴³⁶ the rape exam may have not discovered some of the semen);⁴³⁷ (3) extensive criticism of Nifong's unprofessionalism,⁴³⁸ including his

that she was then "wanted by the police for violating probation in a 2001 embezzlement case." Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. Of course, this had to be disclosed because it was linked to why she later modified her comment that the accuser's charges were a "crook." See *supra* text accompanying notes 423-424.

430. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

431. See *id.*

432. See *id.* The authors, however, do not expressly state this.

433. See *infra* text accompanying notes 434-437.

434. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (explaining that she "initially told" doctors and nurses that no condoms were used, and admitting that this suggested that there "would be a lot of DNA evidence to test").

435. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that she told the hospital sexual assault nurse "she didn't know," but later told Officer Himan "she thought" one had ejaculated in her). It is not entirely clear whether the latter is attributed to Nifong or added by the authors, but it is probably the latter.

436. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

437. See *id.*

438. See *id.* ("Increasingly, Mr. Nifong has become the focus of attacks on the case."). Indeed, as early as April 12, [2006], Duff Wilson co-authored another article in which a criminal law professor at the University of North Carolina, Arnold Loewy, who viewed Nifong's public statements as highly unusual, was quoted as saying: "[Nifong] seems to want to proceed as far as he can whether the evidence is there or not." Macur & Wilson, *Duke Inquiry*, *supra* note 181. Later, Taylor and Johnson characterized Nifong's conduct as "the most flagrant serial smearing of innocent suspects ever to unfold in a national spotlight." TAYLOR & JOHNSON, *supra* note 1, at 87; see also *id.* at 100 (concluding that it is "hard to imagine a more egregious succession of violations" of the prohibition on a prosecutor's prejudicial public remarks); *id.* at 105 ("[The Duke rape case is] widely seen as the worst case of prosecutorial misconduct ever to unfold in plain view."); *id.* at 321 (citing the "common knowledge" that such prejudicial statements are prohibited and that their "egregious nature" was apparent—or should have been—from the beginning to all, including the media that "gave Nifong a free ride for so long"); cf. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (citing defense lawyers' accusations that Nifong provided several dozen "inflammatory interviews"). Indeed, Nifong's misconduct was not limited to the three falsely accused; rather, he and a complicit media falsely portrayed the entire lacrosse team as being either directly involved in the rape as principals, or indirectly involved as aiders and abettors by encouraging or condoning it. See TAYLOR & JOHNSON, *supra* note 1, at 85, 97-98, 190 ("The whole team had been smeared from coast to coast as a bunch of thugs who stood by and watched while a defenseless woman was being raped by their friends.").

inflammatory public statements and defective line-up;⁴³⁹ (4) Nifong's blank and inexplicable refusal to receive evidence from defense lawyers seeking to proffer information that undermined his case,⁴⁴⁰ including information as to one accused whom the authors conceded had an apparently "powerful alibi";⁴⁴¹ and (5) the highly suspect line-up that violated "generally accepted guidelines" for legally admissible line-up-based identifications.⁴⁴²

In light of the above—with most of these same major difficulties conceded, albeit in lesser detail in Wilson and Glater's earlier June 12 article⁴⁴³—what *new* information, and from what source(s), justified the authors' conclusion that "a body of evidence"⁴⁴⁴

439. See *infra* text accompanying notes 499-513.

440. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (commenting on the questions raised by Nifong's refusal to receive evidence from defense counsel: "In the courthouse and around town, even people who know Mr. Nifong well and respect him are wondering: what does he have?"); see also *id.* (noting that the defense lawyers' repeated attempts to meet with Nifong were rejected, and discussing the one meeting where Nifong finally met with three defense lawyers but abruptly terminated it when they attempted to introduce the issue of exculpatory evidence). Nifong's actions were widely viewed by defense lawyers as extraordinary. See e.g., TAYLOR & JOHNSON, *supra* note 1, at 99, 161 (listing reasons, and characterizing Nifong as engaged in "willful blindness").

441. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 ("[A] cell phone log and other records [showed] that [Seligmann, one of the accused,] left the party early."); see also *id.* (discussing, in extended detail, the evidence that counsel for Seligmann would have shown to Nifong, had he permitted it, including "cellphone records, an A.T.M. record, a time-coded dormitory entry card and a taxi driver's account"—but drawing *no* conclusion therefrom, other than a comment that Nifong had "never explained" such refusals). Note that Duff Wilson had penned a detailed story earlier about this information, which was accompanied by two time-stamped photos of the dancers both inside and outside. Duff Wilson, *Duke Player has Proof of Innocence, Lawyer Says*, N.Y. TIMES, Apr. 20, 2006, available at <http://www.nytimes.com/2006/04/20/sports/sportsspecial1/20duke.html>. This time frame provided a backdrop for the compelling alibi information. See *id.* One well-known law professor and commentator viewed the evidence as a "conclusive 'digital alibi,'" and noted that "[i]n this case, the technologies of the surveillance state served the cause of liberty." Jeffrey Rosen, *Review: Until Proven Innocent*, INT'L HERALD TRIB., Sept. 14, 2007, available at <http://www.iht.com/articles/2007/09/14/arts/idbriefs15A.php>.

442. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that defense lawyers were challenging such, and contending that "all evidence that followed from the identifications should be thrown out") (emphasis added). A columnist later concluded that Nifong's actions as to the line-up were "so completely different from standard procedure that it was virtually an invitation for a judge to throw out any identification . . . and without the identification, there was no case. This was not about winning a case. It was about winning an election." Sowell, *Duking*, *supra* note 364, at 1. For a more detailed analysis of the authors' treatment of this line-up travesty, see *infra* text accompanying notes 499-513.

443. Wilson & Glater, *Prosecutor's Silence*, *supra* note 216.

444. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (citing the entire 1,850 pages of evidence as "yield[ing] a more ambiguous picture"). This article constituted an endorsement of Nifong's actions by "the nation's most influential newspaper." TAYLOR & JOHNSON, *supra* note 1, at 268.

“stronger than that highlighted”⁴⁴⁵ by defense lawyers “help[ed] to answer some important questions”⁴⁴⁶ about the case and “add[ed] rich detail to the narrative of what happened that night”⁴⁴⁷ In sum, what justified Nifong in going to trial?⁴⁴⁸ What is their *new* evidence? The “crucial”⁴⁴⁹ after-the-fact, thirty-three page-recollection memo, as well as the three pages of handwritten notes by Sergeant Mark D. Gottlieb,⁴⁵⁰ almost perfectly managed to massage the glaring gaps⁴⁵¹ in Nifong’s case—a document disparaged publicly by one accused’s lawyer as a “make-up document” “transparently written to try to make up for holes in the prosecution’s case” and “smack[ing] of almost desperation”.⁴⁵² Did Wilson and Glater have “obvious reason to doubt” the veracity of the source (Gottlieb) and his “magical mystery tour” account?

445. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

446. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

447. *Id.* One should take notice of the authors’ subtle yet inculpatory use of “*what happened*” that night. *See id.* (emphasis added).

448. *See id.* In their more skeptical June 12 article, Wilson and Glater had quoted Kim Forde-Mazrui, a law professor from the University of Virginia, as saying that a case like Nifong had would be “very difficult to win” and would “turn so much on credibility.” Wilson & Glater, *Prosecutor’s Silence*, *supra* note 216.

449. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. *But see* TAYLOR & JOHNSON, *supra* note 1, at 263 (“A good reporter reading the . . . memo would have smelled a rat, or a bunch of rats . . . but . . . Wilson . . . and Glater found Gottlieb’s memo so credible—or perhaps so convenient—that they used it as the spine of the long-awaited *Times* reassessment.”). While noting some of the contradictions with “other, harder evidence, the *Times* proceeded as though the possibility that Gottlieb was lying had not crossed its collective mind.” *Id.*

450. *See* Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

451. *See id.* (conceding that Gottlieb’s notes were “drawing intense scrutiny” from defense counsel because they “appear[ed] to strengthen” Nifong’s case, and had not been disclosed to the defense until after they “had made much of the gaps in the earlier evidence”).

452. *Id.* (quoting comments of Joseph B. Cheshire, counsel for one of the defendants, and citing Gottlieb’s admission to defense counsel that he had taken almost no notes but had instead relied on his memory and the notes of other police officers); *see* Taylor, *Witness for the Prosecution?*, *supra* note 364 (“With comical credulity, [the Wilson and Glater article] features as its centerpiece a leaked, transparently contrived . . . memo that seeks to paper over some of the most obvious holes in the prosecution’s evidence . . . concocted from memory, nearly four months after the underlying witness interviews. . . .”); *see also id.* (noting that “Gottlieb’s memo is contradicted on critical points by the contemporaneous notes of other police officers, as well as by hospital records” and that the *Times*’ article “blandly mentions these contradictions while avoiding the obvious inference that the Gottlieb memo is thus unworthy of belief”) (emphasis added). Of course, this supposed reliance is suspect, or at least should have been viewed as such, since his *later* recollections were not always consistent with other officers’ *contemporary* notes. There were at least eleven contradictions of contemporaneous notes by fellow officers and examining medical personnel at the Duke hospital. “In *each and every case*, Gottlieb’s version . . . was more favorable to the prosecution.” TAYLOR & JOHNSON, *supra* note 1, at 260-261; *see infra* text accompanying note 520.

Consider what Wilson and Glater were given as an exclusive look:⁴⁵³ a constructed gap-filler based on memory deviating quite extraordinarily from accepted police practice,⁴⁵⁴ and garnered from a police source that the authors conceded was under internal investigation for an unrelated reason⁴⁵⁵ and who came up with a “deus ex machina”⁴⁵⁶ attempt to resuscitate Nifong’s case—a case on the verge of collapsing⁴⁵⁷ like a house of warped cards. Even Bill Keller, executive editor of the *Times*, conceded that “serious questions”⁴⁵⁸ about the information’s reliability existed at the time of publication but that this was “actual new information” about the strength of Nifong’s case, which its reporters had gotten through supposedly diligent efforts.⁴⁵⁹ The *Times* seems to be resurrecting one of its (and the rest of the media’s) favorite (but defective and largely unsuccessful) circumvention devices around *New York Times Co.-St. Amant*: collectively, the so called “accurate” reportage of news.⁴⁶⁰

As I have demonstrated in detail elsewhere, accurate reportage (though I am not conceding this issue) of newsworthy matter does *not* provide the media, including its ranking exemplar, absolute protection.⁴⁶¹ And the intellectually shabby and deceitful August 25 article by Wilson and Glater demonstrates why in an almost

453. See Calame, *Revisiting*, *supra* note 371 (“The key document [in the Wilson and Glater article]— *exclusive to the Times* — was the thirty-three-page typed ‘case notes’ report of Sgt. Mark D. Gottlieb, a Durham police investigator.”) (emphasis added); Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (“Crucial to that portrait of the case are Sergeant Gottlieb’s thirty-three pages of typed notes and three pages of handwritten notes, *which have not previously been revealed.*”) (emphasis added).

454. See TAYLOR & JOHNSON, *supra* note 1, at 260-61 (referring to Gottlieb’s actions as a “shocking departure from standard police practice”); Taylor, *Witness for the Prosecution?*, *supra* note 364 (calling Gottlieb’s failure to take contemporaneous notes an “inexplicable and indefensible police practice”).

455. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (disclosing the details of this investigation in a parenthetical paragraph deep in the article).

456. Andersen, *Rape, Justice, and the ‘Times,’ supra* note 376.

457. See *id.* (referring to the Wilson and Glater article as “The Considered, Authoritative, Long-Awaited *New York Times* Assessment of the Duke Case,” which was intended to demonstrate that “[Nifong’s case was not] a witch hunt, Nifong[was] not so bad, the[defendants were not] the Scottsboro Boys, the accuser may well have been raped, the[] Duke boys might have done it, [and] the case deserve[d] to go to trial”).

458. Calame, *Revisiting*, *supra* note 371. Calame viewed the August 25 article as “significantly less skeptical” about Nifong’s case than the June 12 article; the summary paragraph as an “overstated summary [that] was a major flaw in the article;” and the authors as “not sufficiently skeptical in relying so heavily on the Gottlieb notes.” *Id.*

459. *Id.* As Taylor and Johnson concluded, this was an article *three times* the length of any prior publication on the case, and “came close to admitting that the *Times* valued its little scoop more than truthfulness or fairness.” TAYLOR & JOHNSON, *supra* note 1, at 268.

460. See generally Elder, *Media Jabberwock*, *supra* note 105, at 551-830.

461. See generally *id.*

laughingly compelling fashion. Despite what one critic has correctly termed its “meretricious appearance of balance,”⁴⁶² the authors very early on in the article showed their (and the paper’s) true allegiance.⁴⁶³ They repeated Nifong’s widely criticized, public, pro-accuser statements⁴⁶⁴ and his statements about lacrosse-player non-cooperation⁴⁶⁵ (and paid obeisance to the race/sex/privilege angle⁴⁶⁶) despite the fact that almost all other media had dismissed the non-cooperation ploy as inaccurate.⁴⁶⁷ Most importantly, Wilson and Glater tried deceitfully to diminish the credibility of Nifong’s critics—what one critic calls “single dismissive boilerplate”⁴⁶⁸—by relegating them to a suspect class-of-three category: “defense lawyers, Duke alumni, and obsessive bloggers.”⁴⁶⁹ Of course, the authors did not

462. Taylor, *Witness for the Prosecution?*, *supra* note 364; see also TAYLOR & JOHNSON, *supra* note 1, at 264 (noting that the article “presented a superficially neutral tone”).

