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TRUTH AND CONSEQUENCES: FIRST AMENDMENT
PROTECTION FOR ACCURATE REPORTING ON
GOVERNMENT INVESTIGATIONS

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I. INTRODUCTION

Well before the purported Islamic charity Global Relief Foundation was named a “Specially Designated Global Terrorist” by the United States government, at least six news organizations reported that it was the target of a federal investigation into funding terrorism.¹ These reports came in the immediate aftermath of the September 11, 2001 attacks, when the government announced that it would make no distinction between those who committed terrorist acts and those who harbored them, and would hold responsible those who served as fronts or funding mechanisms for terrorist organizations.² By executive order, President George W. Bush declared a national emergency to address the threat of terrorist attacks and specifically authorized the government to freeze the assets of people and organizations that supported or were associated with terrorism.³

Shortly after this executive order was issued, the press began to report that Global Relief was one of the organizations whose assets were set to be frozen. Within weeks, Global Relief sued each of the press outlets for defamation.⁴ Normally, the press would be able to defend itself through the common law fair report privilege, which shields most reporting concerning official government accusations

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1. See *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973, 975-80 (7th Cir. 2004), *aff'g* 31 Media L. Rep. 1468 (N.D. Ill. 2003). Global Relief unsuccessfully challenged its designation as a “Specially Designated Global Terrorist” in a separate lawsuit. See *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002).

2. See *Global Relief*, 390 F.3d at 975.

3. *Id.*

4. *Id.* at 979.

from liability. But the fair report privilege was not a viable defense here, as there was no “official” report or proceeding to cite, nor any on-the-record government source to point to.

The press defendants set out to establish the truth of the reports by citing officials who later came forward to confirm that such an investigation had been ongoing for years. But the standard of proof required to establish the truth of the reports was in dispute. Global Relief argued that the defamatory sting of the reports was the accusation that it was a funding mechanism for terrorists, and that the common law republication doctrine in defamation actions made the press just as responsible for that accusation — and for establishing its truth to prevail — as the government sources they relied upon.⁵ Proving the truth of the report, they argued, meant proving the underlying accusation, not the fact that it was made by another.⁶ The district court granted summary judgment to the press defendants based on the accuracy of their reports that the government was conducting an investigation, and the court of appeals affirmed the judgment.⁷ Both courts essentially ignored the fundamental precept of defamation law argued by Global Relief,⁸ which would have warranted a different level of truth analysis. Without question this was the right result, but was it legally sound in view of the republication doctrine? What if the courts had mechanically applied that doctrine and reached a different result? Could a finding of liability for accurately reporting the fact of a government investigation and accusation coexist with the First Amendment? This article sets out to answer these questions.

The *Global Relief* case brings into focus a striking disconnect between constitutional policy and well-established legal doctrine that has received little attention yet has the potential to eliminate coverage of significant news concerning government accusations and investigations. The problem comes into focus where government targets claim they were defamed by official finger-pointing and, more specifically, by press coverage republishing the accusations. In most instances, the common law fair report privilege will

5. See *id.* at 980, 982, 987, 990. Global Relief made similar arguments to the District Court. See *Global Relief*, 31 Media L. Rep. at 1472 (N.D. Ill. 2003).

6. *Global Relief*, 390 F.3d at 975.

7. *Id.* at 973, 980-81.

8. *Global Relief*, 31 Media L. Rep. at 1475; *Global Relief*, 390 F.3d at 986-90.

apply to shield the press from having to prove that which the government itself has not yet proven. The remaining cases in which no privilege applies are few, yet ultimately beg a vitally important question: what does it mean for the press to truthfully report on a government charge of wrongdoing? These cases, such as *Global Relief*, concern information of enormous public interest and import, and occur in an area where the First Amendment would seem to promise the greatest protection, but where the Constitution's reach does not necessarily extend. Truth is the obvious defense to a claim of defamation based on accurate republication of a government accusation or investigation. A showing of truth would render impossible the plaintiff's constitutional burden of proving falsity and obviate the need for any fault analysis.⁹ Yet this is where the disconnect lies, for there are two levels of truth in such cases, with radically different burdens of proof which may be outcome determinative, and often no clear way to tell which level of truth will be applied in any given case.

The first, intuitive level of truth in such cases concerns the fairness and accuracy of a news report on a government charge. The fundamental question here is, did the press get it right? This is the sort of truth journalists principally do — and should — concern

9. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (holding that there is “a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages”). Aside from truth, the other primary constitutional defense, which presupposes falsity, is a showing that one lacked fault, which the plaintiff is required to prove as well. *Id.* This may be an effective defense in cases involving accurate reports. See RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 5:29 (2d ed. 2001) (“[A]n accurate report by the media of criminal charges against the plaintiff . . . frequently receives complete first amendment protection [based on lack of actual malice or a showing of neutral reportage] even if the underlying charges ultimately prove false.”). Yet there are problems with a fault defense in such cases. First, the nearly insurmountable fault standard of “actual malice,” applicable in public figure libel cases, will not apply in most cases. Targets of law enforcement typically are private figures, meaning a fault standard of negligence would apply in most states. Negligence claims are rarely susceptible to motions for dismissal or summary judgment, and unpredictable at trial given the risks associated with a “battle of experts” and the virtually unassailable leeway afforded juries in determining reasonable behavior. And even in these cases, the truth standard will necessarily affect the outcome, for any finding of fault necessarily depends on what a reasonable journalist should have done to determine the truth. Will the question be whether the reporter failed reasonably to ascertain the contents of the government's allegations, or whether the reporter failed to independently investigate the veracity of those allegations?