463. See *infra* text accompanying notes 464-471.

464. See e.g., Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (quoting Nifong as saying that there was “no doubt in [his] mind that she was raped”); *id.* (citing Nifong’s earlier admission of error in making press statements and that he had not gotten DNA matches but nonetheless quoting him as saying that he had “not backed down from [his] initial assessments”).

465. See, e.g., *id.* (noting that Nifong “had been beseeching Duke lacrosse players to break their ‘stonewall of silence’ about what had happened”). Later, the authors noted what everyone then knew (but without conceding any inconsistency): that one accused and two other team captains sharing the house where the alleged rape took place “cooperated fully” (according to police reports); said that no rape or sex had occurred; talked at length without lawyers; gave DNA samples; and offered to take polygraphs, which police declined because of the DNA testing that “would solve the case.” *Id.*

466. See, e.g., *id.* (“[The Duke rape case is] yet another painful chapter in the tangled American opera of race, sex and privilege.”); *id.* (“What is more, regardless of one’s opinion about the prosecution, to read the files, with their *graphically twined accusations of sexual violence and racial taunts*, is to understand better why this case has radiated so powerfully from the edgily cohabited Southern world of Duke and Durham.”) (emphasis added); see also Taylor, *Witness for the Prosecution?*, *supra* note 364 (“[Unwarranted reliance on Gottlieb’s dubious memo] fits the *Times*’ long-standing treatment of the case as a fable of evil, rich white men running amok and abusing poor black women.”).

467. A leading blogger and critic criticized the Wilson and Glater article for “wast[ing] no time [in] rehashing the old lie that the Duke lacrosse players were refusing to cooperate with the police.” Anderson, *Desperate Times*, *supra* note 384 (alteration in original).

468. Andersen, *Rape, Justice, and the ‘Times,’ supra* note 376.

469. *Id.*; see Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (“Defense lawyers, amplified by Duke alumni and a group of bloggers who have closely followed the case, have portrayed it as a national scandal—that there is only the flimsiest physical evidence of rape, that the accused is an unstable fabricator, and that Mr. Nifong, in the middle of a tight primary campaign, was summoning racial ghosts for political gain. By disclosing pieces of evidence favorable to the defendants, the defense has created an image of a case heading for the rocks.”). Note the *very* limited reference to Nifong’s politically partisan motivation and the attempted diminishing thereof. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. *But cf.* Wilson & Glater, *Prosecutor’s Silence*, *supra*

acknowledge that *Times* editorial and other writers,⁴⁷⁰ as well as most national and local journalists,⁴⁷¹ had joined these suspect three in viewing Nifong and his police investigative network with justifiably strong skepticism.

Wilson and Glater's attempt to resuscitate Nifong's case focused especially on two arenas: the dearth of corroborating medical evidence and the highly suspect identification process. Beginning with the medical evidence, the article dramatically downplayed the hospital forms⁴⁷² that failed to provide corroborating evidence of

note 216 ("People in Durham are asking what Mr. Nifong is up to[and] whether his prosecution was influenced by politics[as]he was in the midst of a campaign when the case began. . . ."); *id.* ("[Some of Nifong's critics have] accused him of 'zeal to make national headlines and win a hotly contested primary.'").

470. See Andersen, *Rape, Justice, and the 'Times,' supra* note 376 (noting that David Brooks and Nicholas Kristof of the *Times* had also criticized the prosecution); see also Peter Applebome, *As Accusation at Duke Festers, Disbelief Gnaws at Suspect's Supporters*, N.Y. TIMES, July 16, 2006, available at <http://select.nytimes.com/2006/07/16/nyregion/16towns.html> (citing character testimonials for one accused and some of the details warranting skepticism for the suggestion this might have "become a cautionary tale of a rush to judgment before facts were known, of a toxic brew of politics and race in the middle of [Nifong's campaign]"); Brooks, *Witch Hunt, supra* note 396 (rejecting any explanation for the "sweeping sociological theories . . . tossed about with such wild abandon a few weeks ago," and noting the "devastating" essays by Stuart Taylor, "one of the most admired legal journalists in the country," in which, based on the lack of DNA evidence, the "seemingly exculpatory" evidence, and the prosecutor's "weak case," Taylor "estimate[d] that there is an 85 percent chance the players are innocent"); Kristof, *supra* note 336 (citing Stuart Taylor's critique, and listing numerous factors why Taylor was "more than 90 percent confident" of the accused's innocence: the time-stamped photos, including one after the alleged attack showing the accuser "looking relaxed, with her clothes in good order"; the "pretty good alibi" based on one accused's cell phone records of seven phone calls, including one to a taxi driver who picked him up; the absence of any DNA evidence; the fact that the accuser was herself a "bundle of complexities," including a criminal record and prior gang-rape charges; the issuance of rape charges when the accuser was about to be detained in a mental health center; her later shifts in position on the rape charges; the other dancer's "crock" statement; and the argument that Nifong was possibly the "real culprit" based on his unprofessional actions violating state bar prohibitions and the strong political "campaign tool" context thereof).

471. See Andersen, *Rape, Justice, and the 'Times,' supra* note 376; see also Anderson, *American Political Culture, supra* note 364 ("Where others saw a case falling apart, the *Times* saw 'a body of evidence to support [Nifong's] decision to take the matter to a jury.'"); Peyser, *supra* note 364 (noting that the *Times* continued with its "hoax . . . long after other media outlets had backed off"); Taylor, *Witness for the Prosecution?, supra* note 364 ("Imagine you are the world's most powerful newspaper and you have invested your credibility in yet another storyline that is falling apart, crumbling as inexorably as Jayson Blair's fabrications and the flawed reporting on Saddam Hussein's supposed WMD. What [do you] do [about a claim shown by mounting evidence to be almost certainly fraudulent]? . . . [Y]ou tone down your rhetoric while doing your utmost to prop up a case that's almost wholly driven by prosecutorial and police misconduct.").

472. See *supra* text accompanying notes 413-422; *infra* text accompanying notes 473-477.

rape.⁴⁷³ These forms had been analyzed in detail in affidavits filed by defense lawyers who claimed that a judge had been calculatedly misled by Nifong and police in issuing earlier search warrants.⁴⁷⁴ The article downplayed this evidence while waxing eloquent about the nurse's subsequent, non-medical record and "much stronger"⁴⁷⁵ statements that Gottlieb remembered in quite specific and technical detail⁴⁷⁶ despite having taken no notes. The authors further cited the miracle memo as a source for the alleged victim's "extreme pain" and bruises that Gottlieb had seen during an interview with the accuser a couple of days later, while acknowledging that the bruises were not mentioned in an accompanying officer's contemporary notes.⁴⁷⁷

The authors also took great pains to ignore or discount any alternative hypothesis for the evidence of swelling thought to be consistent with rape.⁴⁷⁸ Specifically, Wilson and Glater noted the

473. See *supra* text accompanying note 418. Ultimately, the special prosecutors appointed by the attorney general to review the files found no medical evidence to support the accuser's charges. See TAYLOR & JOHNSON, *supra* note 1, at 350.

474. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (synthesizing medical records attached under seal to a motion filed by two defense lawyers for Seligmann, which suggested that there was little or no objective evidence by doctors or nurses to substantiate that a rape occurred).

475. *Id.* (quoting from Gottlieb's notes about the nurse's statements a week later regarding the accuser's out-of-presence-of-police-officers comments—specifically, that during the six to seven hours that they were together, the accuser had never modified her statement after the nurse had calmed her down). Of course, the fact that *none* of this was corroborated by the Duke University Medical Center medical records seemed not to phase the authors. See *supra* text supporting note 418; see also Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting that the article "glosses over the contradiction" between the nurse's own statements and her written report).

476. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (quoting Gottlieb's notes as saying that "the victim had edema and tenderness to palpitation both anally and especially vaginally" and that it was "[very] painful . . . [for her] to have the speculum inserted vaginally"; further quoting Gottlieb's notes of a later conversation with the nurse to the effect that the "blunt force trauma" was "consistent" with the sexual assault alleged by the accuser).

477. *Id.* (stating that Gottlieb's memo said that during an interview with the accuser, a female officer "took photographs and confirmed that '[the accuser] had the onset of new bruises present,'" but also noting that "[t]he female officer's report [did] not mention bruises"). This discrepancy was quite important, but its importance was largely ignored, which is a pattern typical of the authors' treatment. See TAYLOR & JOHNSON, *supra* note 1, at 262, 265-66 ("Despite Mangum's sometimes story of being hit in the face, strangled, and having her head smashed against a sink", Gottlieb did not explain [the bruises]' absence from the photos from Reid's own report, and from the many reports created to record Mangum's frequent hospital visits."). Duff Wilson actually saw the photos as a result of contact with counsel for David Evans *prior* to putting his story to press, which refuted any such bruising. See *id.* at 263.

478. Compare Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (responding to the again gap-filling nature of Gottlieb's notes by stating that "[b]efore Sergeant Gottlieb's notes were turned over to the defense, . . . defense lawyers had argued publicly that the woman's swelling and tenderness could have been caused by consensual

accuser's four escort service jobs at hotels and motels on Friday through Sunday⁴⁷⁹ (including one in which the accuser performed with a vibrator for one couple),⁴⁸⁰ "jobs" that the authors had previously (and hilariously) indicated were of an unclear nature.⁴⁸¹ They further took at face value the accuser's driver's conveniently revised recollection that the sex he had with the accuser took place not during the weekend just prior to the alleged Monday incident, but the previous weekend!⁴⁸² Lastly, they referenced the accuser's denial that she had had sex that weekend and stated that *no* evidence contradicted her⁴⁸³—a hugely uncritical, non-skeptical conclusion in light of the above factors and the accuser's mountain of credibility issues.

The article's handling of the issue of DNA is particularly fraudulent. The authors made only a terse, half-correct citation to Nifong's original position that DNA was pivotal in showing conclusively which lacrosse players were suspects while ignoring his

sexual activity in the days before the Monday-night party"), *with Taylor, Witness for the Prosecution?*, *supra* note 364 (noting that the mild vaginal swelling could well have been caused by "consensual sexual activities, including [her admitted recent] perform[ance] with a vibrator"). Wilson and Glater failed to include a defense contention cited in an earlier article that the swelling could have been caused by the accuser's menstrual cycle. See Wilson & Glater, *Prosecutor's Silence*, *supra* note 216; cf. TAYLOR & JOHNSON, *supra* note 1, at 33 (quoting an expert forensic nurse who trains sexual assault nurse examiners as stating that such swelling or edema could be attributed to several possible causes, including sex within twenty-four hours; frequent sexual activity; Tricyclic antidepressants such as Flexeril, which the accuser took; or other drugs with comparable properties, and noting that the accuser fulfilled all four options); *id.* at 36-37 (faulting police and prosecutors for failing to investigate "ample signs" that the accuser was a prostitute and that the vibrator and multiple partners could account for the swelling found at the hospital).

479. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that the accuser had two of these "job[s]" on Friday, one on Saturday, and one on Sunday).

480. See *id.*

481. See Wilson & Glater, *Prosecutor's Silence*, *supra* note 216 (stating that "[t]he exact nature of [her] meetings [with clients in various hotel rooms] was not disclosed"). *But cf.* TAYLOR & JOHNSON, *supra* note 1, at 24 ("Some call [four private hotel room engagements with various escort customers] prostitution."). The authors took some pains to quote the accuser's statements to police, explaining she was a *stripper*, not a *prostitute*: "[S]he [said that she] had been to one event in the past where she thought a male at the party was nice, so after the party they went out and had consensual sexual relations." Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. Again paraphrasing the police statement, the authors added, "but just that once." *Id.*

482. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that the driver's DNA was "the only positive match" with samples from the accuser). Of course, this convenient revision avoided contradicting the accuser's statement that she had not had sex for a week before the Monday lacrosse party. See TAYLOR & JOHNSON, *supra* note 1, at 159.

483. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

bold, *volte-face* on this issue.⁴⁸⁴ The article then quoted Nifong at length the day following the release of non-DNA-linkage exculpatory results about handling this the pre-DNA “old-fashioned way” via witness testimony.⁴⁸⁵ It cited Nifong’s maybe-condoms-were-used argument⁴⁸⁶ without disclosing that his own files (which the authors claim to have reviewed) refuted this line of reasoning.⁴⁸⁷ Moreover, Wilson and Glater did not acknowledge or discuss the sheer unlikelihood, if not near impossibility, of the absence of DNA evidence connecting the accuser to the three accused in light of the forcible

484. See *id.* (quoting a statement from Nifong to the court that DNA tests “would ‘show conclusive evidence as to who the suspect(s) [were] in the alleged violent attack upon this victim’”). The article’s authors did *not* quote the other half of the Nifong statement to the effect that DNA would “immediately rule out any innocent persons.” Taylor, *Witness for the Prosecution?*, *supra* note 364 (quoting the other half of Nifong’s statement to the court); see TAYLOR & JOHNSON, *supra* note 1, at 266-67. This statement was contained in Nifong’s affidavit to the court for a nontestimonial identification order to get DNA samples from all Duke lacrosse players. TAYLOR & JOHNSON, *supra* note 1, at 59 (“This was nothing short of an assurance that he (Nifong) would end the case and admit the players’ innocence if the DNA results proved to be negative.”).

485. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. The authors did not “explain how blatantly” Nifong was behaving in shifting his position. See Taylor, *Witness for the Prosecution?*, *supra* note 364. A lawyer’s letter to the editor gave a brutally incisive critique of Nifong’s “old fashioned way” comment and the paper’s credibility for uncritical acquiescence therein:

There’s a big difference between convicting a defendant without DNA evidence because the technology did not exist and convicting a defendant when DNA is available and the DNA results are negative. In the first instance, there would have been no DNA evidence to counter the testimony of witnesses. In the second, such DNA evidence exists and is exculpatory.

Thomas F. Schlafly, *Duke and DNA Evidence*, N.Y. TIMES, Aug. 29, 2006, available at <http://www.nytimes.com/2006/08/29/opinion/129duke.html>.

486. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. The authors noted that the woman had “initially told” doctors and nurses that no condoms were used, but then responded with Nifong’s proffered contradictory explanations—maybe the victim didn’t notice, or maybe the rape exams had missed semen. *Id.* The authors added another explanation—the “differing versions” as to ejaculations that the accuser had given to the nurse and Officer Himan. *Id.* The authors then added the argument that “[o]utside experts” say it is “possible” for a rapist to leave behind no DNA. *Id.* But that statement is itself suspect because it is not consistent with the facts of this case, which would have made such absent DNA extraordinarily unlikely. See *infra* text accompanying notes 487-497. Moreover, the selective reliance on “[o]utside experts” is itself deceiving. Surely, in light of the extraordinary attention given to DNA in the post-O.J. Simpson era, including its extensive use in capital punishment cases, the *Times* reporters had access to experts who would have told them how extraordinarily unlikely it would be to have no DNA under the circumstances alleged by the accuser. See *infra* text accompanying note 487. If the reporters had such but did not use it, this would be a further example of their ignoring contradictory evidence. See *supra* text accompanying notes 406-409. If they did not seek such for fear that it would refute their “experts,” this is another example of “purposeful avoidance of truth.” See *infra* text accompanying notes 525-534, 537.

487. See TAYLOR & JOHNSON, *supra* note 1, at 267.

nature of the alleged rape in a confined space—a bathroom—over a thirty minute period.⁴⁸⁸

Having failed to tie *any* of the three accused to the rape through DNA directly, the authors then flaunted other DNA pseudo-evidence⁴⁸⁹ that supposedly filled this Grand Canyon-esque chasm. They detailed police evidence of semen by a non-accused (and presumably innocent) lacrosse player on the floor of the bathroom, the same location where the accuser claimed to have spat semen.⁴⁹⁰ They further referenced a towel found in the hall that contained the semen/DNA of one of the three accused and linked that to the accuser's statement that her vagina had been wiped with a towel.⁴⁹¹ However, there was a huge hole in this DNA "evidence" large enough to drive a queue of Sherman Tanks through—neither the floor-spat semen nor towel-absorbed semen contained *any* of the accuser's DNA, an extraordinary medical improbability (if not impossibility)⁴⁹² and one which would have rendered such DNA useless as testimony.⁴⁹³ So either the accuser was lying, or the spitting/towel statements

488. See TAYLOR & JOHNSON, *supra* note 1, at 162, 169, 205, 266-67 (quoting Joseph B. Cheshire, lawyer for David Evans, as saying that a three-person gang rape would have left DNA even if they used condoms, and noting that there was "expert consensus" on point; that after the release of the DNA test at a defense counsel press conference, "serious lawyers became increasingly unwilling to put their credibility on the line" by defending Nifong; and that Wilson and Glater had failed to quote any experts for the view that the alleged circumstances would have resulted in "DNA evidence all over the place"); see also *id.* at 96-97 (citing an article quoting the chair of the Department of Medical Ethics at the University of Pennsylvania to support the conclusion that a lack of DNA under such circumstances was "not merely unlikely" but "virtually impossible"); Anderson, *Desperate Times*, *supra* note 384 ("[T]he *Times* fails to point out that had the attack gone as [the accuser] described to the police, there is no way that there could have been *no* DNA traces left on the woman. One cannot physically attack someone in the manner that Nifong has claimed and *not* leave evidence."); Taylor, *Witness for the Prosecution?*, *supra* note 364 (summarizing the accuser's allegations, noting the *Times*' expert's statement about the possibility of no DNA being left, and concluding that "it's hard to imagine the crime alleged to have happened here leaving [no DNA]"); cf. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 ("In her subsequent detailed accounts to doctors and detectives, files show, the accuser said she was raped vaginally, anally, and orally. . . . [S]he said the men . . . had held, pushed and kicked her during the attack.").

489. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. *But cf. id.* (conceding that the tests' "relevance is unclear").

490. *Id.* *But cf. id.* (citing the non-accused's lawyer as saying such "had come from other innocent sexual activity").

491. *Id.* *But cf. id.* (referencing the lawyer for David Evans, one of the accused, as stating that "th[e] towel had nothing to do with her accusation . . . and that the semen came from other activity").