themselves with in reporting on government. The second and deeper level is concerned with the truth of the underlying charge itself, regardless of whether it was accurately recounted.¹⁰ The question here is, did the government get it right? While it does not seem appropriate to hold the press accountable to this deeper level of truth when it is relying on the government and fulfilling its core First Amendment function by faithfully reporting the government's word and deed to the public, a mechanical application of the common law republication doctrine does just that. This general rule of defamation law holds any republisher of a defamatory falsehood just as culpable as the original speaker.

The limited exceptions to this rule, for the most part, come in the form of common law privileges, now often codified, which vary from state to state in degree of protection. Principal among them is the fair report privilege, which protects from liability accurate press reports of official government proceedings. Generally, the privilege protects reporting on statements made in *official* government charges or proceedings, such as public hearings, records and court cases. What the patchwork of state privilege law fails to protect in many instances are accurate reports on government accusations or investigations that precede formal charges or proceedings, or statements regarding such investigations made by government officials that are not part of any official proceeding. These are the cases we are concerned with here.

While the First Amendment free speech and press guarantees strongly promote accurate reporting on the statements of government officials, there is no principle of First Amendment law that shields the press from operation of the republication doctrine. Some have advocated for a First Amendment-based fair report privilege, though none has been recognized.¹¹ Even if a constitutional privilege was recognized and broadly defined to cover reports on

10. The concept of two different levels of truth and falsity analysis has been acknowledged by the U.S. Supreme Court, while also recognizing that it is "the second level of falsity that would ordinarily serve as the basis for a defamation action." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.7 (1990) (discussing two levels of falsity where statement of opinion implies fact).

11. Katheryn Dix Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 522 (1979); Leslie C. Levin, Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266, 1269 n.26 (1977).

unofficial government proceedings, it might not provide sufficient protection. The very concept of a fair report privilege suggests a specific government statement that has been fairly and accurately recounted, one that can be readily proffered and relied upon.¹² Such a showing of pre-publication reliance may be impossible in cases involving unofficial reports on investigations or accusations, particularly if based on the statements of a confidential source. Both legal and ethical considerations would preclude the reporter from identifying the source, rendering the privilege useless.¹³ In contrast, a simple truth defense avoids these problems by permitting truth to be shown through the fruits of discovery, whereby one can establish the fact of the investigation or accusation through persons other than the source.

Another way in which the First Amendment might mitigate the harsh effect of the republication doctrine is through operation of the neutral reportage privilege, though its usefulness in these cases is limited. This privilege has not been widely accepted and would apply only in the small minority of cases where the government's target is a public figure.¹⁴ Despite these limitations, what both the

12. See ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 7.3.2.2.7, at 7-35 & n.128 (3d. ed. 2002) ("The privilege usually applies to statements that are identified to the reader as part of official public proceedings, records, or statements. It does not extend to statements that the ordinary reader would interpret as background information or statements of fact."). See also *id.* at 7-35 n.126 ("Courts are divided as to whether the person asserting the privilege must show that he or she actually relied upon the official records in preparing the report."); *id.* at 7-35 n.127 ("There is authority for, and should be less dispute about, the proposition that indirect reliance on the official proceedings, such as being told about a hearing by someone who was there, is sufficient to give rise to the privilege.").

13. See, e.g., *Cohen v. Cowles*, 501 U.S. 663, 665 (1991) (holding that the First Amendment did not prohibit a claim of promissory estoppel by source whose identity was revealed by newspaper despite its having promised to keep the source's identity confidential); American Society of Newspaper Editors, Statement of Principles, Art. VI, (Aug. 28, 2002), <http://www.asne.org/kiosk/archive/principl.htm> ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."); Society of Professional Journalists, Code of Ethics, art. III (1987 ed.) ("Journalists acknowledge the newsman's ethic of protecting confidential sources of information."). The protection of confidential sources is also the cornerstone of the reporter's privilege. Thirty-one states have enacted a statutory reporters' privilege; all states but one have recognized the privilege in at least some context.

14. The most recent setback for the neutral reportage was the Supreme Court's denial of certiorari in *Troy Publ'g Co. v. Norton*, 125 S. Ct. 1700 (2005), a case in which the Pennsylvania Supreme Court had rejected the privilege. See *Norton v. Glenn*, 860

fair report and neutral reportage privileges have to offer is a shared and compelling policy basis for shielding accurate reports on government statements from defamation claims, and the means by which to do it — keeping the analysis focused on the first level of truth.

Practice in the courts has tended to follow policy where the fair report privilege is unavailable. More often than not, courts avoid unjust outcomes by avoiding a mechanical application of the republication doctrine where it is at odds with one of the core purposes of the First Amendment — protecting the press's ability to report on the government. That courts by and large find their way to a just result does not lessen the uncertainty or confusion. There is a marked absence of any coherent unifying principle or jurisprudential basis articulated by the courts that would explain why the general rule of republication does not apply. In most cases, courts simply conduct the truth analysis on the first level of truth, rather than the deeper level generally required by the republication doctrine, thereby foregoing inquiry as to the ultimate truth of the underlying allegations. One commentator has suggested that these courts reach this result by treating the government's announcements or investigations as "events."¹⁵ This allows them to view the report as coverage of an "event" and not as a republication of the suspicions or allegations giving rise to it.¹⁶ Other courts have avoided the truth inquiry altogether by holding as a threshold matter that reports on government investigations are not, as a matter of law, capable of defamatory meaning and thus cannot provide the basis for a claim.¹⁷ But not every case is a win for the press. On

A.2d 48 (Pa. 2004). For a discussion of this case *see infra* text accompanying notes 91–103.

15. *See* SACK, *supra* note 12, § 7.3.2.3 at 7-37.

16. *Id.* at 7-37 & 7-37 n.138.1 (citing *Jackson v. Paramount Pictures Corp.*, 80 Cal. Rptr.2d 1 (Cal. Ct. App. 1998)). For further discussion, *see infra* text accompanying notes 116–120. *See also* *Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex. Ct. App. 2000).

17. *See* *Hatfill v. New York Times Co.*, 33 Media L. Rep. 1129, 1134 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005) ("In similar situations, courts in the Fourth Circuit and across the country have clearly denied efforts to transform reports raising questions about matters of public concern into defamatory assertions of guilt.") This reasoning has been employed in several cases not involving reports on government allegations or investigations. *See* *Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995) ("inquiry itself, however embarrassing or unpleasant to its subject, is not an accusation"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, Lo-

other occasions courts have viewed the republication doctrine as unavoidable in the absence of any privilege and held the press liable.¹⁸

These cases have been collected and examined before, sifted for clues as to how one might limit application of the republication doctrine in practice.¹⁹ The time has come to reconcile theory and practice, to eliminate the guesswork and ensure a principled approach consistent with core constitutional values to protect the press in all of these cases. Currently, the lack of legal clarity on this issue makes it extremely difficult to reliably determine a publisher's potential liability for republishing the fact of a law enforcement investigation. There needs to be formal recognition of what a majority of courts are already doing in practice and what the First Amendment demands.

Until now, the cases that did not qualify for the fair report privilege fell between the cracks. Times have changed. We live in an era in which formal charges and proceedings are not the corollary to government pronouncements they once were,²⁰ secrets abound, and off-the-record statements have become the norm.²¹ At the same time, the targets of government focus in the war against terror are a matter of intense public concern and, inevitably, greater press scrutiny. This scrutiny is not without consequence. Recent experience suggests that there will continue to be challenges to press reports on government accusations and investigations. The stakes in

cal 655, 39 F.3d 191, 195 (8th Cir. 1994) (raising the question of whether plaintiff engaged in discriminatory hiring practices is not an actionable false statement of fact); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993) (journalism which "invite[s] the public to ask" questions about matters of public concern is the "paradigm of a properly functioning press").

18. See cases cited *infra* part III.B.

19. See Jennifer O'Brien, *MLRC Report: The Substantial Truth Defense and Third Party Allegations*, (Media Law Resource Center, New York, N.Y.) Media Law Letter, April 2005, at 47; Charles L. Babcock & Cami Dawson Boyd, *Can Suspects Sue the Media for Coverage of Investigations?*, 15 COMM. LAW. 3 (Summer 1997).

20. See, e.g., Ann W. O'Neill, *Watchdog Challenges Secrecy in U.S. Court*, FT. LAUDERDALE SUN-SENTINEL, Jan. 8, 2004, at A1 (detailing the secret case of "MKB," a federal prosecution that was never publicly docketed until certiorari was sought before the Supreme Court).

21. See, e.g., Don Wycliff, *This Absurd Practice of Governing Anonymously*, CHI. TRIB., Feb. 10, 2005, at 27 (criticizing the Bush Administration's practice of routinely conducting government briefings on background).

these cases are enormous. Absent protection, there is a very real risk that important news coverage of government conduct will be unduly chilled and public access to important information will be limited to only the “official” versions set forth in press releases and public indictments. As one distinguished commentator has noted, permitting claims for accurate reports of government investigations would “black out significant news.”²²

Parts II and III of this article briefly summarize the law, scope, and underpinnings of both levels of truth. Part IV examines the practice of courts in cases seeking to hold the press liable for accurate reporting on government allegations where no privilege is applicable. The conclusion derived from this survey is straightforward: while one can continue to cite and rely upon the favorable outcomes in those cases in which courts have avoided rigid application of the republication doctrine, it is far more preferable to recognize that the First Amendment demands much more — that accounts of government charges and suspicions be analyzed on the first level of truth and be deemed true when accurately recounted.