492. See Anderson, *Desperate Times*, *supra* note 384 for a scathingly brilliant critique.

493. See *id.* (noting that the bathroom semen was not relevant evidence); see also TAYLOR & JOHNSON, *supra* note 1, at 267 (noting that this was "evidence" that not even Nifong viewed as relevant).

contradicted Nifong's proffered statements that condoms may have been used.⁴⁹⁴ The *Times* and Nifong could not have its cake and eat it too. As one critic said, the paper's "dishonesty . . . is breathtaking."⁴⁹⁵

In sum, the DNA "evidence" that the authors supplied actually provided further compelling evidence that the accuser was lying.⁴⁹⁶ Is there even a hint of this obvious conclusion—one that a competent, open-minded, inquisitive reporter would draw? No, nay, never. And the clear corollary? The *Times* "is not interested in asking obvious questions that go to the heart of this case."⁴⁹⁷ More generally, the world's most highly touted and influential newspaper "does not ask serious questions when clear discrepancies are raised."⁴⁹⁸

Parallel problems arise when one scrutinizes the article's handling of the identification/line-up issue. The core of the authors' problem is that Gottlieb's magical recollection memo, which Wilson and Glater admitted was "drawing intense scrutiny,"⁴⁹⁹ "closely correspond[ed]"⁵⁰⁰ to the descriptions of the three accused despite *contemporary* notes of an accompanying officer⁵⁰¹ that boldly contradicted these descriptions. Wilson and Glater acknowledged this

494. See Anderson, *Desperate Times*, *supra* note 384.

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.* ("[I]t also tells us that when an agent of the state lies, and uses the prosecutorial apparatus in a dishonest and abusive way, the agent can find refuge in the *New York Times* if the desired outcome can validate the *Times'* politically-correct view of the world Having been burned once [by the Tawana Brawley story], the editors this time apparently have decided that they will continue to press the lie no matter what the truth may be. They will stand by their man, Michael Nifong, and stand by him to the bitter end. But they will stand by him.").

499. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (explaining that this scrutiny from defense counsel was the result of the fact that Gottlieb's notes "strengthened" the prosecutor's case and had not been provided to defense lawyers until after they "had made much of the gaps in the earlier evidence").

500. *Id.* Without noting that Gottlieb's "descriptions" were recorded much later, the authors merely stated that "the two investigators who interviewed her at home recorded the conversation differently." *Id.* Gottlieb's notes were supposedly "more detailed and correspond[ed] more closely to the men later arrested." *Id.* Of course, none of the three accused bore *any* resemblance to the 260-70 pounder from Officer Hinman's notes. See *id.* One of the accused, Collin Finnerty was six feet five inches tall and "rail-thin." See TAYLOR & JOHNSON, *supra* note 1, at 261.

501. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting the widely varying description "recounted in one investigator's notes," and the fact that Officer Benjamin W. Himan's contemporary handwritten notes described all three as "chubby or heavy," including one of whom was "[h]eavy set [with a] short haircut [and weighing] 260-70 [pounds]"). Of course, the authors do not note, or concede that notes taken during interviews of witnesses, "imperfect as they are, tend to be the most reliable record of what witnesses saw and heard." TAYLOR & JOHNSON, *supra* note 1, at 41.

inconsistency,⁵⁰² which others have termed “irreconcilable,”⁵⁰³ then tried to bolster Gottlieb’s credibility by noting that he was “by far the more experienced [officer].”⁵⁰⁴ Of course, the “obvious inference” was that Gottlieb lied.⁵⁰⁵ But the authors treated him as the more believable source. *Incroyable*.

Equally indefensible was the authors’ treatment of the broader evidence as to the other accuser-identification opportunities. They mentioned, but did not emphasize or discuss, the implications of the fact that the accuser did not identify one accused as an attacker during her first opportunity⁵⁰⁶ or another accused as an attacker during the second and third opportunities.⁵⁰⁷ Indeed, she only picked out two accused as attackers during a rigged⁵⁰⁸ line-up that only

502. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181 (noting that “[t]he difference in the police accounts could not be explained”). Byron Calame, the *Times* public editor, later criticized this “striking example” of the paper’s decision to portray Gottlieb as “more credible” and more “prominently listed” than Officer Benjamin W. Himan. Calame, *Revisiting*, *supra* note 371. He noted also that Wilson had been informed that Gottlieb “relied [largely]” on Himan’s notes. *Id.* This, according to Calame, was a “flawed” judgment, “allowing critics to foster a perception of the paper as leaning toward Mr. Nifong.” *Id.*

503. Smolkin, *supra* note 143 (“I was really struck that [the *Times* reporters] used this report that I had seen, but they used it basically 180 degrees from how I was planning to use it”) (quoting Joe Neff of the *News & Observer*). Neff was one of the few journalists given high marks for professional and hard work throughout the Duke rape case. See *supra* note 9.

504. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. Of course, the “obvious implication” was that Officer Himan “made a rookie mistake. Make that three rookie mistakes. Big mistakes.” TAYLOR & JOHNSON, *supra* note 1, at 266 (emphasis in original). Wilson and Glater then disclosed that Gottlieb was the subject of an unrelated internal affairs investigation. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

505. See Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting the inconsistency between the descriptions of all three in Officer Himan’s contemporaneous notes and Gottlieb’s “miraculous[] match” in his later memo to support the suggestion that the Wilson and Glater article “avoids the obvious inference: Gottlieb’s version was made up to fit the defendants”).

506. See Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. From a group of twenty-four pictures which did not include pictures of Finnerty and Evans, the accuser identified one of the three accused, Reade Seligmann, as at the party, *not* as an attacker. See *id.* The authors quoted the accuser from Officer Michele Soucie’s notes as saying that the identification process was “harder than [she] thought” it would be. *Id.*

507. See *id.* Officer Benjamin W. Himan wrote in his report that the accuser was “unable to remember anything further about the suspects,” and Officer Richard D. Clayton stated in his notes that “[s]he again stated the photos looked the same.” *Id.*

508. Interestingly, the *Times* (like most other media) ignored a detailed letter critiquing the identification debacle by Duke Law Professor James Coleman on June 13 [2006] in the *News & Observer*, in which Coleman also suggested that Nifong remove himself and request that the attorney general appoint a special prosecutor. See TAYLOR & JOHNSON, *supra* note 1, at 239-240. Even Wilson and Glater viewed the identification as “one of the most hotly disputed elements” of the case. Wilson & Glater, *Files From Duke*

included the forty-six white Duke lacrosse players.⁵⁰⁹ Nor did the article discuss the significance of the fact that one of the two identified players (David Evans) was identified only if he had a mustache.⁵¹⁰ The authors did note that his (impliedly suspect) lawyers and family refuted any suggestion that he had *ever* had a mustache.⁵¹¹ Obviously, the authors did not think it necessary (or advisable) to check the readily available and widely circulated pictures⁵¹² of the entire team or otherwise investigate this extraordinarily important inconsistency.⁵¹³

Rape Case, *supra* note 181. They quoted Evans's defense lawyers as calling the process "fatally flawed," and quoted one of the accused's unidentified lawyers, who disparaged it as "a multiple-choice test with no wrong answers, a pin-the-tail-on-the-donkey identification." *Id.* Of note, in their earlier, skeptical article, the authors had also attributed the claim that the identification procedure was "fatally flawed" to "[s]ome experts." Wilson & Glater, *Prosecutor's Silence*, *supra* note 216. The authors noted that the identification violated both Durham and U.S. Department of Justice standards requiring a minimum of five non-suspect persons for each suspect, and further noted that defense lawyers had filed motions to bar the accuser's tainted identification at trial. Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181; *see also* Taylor, *Witness for the Prosecution?*, *supra* note 364 (referring to the Nifong-arranged identification as "an outrageously suggestive, pick-any-lacrosse player session that grossly violate[d] local and state rules and (in [the author's] view) the U.S. Constitution"; and noting that this defective identification process resulted in selection of a later-indicted defendant with "an airtight alibi").