II. THE REPUBLICATION DOCTRINE: REQUIRING A DEEPER TRUTH

The republication doctrine is the common law’s response to false rumors and those who repeat them. It is a rule as broad as it is simple. When you republish a defamatory statement made by another, you effectively own it and may be held liable just as if you made it yourself.²³ So far as the republication doctrine is concerned, it is irrelevant that you gave full attribution to the original speaker and quoted him accurately. Nor does it matter that you are quoting a government official in his or her capacity as such. Now it is yours, and you are left with the same defenses in defamation as the speaker you quoted. For the press, this means potential liability for accurately reporting on a government accusation or investiga-

22. SACK, *supra* note 12, § 7.3.2.3 at 7-37.

23. See Robert D. Sack & Stuart D. Karle, *Common Law Libel and the Press: A Primer*, in COMMUNICATIONS LAW, at 7, 30-34 (1991); RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”). See generally William H. Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131 (1961).

tion if the plaintiff can establish that he or she did not actually commit the act being investigated.²⁴

The lesson of the republication doctrine is a harsh one for journalists. In practice, it places an almost impossible demand on republishers, who often lack first-hand access to the information reported upon, particularly when the subject is government investigations and allegations. It would hold a reporter accountable to the same standard as the government and require proof of accuracy as to the underlying allegation itself to sustain a truth defense. The harshness of the doctrine is one of design, not accident. The policy which animates the republication doctrine is best summed up by the well-worn phrase, “talebearers are as bad as talemakers.”²⁵ “There is safety in no other rule,” one nineteenth-century court concluded, for “[t]he danger is an obvious one and long since pointed out; and it is, that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of repetition.”²⁶ The danger is not limited to “bad men” with malicious motives, the court stressed, but lies with the act of repetition itself, regardless of source or motive. As the Court explained: “[o]ften, the origin of slander can not be traced. If it were, possibly it might be harmless. He who gives it circulation gives it power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed.”²⁷

Viewed in the context of idle gossip or malicious falsehood, the policy underpinnings of the republication doctrine are eminently reasonable. Looked at in the context of accurate reporting on government investigations, however, the policy rationale dissolves. It is obvious that reporting on a serious law enforcement investigation into suspected criminal activity bears scant relation to the sort of pernicious chatter that the republication doctrine is designed to

24. See RESTATEMENT (SECOND) OF TORTS § 581A cmt. e (1977), stating:

It is necessary to find that the defamatory matter contained in the statement is true. When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established.

25. *Harris v. Minvielle*, 19 So. 925, 928 (1896).

26. *Kenney v. McLaughlin*, 71 Mass. (1 Gray) 3, 5, 7 (Mass. 1855).

27. *Id.* at 5.

discourage. Clearly law enforcement is one of the most critical of government functions, and the public has a deep interest not merely in knowing about successful prosecutions, but also in knowing how the government investigates criminal behavior. This is especially true during the ongoing war on terror, in which law enforcement activity is clearly constant, but actual public criminal prosecutions are virtually non-existent. If the press cannot report on the government's investigations into terrorism, it will essentially be precluded from reporting on law enforcement activity regarding terrorism at all. Furthermore, in the event that the government deliberately conducted such an investigation for no other purpose than to embarrass or vilify an individual, the government conduct would itself be highly newsworthy and of public interest in a way that malicious gossip about private citizens would not be. Indeed, such activity would go the very core of the functioning of our democracy.

III. ACCURATE REPORTING AND THE FIRST LEVEL OF TRUTH

A. *Constitutional Policy Goals*

It is not surprising that the U.S. Supreme Court has not directly spoken to the issue of whether the republication doctrine may — or was ever intended to — extend to reports on official accusations, and has not articulated what the First Amendment demands in such cases. The constitutionalization of defamation law is relatively young.²⁸ The Supreme Court has, however, repeatedly emphasized the unique and vital role of the press in securing and fostering our republican system of self-government.²⁹ The primary function of the press, the cases and history teach, is a structural one

28. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-17 (1990) (summarizing case law imposing First Amendment limitations on defamation law, beginning in 1964 with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

29. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (noting that freedom of the press is a right created “not for the benefit of the press so much as for the benefit of all of us”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that the “Constitution specifically selected the press” to fulfill an “important role” in our democracy); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (noting that the press “has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences”).

protected by the First Amendment, to play citizen watchdog and ensure that the electorate is fully informed about the workings of government, including all that it says and does.³⁰ Constitutional protection for journalists thus has been expressed as the means to ensure that necessary conditions exist for the press to fulfill its role.³¹

Clearly, protection for accurate news reports concerning the conduct of elected officials and the government they lead is an essential condition for the press's fulfillment of its constitutional role. It is also essential to allow citizens to fulfill their role. For if, as the Supreme Court tells us, the "central meaning of the First Amendment" is the freedom to criticize official conduct,³² then the means to evaluate that conduct are equally deserving of protection.³³

At bottom, then, these principles strongly argue in favor of constitutional protection for accurate reports of government accusations, investigations, and suspicions, regardless of whether they are defamatory. In order to achieve that protection, these values argue equally in favor of a truth analysis that operates on the first level and does not require a showing that the underlying government charges are in fact true. Indeed, the privileges applied in a

30. See generally Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975) (arguing that the free-press guarantee is a "structural provision of the Constitution," and has its own meaning distinct from the free-speech guarantee). The structural view was later advocated by Justice Brennan. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and this entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication."). In at least one instance, Brennan's conception of the structural view was adopted by the Court to support its opinion. *Globe Newspaper v. Superior Court*, 457 U.S. 596, 604 (1982) (adopting structural model of Justice Brennan's concurrence in support of holding).

31. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."). Among the "indispensable conditions" necessary for an effective press is protection for newsgathering. See *Richmond Newspapers*, 448 U.S. at 576 (stating that "'freedom of the press could be eviscerated'" without constitutional protection for newsgathering) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

32. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

33. See, e.g., *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971) (stating that the First Amendment protects "the free flow of information so that the public will be informed about the Government and its actions").

majority of cases involving official charges share the same policy goals as the First Amendment and operate on the first level of truth.

The fair report privilege, discussed in Part III.B.,³⁴ finds its origin and support in three policy rationales, articulated as agency, public supervision, and the public's right to know.³⁵ The agency rationale is another description of the press's constitutionally recognized role as public surrogate — one who reports on government proceedings acts as agent for those with the right to attend, and informs them of what they might have seen for themselves.³⁶ The predominant rationale is “public supervision.”³⁷ The classic formulation belongs to Justice Holmes, who wrote in a case concerning republication of court proceedings that “[the privilege is justified by] the security which publicity gives for the proper administration of justice.”³⁸ Chief Justice Burger echoed this same reasoning nearly a century later in a seminal First Amendment case in which the Supreme Court first recognized a constitutional right of access to criminal trials.³⁹ The third and final policy rationale for

34. See *infra* text accompanying notes 48–79.

35. See, e.g., *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988); *Medico v. Time, Inc.*, 643 F.2d 134, 141–43 (3d Cir. 1981); SACK, *supra* note 12, § 7.3.2.2.2, at 7-17; Kathryn Dix Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979); Leslie C. Levin, Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266, 1269 n.26 (1977); Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102 (1964) (analysis of “supervisory,” “informational,” and “agency” rationales).

36. See *Medico*, 643 F.2d at 141. See also SACK, *supra* note 12, § 7.3.2.2.2 at 7-17 n.62 (collecting cases).

37. SACK, *supra* note 12, § 7.3.2.2.2 at 7-18 & 7-18 n. 64 (collecting cases).

38. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

39. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558 (1980) (7-1 decision) (holding that there is a First Amendment right to attend criminal trials). In his plurality opinion, Chief Justice Burger traced the history of public access to criminal trials from before the Norman Conquest of England up to Colonial America, finding that “throughout its evolution, the trial has been open to all who cared to observe.” *Id.* at 564. See also *id.* at 564-69. Examining the reason behind this record, he concluded that the presumption of openness “is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.” *Id.* at 569. Foremost among the values of openness is its operation as a check on the proper functioning of trials, in that it “it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” *Id.* (citing Hale and Blackstone).

Related reasons for openness include its enhancement of “the performance of all involved,” *id.* at 569 n.7 (citation omitted), protection of the judge and government from imputations of dishonesty, *id.*, its public educative function, *id.* at 567 n.7 & 572,

the fair report privilege is the public's interest in learning of important matters generally and the operation of government specifically. This rationale is consonant with the constitutional concern that debate on public issues be vigorous and robust — an impossibility where there exists a threat of liability to those who merely convey relevant information.

The neutral reportage privilege, like the fair report privilege, seeks to protect accurate, disinterested reporting of accusations, though only when made by a prominent organization, figure, or public official against another public figure. Despite its limited usefulness in the context of reporting on government charges, where targets typically are not public figures,⁴⁰ the neutral reportage privilege is of interest because of the policy underpinnings it shares with the fair report privilege and how it fixes the inquiry on the first level of truth.⁴¹ Each provides a means of protecting publication of statements that are newsworthy principally because they were made, even if untrue.⁴²

Significantly, there is a notable absence of competing policy reasons for withholding First Amendment protection from accurate reports on government investigations. The interest in curtailing the repetition of false rumors of unknown origin is no such reason.⁴³ To be sure, there will be occasions when law enforcement is wrong, and reputations damaged, but victims of errors originating with the government should seek remedy from the government. In addition, such reporting would not undermine legitimate law en-

and its significant therapeutic value, providing an outlet for community concern, hostility and emotion. *Id.* at 570-71. Not only do open trials enhance the likelihood of justice, they "satisfy the appearance of justice." *Id.* at 571-72 (citation omitted). The Court famously stated that while "[p]eople in open society do not demand infallibility from their institutions . . . it is difficult for them to accept what they are prohibited from observing." *Id.* at 572. Chief Justice Burger, mining the legal and political literature, quotes, among others, Jeremy Bentham — who viewed openness as the keystone of justice — stating that "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small amount." *Id.* (citation omitted).

40. See, e.g., *Dixson v. Newsweek*, 562 F.2d 626, 631 (10th Cir. 1977).

41. See generally, *The Neutral Report Privilege*, *The Record*, vol. 53, No. 6, at 686 (Association of the Bar of the City of New York, The Committee on Communications and Media Law).

42. See *Edwards v. Nat'l Audobon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977). For a discussion of this case see *infra* text accompanying notes 80-85.

43. See *supra* Part II.

forcement goals or the government's need for secrecy in certain instances. Those interests simply have no place in defamation cases, in which the concern is compensation of private parties for reputational damage. The field in which government secrecy competes with First Amendment interests is the initial *access* to information,⁴⁴ or government efforts to block publication,⁴⁵ not private parties' post-publication libel suits. Even in those cases in which these interests have come into conflict, the Supreme Court has squarely held that publication of secret documents may not be blocked in all but the most extraordinary circumstances involving grave risk to national security.⁴⁶ It has also recognized a presumptive right of access under the First Amendment, at least to criminal court proceedings — a principle courts have extended to other historically open areas of government — which may be overcome only by a specific showing of compelling need.⁴⁷ These cases reflect the broader reality that any tension between government secrecy interests and First Amendment values is not irreconcilable, but rather one of constitutional design, and one in which the balance tips in favor of the First Amendment.