509. *See* Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181. The authors tried to bolster the accuser's credibility by suggesting that the transcript of the photo-by-photo identification "shows some precise recollections, three weeks after a relatively brief encounter with a large group of white strangers." *Id.* What the comment more logically does is show the anomaly of such in light of her previous inability to remember *any* details. *See supra* notes 505-506. Of course, the authors drew no such negative inference, nor did they disclose that the accuser made other significant errors, such as identifying one lacrosse player as talking to her co-dancer in the front yard at a time when he was in Raleigh, twenty miles away. TAYLOR & JOHNSON, *supra* note 1, at 266.

510. *See* Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181.

511. *Id.*

512. *See supra* note 3.

513. Nor did the authors ask any of the hundreds of coaches, fellow students, Duke faculty and employees, etc., whether Evans ever had a mustache or had one on the date in question. One would think any starting journalist would have pursued such basic inquiries, but it was easier to minimize the gross anomaly of the mustache identification by imputing the contradictory evidence *only* to defense lawyers and family, who were portrayed by the authors as obviously self-interested parties of diminished credibility. *See* Wilson & Glater, *Files From Duke Rape Case*, *supra* note 181; *supra* text accompanying notes 468-69. Maybe it was just laziness that caused the authors to refrain from doing their own investigation, or maybe they did not want to find such photographic—or other—contradictory evidence, as such might pose additional problems for their accuser, their prosecutor, and their thesis. *See infra* text accompanying notes 525-34, 537. The authors also ignored a corroborating factor they cited in their earlier article following their discussion of the mustache controversy: that Evans had passed a lie detector test by an expert his lawyers had hired. *See* Wilson & Glater, *Prosecutor's Silence*, *supra* note 216.

In conclusion, the August 25 story provides a veritable treasure trove of evidence of constitutional malice: (1) common law malice of a preconceived story line reflecting the *Times* politically correct prism and prejudices;⁵¹⁴ (2) deviation from accepted journalistic practices⁵¹⁵ and the paper's own standards;⁵¹⁶ (3) extensive evidence in the article and in prior publications contradicting its pro-Nifong/pro-accuser conclusions;⁵¹⁷ (4) the inherent implausibility of a questionable accuser's accusations⁵¹⁸ absent DNA testimony;⁵¹⁹ (5) the widely cited distortions, omissions, and understatement of contradictory or refutatory evidence;⁵²⁰ and (6) the extraordinary misconduct of Nifong and police investigators that seemed highly probable⁵²¹ to all but the "maimed[.]. . . the halt, and the blind,"⁵²² i.e., the manipulable authors⁵²³ of the article and a manipulative, see-no-evil-of-the-prosecutor editorial board.⁵²⁴

In its most discursive analysis of constitutional malice, *Harte-Hanks Communications, Inc. v. Connaughton*,⁵²⁵ the Supreme Court distinguished a failure to investigate from the scenario before the Court, where the defendant avoided pursuing the most obvious

514. See *supra* text accompanying notes 23-25, 363-400.

515. See *supra* text accompanying note 386-88; *infra* text accompanying note 540.

516. See *supra* text accompanying notes 365-370, 386-400.

517. See *supra* text accompanying notes 406-513.

518. See *supra* text accompanying notes 5, 434-35, 472-498.

519. See *supra* text accompanying notes 380-384, 395-396, 409-410, 416, 416, 417, 420, 429-436, 471-497.

520. See *supra* text accompanying notes 25, 363, 396-401, 409-412, 416 461-512 and *infra* text accompanying notes 535-544, for examples; see also TAYLOR & JOHNSON, *supra* note 1, at 265-67 (detailing the "most misleading aspects of the article[.] . . . its selective presentation of evidence and omissions"); Smolkin, *supra* note 143; Taylor, *Witness for the Prosecution?*, *supra* note 364 (noting that the Wilson and Glater article "highlights every superficially incriminating piece of evidence in the case, selectively omits important exculpatory evidence, and reports hotly disputed statements by not-very-credible police officers and the mentally unstable accuser as if they were established facts"). See ELDER, DEFAMATION, *supra* note 3, § 7:13, for a discussion on omitted matter and distorted or slanted matter as evidence of constitutional malice.

521. See *supra* text accompanying notes 1-5, 11-14, 18-20, 378-381, 382-384, 396-98, 409-449, 463-495, 498-512.

522. Luke 14:21 (King James).

523. See TAYLOR & JOHNSON, *supra* note 1, at 120; *supra* text accompanying notes 365, 375-385, 396-513.

524. TAYLOR & JOHNSON, *supra* note 1, at 260 (noting that after stories by *Newsweek* and by Joe Neff in the *News & Observer*—who had access to the 1,850 pages turned over by the prosecutor—were hugely critical of Nifong's case, the *Times* assigned Duff Wilson, an individual "very much a part of the journalistic pack committed to the now increasingly discredited presumption-of-guilt approach," to "reassess, among other things, his own work"); see also *supra* text accompanying notes 361-63, 370-85 396-513.

525. 491 U.S. 657 (1989).

sources of verifying or refuting evidence.⁵²⁶ In that case, the pivotal issue was the credibility of a party to a series of disputed taped conversations with plaintiff-candidate for judge.⁵²⁷ The editors directed its reporters to interview every witness to the conversation except one, the source's sister—a delict the Court found “hard to explain” in light of editorial discussions with both the plaintiff and the source affirming that the sister could verify the charges.⁵²⁸ The Court characterized the reporters' decision not to interview her as “utterly bewildering”⁵²⁹ in light of the defendant's commitment of extensive resources. However, if it had serious concerns about the source's credibility but was “committed to running the story,” then not interviewing her made sense, as a denial “would quickly put an end to the story.”⁵³⁰

The Court in *Harte-Hanks* also found that the defendant's refusal to listen to tapes in its possession of an interview with the pivotal source supported a conclusion of constitutional malice.⁵³¹ Much of what the source said was disprovable or provable by listening to the tapes. Accordingly, the refusal to listen to them gave rise to the inference that the defendant was “motivated by a concern that they would raise additional doubts”⁵³² regarding their source's veracity, i.e., the “product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity”⁵³³ of her accusations. This was clearly quite different from a failure to investigate—it was a “purposeful avoidance of the truth.”⁵³⁴

In the August 25 story, the authors and the *Times* editorial staff did something measurably worse than the reporters in *Harte-Hanks*. They refused to pose the pivotal questions or pursue the logical or obvious inferences, and tried to obfuscate the truth under a thin veneer of false pseudo-neutrality.⁵³⁵ And the bloggers, much of the journalistic public, and many of its readers saw the *Times* coverage for what it was—at worst, a fabricated hatchet job to keep Nifong and its huge reputational investment in him alive;⁵³⁶ at best, a

526. *Id.* at 692.