B. *Fair Report Privilege*

The most commonly referenced distillation of the fair report privilege is likely that of the Restatement of Torts, which states that

44. See, e.g., *supra* note 39.

45. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (in "Pentagon Papers" case, rejecting government application for prior restraint); *Near v. Minnesota*, 283 U.S. 697 (1931) (broadly rejecting validity of prior restraints, while acknowledging that "[n]o one would question but that a government might prevent . . . publication of the sailing dates of transports or the number and location of troops").

46. *Near*, 283 U.S. 697 (1931). But see *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 996-98 (W.D. Wis. 1979), which exemplifies a rare instance where the government sought and obtained an injunction, under the Atomic Energy Act, prohibiting a magazine from publishing an article entitled "The H Bomb Secret: How We Got It, Why We're Telling It." Nor may the government punish publication after the fact absent similarly compelling circumstances, at least in those instances where the press obtained the information lawfully. See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

47. This principle is articulated in a quartet of Supreme Court decisions. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Press-Enterprise Co. v. Superior Court (I)*, 464 U.S. 501, 509-10 (1984); *Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1, 10-11 (1986).

“the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”⁴⁸ As its name implies, the report itself must be “fair” for the privilege to apply, which means it must be accurate and impartial.⁴⁹ The privilege carves out an exception to the general common law defamation principle that one who republishes a defamatory statement made by another is considered to have adopted the statement as his own and is as liable as the original defamer. The Restatement views the fair report privilege as immunizing even statements which the publisher does not believe to be truthful, thereby protecting material which would potentially not be protected by the actual malice standard.⁵⁰

Although originating in the common law, the fair report privilege has been enacted by statute in numerous states, including New York.⁵¹ Because of variations in the statutory language, the precise scope of the fair report privilege varies widely by jurisdiction.⁵² The differences in statutory provisions naturally lead to differences in application by the courts. It is these differences that make the fair report privilege an unreliable source of protection for news reports on government charges. The extremes to which differences in scope and application can run are best illustrated by a sampling of cases.

Some courts have taken expansive views of what the fair report privilege protects. In *Reeves v. American Broadcasting Cos.*,⁵³ the Second Circuit, applying California law, held that a fair and true news report relating to charges made in the course of a secret grand jury proceeding were protected by the fair report privilege. In doing so, the court spoke expansively about the policy rationale behind such a holding: “The noble guarantee against laws abridging the freedom of the press, enshrined in the First Amendment, would be incongruous indeed, were any federal or state statutes to punish a

48. RESTATEMENT (SECOND) OF TORTS § 611 (1977).

49. See, e.g., *Lubin v. Kunin*, 17 P.3d 422, 427 (Nev. 2001).

50. RESTATEMENT (SECOND) OF TORTS § 611 cmt. a. (1977).

51. See N.Y. CIV. RIGHTS LAW § 74 (1992).

52. See SACK, *supra* note 12, § 7.3.2.2.1, at 7-14.

53. 993 F.2d 1087 (4th Cir. 1993).

journalist for accurately reporting allegations of wrongdoing in a matter of public interest.”⁵⁴ The court found that California’s privilege extended “to fair and true accounts even of secret proceedings.”⁵⁵ Significantly, the court looked to the First Amendment to justify its expansive reading of the state privilege.⁵⁶

In *Chapin v. Knight-Ridder, Inc.*, plaintiff, who ran a program to send gift packages to American soldiers during the first Gulf War, brought a defamation action in response to an article investigating the finances of the operation.⁵⁷ The Fourth Circuit affirmed dismissal of the action on the basis that none of the statements in the article could be reasonably read to express the libelous meaning ascribed to them by the plaintiff.⁵⁸ Specifically, the court reviewed a quote from Congressman Fortney Stark that “[n]o one should line their pockets by playing on the sentiments of the holiday season,” a quote which the court said came the closest to insinuating wrongdoing.⁵⁹ However, even accepting that Representative Stark’s comment was defamatory, the court refused to find that the newspaper could be held accountable for republishing the remark.⁶⁰

While acknowledging the common law doctrine of republication, the *Chapin* court nevertheless found that “[l]iteral adherence to this rule would sap the vigor of public debate, and could frighten the press from even reporting to the public the few debates that might occur.”⁶¹ While also acknowledging the Second Circuit’s adoption of the neutral reportage privilege, the court declined to adopt or reject the privilege, instead concluding that the newspaper’s republication of Congressman Stark’s comment was protected by the fair report privilege.⁶² Although the Congressman’s remarks were made directly to the newspaper and were not part of an official proceeding, the court nevertheless applied the privilege, noting

54. *Id.* at 1096.

55. *Id.* at 606 (discussing *Hayward v. Watsonville Register-Pajaronian & Sun*, 71 Cal. Rptr. 295 (Cal. Ct. App. 1968)).

56. *Id.* at 602 (“[O]ur conclusion is buttressed by fundamental precepts of free expression.”).

57. 993 F.2d 1087 (4th Cir. 1993).

58. *Id.* at 1089.

59. *Id.* at 1096.

60. *Id.* at 1096-97.

61. *Id.* at 1097.

62. *Id.* at 1097-98.

that “from the public’s viewpoint, a higher proportion of the ‘unofficial’ public statements of congressmen will be newsworthy and of concern than will the countless ‘official’ documents generated by quasi-public agencies.”⁶³

The broad sweep of the fair report privilege articulated in cases like *Reeves* and *Chapin* would protect the press against virtually any claim for accurately reporting on government charges, by maintaining focus on the first level of truth. At the other end of the spectrum, however, the fair report privilege may provide little or no protection for reporting that goes beyond parroting public records of official proceedings. For example, in *Rouch v. Enquirer & News of Battle Creek*,⁶⁴ the Michigan Supreme Court held that information orally furnished to a reporter by police officers regarding an arrest was not covered by the state privilege protecting reports on “public and official proceedings.” While the newspaper had accurately reported that plaintiff was arrested for rape, plaintiff was never formally charged with the crime. The court held that the arrest did not amount to a proceeding under the statute and, therefore, the reporting was not privileged.⁶⁵

Similarly, in *Stone v. Banner Publishing Corp.*, a federal district court in Vermont rejected an attempt to apply Vermont’s privilege protecting reports on judicial proceedings to a news story based largely on a police department press release.⁶⁶ That press release warned area businesses that police suspected two salesmen who had come to town soliciting businesses for a distribution arrangement were actually con artists.⁶⁷ The resulting article was couched in conditional language, accurately noting that the police believed “the scheme may be a con game.”⁶⁸ The court also rejected the application of a common law qualified privilege allowing the media to publish the actual facts of the commission of a crime or an arrest, because “no arrests were made and no charges were ever brought

63. *Id.* at 1097.

64. 398 N.W.2d 245 (Mich. 1987).

65. *Id.* at 251-52. *See also* *Rouch v. Enquirer & News of Battle Creek*, 487 N.W.2d 205, 208 n.3 (Mich. 1992) (noting that the “existence and scope of any constitutionally based doctrine of neutral reportage remains as yet undefined”).

66. 677 F. Supp. 242 (D. Vt. 1988).

67. *Id.* at 244.

68. *Id.* at 245.

against the plaintiffs."⁶⁹ The court therefore found in favor of plaintiffs on their defamation claim and awarded damages.⁷⁰

The result in *Stone* is difficult to reconcile with the public policy principles encapsulated by the First Amendment. The police department clearly issued the press release with the hope that the press would report on the men and thus protect area businesses from potential fraud. Nowhere in its opinion did the court acknowledge the strong public policy arguments in favor of protecting the press from a defamation claim under those circumstances.

Similarly, in another rejection of the fair report privilege, a Minnesota federal district court in *Stokes v. CBS, Inc.* denied summary judgment to press defendants who had broadcast statements by the deputy sheriff in charge of a homicide investigation.⁷¹ While conceding a lack of sufficient evidence to arrest the victim's wife, the deputy nevertheless emphatically expressed his view in interviews that she was guilty.⁷² Because such statements went well beyond recounting that an investigation was under way, were not made in any official proceeding or public record, and were uncritical endorsements of the deputy's views, the court allowed the case to proceed to trial.⁷³

In *Jones v. Taibbi*, the Massachusetts Supreme Judicial Court held that unofficial statements made by police sources were outside the scope of the fair report privilege.⁷⁴ This case again concerned a plaintiff who had been arrested on suspicion of a crime but never ultimately charged.⁷⁵ The court limited the fair report privilege to those statements that the police had made officially.⁷⁶ *Wiemer v. Rankin* also distinguished between police reports and statements made by the investigating officer that were not contained in such

69. *Id.* at 246.

70. *Id.* at 248.

71. 25 F. Supp.2d 992 (D. Minn. 1998).

72. *Id.* at 999-1001.

73. *Id.* at 1002. One of the press defendants settled before trial, and the remaining press and law enforcement defendants were found not liable for lack of actual malice following a five week trial. See *WCCO-TV prevails in a potentially disastrous defamation trial*, MINNEAPOLIS/ST. PAUL CITY PAGES, Aug. 25, 1999, available at <http://citypages.com/databank/20/977/article7891.asp>.

74. 512 N.E.2d 260 (Mass. 1987).

75. *Id.* at 262.

76. *Id.* at 267.

official reports.⁷⁷ In that case, the court held that the latter fell outside of the fair report privilege of a public official proceeding.⁷⁸ These cases illustrate the extent to which accurate reporting of newsworthy information obtained from law enforcement can expose the press to liability, and the need for greater protection grounded in the First Amendment.⁷⁹

C. *The Neutral Reportage Privilege*

The neutral reportage privilege is an ill-fitting doctrine for protecting reports on government charges. It is both too narrow in the sense that the target of the speech must be a public figure, and far broader in scope than necessary to the extent that it protects accurate republication of accusations by any public figure, not just government officials. Clearly there are instances where it would apply if recognized. But like the fair report privilege, even in those cases in which it might provide a perfect fit, it is too unreliable a doctrine upon which to stake protection for such important speech. While the privilege is instructive for the reasoning which led to its recognition, and focuses on the first level of truth in order to vindicate fundamental First Amendment principles, it is equally important to understand the reasons for its limited acceptance and usefulness in this context so as not to place too much reliance on it.