527. *See id.* at 659.

528. *Id.* at 668, 682.

529. *Id.*

530. *Id.*

531. *Id.* at 692-93.

532. *Id.* at 684.

533. *Id.* at 692.

534. *Id.*

535. *See supra* text accompanying notes 458-462; *infra* text accompanying notes 540-542.

536. *See supra* text accompanying notes 375-85, 396-401, 410-513.

“purposeful avoidance of the truth.”⁵³⁷ Its readership and the body politic deserved better from a company whose vaunted reputation and courage gave rise to the *New York Times Co. v. Sullivan* rule,⁵³⁸ which frustrated Southern segregationist public officials’ aggressive attempts to bludgeon “outside agitators”⁵³⁹ into silence under the heavy weight of the common law of libel.

Maybe the aggressively politically correct *Times* and its equally haughty emulators will return to the traditions of good old-fashioned, fact-intensive journalism without partisan objectives.⁵⁴⁰ Maybe they will absorb the potent message of one of the defense lawyers who told them what their lawyers and editors should have but didn’t—that the media erroneously believes that a “perverted notion”⁵⁴¹ of “balance requires them to report anything someone says, whether it’s true or not.”⁵⁴² Maybe they will take to heart the critique of one of their own, that sometimes “simple decency” requires a rush-to-judgment media to recognize a “more complicated reality” which, sadly, many were unwilling to do.⁵⁴³ And maybe even apologize. But try not to hold your breath⁵⁴⁴—you may asphyxiate on your sense of outrage.

IV. CONCLUSION

The abuses chronicled by Stuart Taylor, Jr. and K. C. Johnson in *Until Proven Innocent* make for a mesmerizing read. Nifong has been disbarred and universally vilified. Litigation against the City of

537. *Harte-Hanks*, 491 U.S. at 692.

538. See *supra* text accompanying notes 28, 35-36.

539. 376 U.S. 254, 294 (1964) (Black, J., concurring).

540. See Smolkin, *supra* note 143 (“The lessons of the media’s rush to judgment and their affair with a sensational, simplistic storyline rank among journalism’s most basic tenets: be fair; stick to the facts; question authorities; don’t assume; pay attention to alternative explanations.”); see also *id.* (quoting Stuart Taylor’s response to a question about what the media could learn from the media’s Duke debacle: “Read the damn [defense counsel] motions If you’re covering a case, don’t just wait for somebody to call a press conference. Read the documents.”).

541. Elder, *Media Jabberwock*, *supra* note 105, at 571 n.148.

542. Smolkin, *supra* note 143 (quoting Jim Cooney, defense counsel for Seligmann).

543. See Brooks, *Witch Hunt* *supra* note 396; see also Anderson, *American Political Culture*, *supra* note 364 (“[E]ven now the paper is loathe to admit that this entire case was a piece of fiction that Nifong and the police hatched—and was aided and abetted by false coverage from the ‘Newspaper of Record.’”).

544. See e.g., Anderson, *American Political Culture*, *supra* note 364 (“[T]he *Times* has not editorialized any mea culpa even though it rushed to judgment.”); Peyser, *supra* note 364 (“Will the *Times* make reparations now? . . . For shame.”); Smolkin, *supra* note 143 (“The one thing I’m quite certain I didn’t see was an apology [from the *Times*]”) (quoting Daniel Okrent, the *Times* former public editor); Sowell, *New York Times Buried*, *supra* note 364 (noting the absence of any suggestion that the *Times* plans to apologize and referencing its parallel failure in the Tawana Brawley case).

Durham, Duke University, and selected employees may provide both compensation to those injured and deterrence to those defendants and others similarly situated in the future. So far, the media and its supposed exemplar of virtuous journalism remain unscathed, except perhaps (and importantly) in the courts of public opinion and history. But can we assume that the media has learned anything from the debacle they fertilized with a vengeance?

A thoughtful critic provides a sad commentary on the state of modern journalism and the lessons to be learned from the media's collective egregious misfeasance and malfeasance in mishandling the Duke lacrosse fabricated rape charges:

All too soon, the next lurid crime story will explode into the headlines. The media will have a chance to show what they learned from this fiasco. Will they remember that sometimes the accused are innocent? Will they proceed with caution, combing through the facts and avoiding sweeping generalizations? Will they remind viewers and readers, "It looks bad now, but not all the evidence is in"?

Maybe some journalists . . . really will apply more prudence and skepticism in the future. But the media's collective memory is notoriously short, and competitive pressures are awfully hard to resist. Official assurances—whether about the guilt of privileged athletes or the existence of weapons of mass destruction—can persuade, even when they shouldn't. Journalists in [*Times* Executive Editor Bill Keller's phrase, can get "sucked into the undertow."

So does another rush to judgment await some hapless citizen thrust into the media's glare?

Almost certainly.⁵⁴⁵

Does this mean that the law is powerless in the face of such a jaundiced view of the inevitability of media "rush to judgment" scenarios? Not at all. Even if the media miss the lessons from the Duke lacrosse fabricated rape mess, the law need not. It can incorporate the lessons learned from the unconscionable media mistreatment and maltreatment of the three Duke lacrosse accused and the other maligned members of the team. How? By treating all such involuntary participants, even those vigorously defending their reputations, as private persons, not public figures.⁵⁴⁶ By denying fair report and neutral reportage protection to published accounts of miscreants defaming future victims of media-generated and media-sensationalized witch hunts.⁵⁴⁷ By appending the label "calculated falsehood"⁵⁴⁸ to media attempts to make fools of their readers and

545. Smolkin, *supra* note 143.

546. See *supra* text accompanying notes 36-140.

547. See *supra* text accompanying notes 141-362.

548. See *supra* text accompanying note 35.

viewers by parroting under a false veneer of pseudo-neutrality lies fed to them by co-complicit sources, whether governmental or private.⁵⁴⁹ To ignore these lessons and discount the awful experiences of the Duke lacrosse players would be the ultimate tragedy.

549. See *supra* text accompanying notes 363-544.