The neutral reportage privilege was first recognized by the Second Circuit in *Edwards v. National Audubon Society, Inc.*⁸⁰ At issue was a *New York Times* article, which accurately reported that National Audubon Society officials made statements attacking a handful of scientists as paid liars.⁸¹ The scientists, who were identified by name, brought suit against Audubon, the *New York Times*, and the

77. 790 P.2d 347 (Idaho 1990).

78. *Id.* at 354.

79. There may also be instances where the press chooses to forego reliance upon the fair report privilege, regardless of scope, to avoid compromising its confidential sources. One can surmise that this may have been a concern for defendants in *Global Relief*, along with the scope of statutory protection for reports on a non-public investigation, where news reports at issue were for the most part based on confidential source reporting. See *Global Relief*, 390 F.3d at 975–79.

80. 556 F.2d 113 (2d Cir. 1977).

81. *Id.* at 116-17 (stating that scientists had claimed that an insecticide was not having an adverse effect on bird populations).

quoted Audubon officials.⁸² At trial, the jury was told that the *New York Times* could be found guilty of having acted with actual malice if its reporter had serious doubts about the truth of the statement that the scientists were paid liars, even if the reporter did not have any doubt that he was accurately reporting the allegations themselves. The jury returned a verdict for the plaintiffs.

The Court of Appeals reversed the judgment against the *New York Times*. Declaring “a fundamental principle” to be at stake, the court held that:

[W]hen a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private view regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.⁸³

The court concluded that a neutral reportage privilege grounded in the First Amendment provided immunity from defamation liability where the press accurately conveyed the charges in context and the publisher did not espouse or concur in those charges.⁸⁴ The court found the article at issue to be “the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps,” and thus protected by the privilege.⁸⁵

Read by itself, *Edwards* appears to give broad scope to the neutral reportage privilege. However, the Second Circuit quickly clarified the relative narrowness of its holding. The court revisited the privilege in *Cianci v. New Times Publishing Co.*, in which it made clear that the analytical approach utilized in *Edwards* was a four-element

82. *Id.* at 115.

83. *Id.* at 120 (citations omitted).

84. *Id.*

85. *Id.*

test that must be satisfied for the privilege to apply.⁸⁶ That test required the statement in question be: first, that of a responsible and prominent speaker; second, regarding a public-figure plaintiff; third, reported through fair and dispassionate coverage; and fourth, on a matter of public concern.⁸⁷ The court noted that absent these qualifications on the privilege, “all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past and made by persons known to be of scant reliability.”⁸⁸ Other courts have declined to apply the privilege in cases involving private figures, while leaving unresolved the question of whether it would apply to facts that fit within the *Edwards* framework.⁸⁹

Beyond the issue of scope, the neutral reportage privilege has met with limited acceptance outside the Second Circuit in the twenty-eight years since *Edwards*.⁹⁰ The Pennsylvania Supreme Court’s recent decision in *Norton v. Glenn* stands as a thorough display of the reasoning that leads a court to reject the privilege, but

86. 639 F.2d 54 (2d Cir. 1980). This case concerned a report that Vincent Cianci, who was then the Mayor of Providence, Rhode Island, had been accused of rape while in law school. *Id.* at 55–56. Reversing the court below, the Second Circuit found that the article contained “many instances where defendants could be found to have made charges of criminal conduct on their own responsibility.” *Id.* at 60. The court rejected both the neutral reportage and fair report privileges. *Id.* at 67–71.

87. *See id.* at 68–69. The *Cianci* court determined that the article at issue “fulfills almost none of the conditions laid down in *Edwards*.” *Id.* at 69. Instead, the court concluded that “a jury could well find that the New Times did not simply report the charges but espoused or concurred in them; indeed, despite the ingenious construction of the article, more naiveté than ought to be demanded even of judges is needed to consider the article as doing anything else.” *Cianci*, 639 F.2d 54 at 69.

88. *Id.* at 69–70.

89. *See, e.g.*, *Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254 (1998).

90. Cases following *Edwards* include *Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S.C. 1999); *Woods v. Evansville Press Co.*, 11 Media L. Rep. 2201 (S.D. Ind. 1985); *Whitaker v. Denver Post, Inc.*, 579 F.2d 1174 (D. Wyo. 1978); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781 (Ariz. Super. Ct. 1988). Cases extending *Edwards* include *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989) (extending *Edwards* by eliminating requirement that speaker be generally trustworthy); *Barry v. Times, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984) (extending *Edwards* to a situation where the speaker was not a responsible, prominent organization but rather a convicted felon who had failed a lie detector test). Although a small but steady stream of courts followed *Edwards* throughout the 1980s, fewer cases have done so in the past fifteen years.

also reveals the dangers to free speech that such a rejection can pose.⁹¹ In *Norton*, a town councilman, William T. Glenn, made wild and unsubstantiated allegations outside of any official proceeding regarding other public officials.⁹² Glenn alleged in hyperbolic terms that the council president engaged in homosexual affairs, child molesting, and made unwanted physical advances on Glenn.⁹³

The issue before the Pennsylvania Supreme Court was whether the First Amendment encompasses the neutral reportage doctrine.⁹⁴ The court noted that the lower federal and state courts were divided in their acceptance or rejection of the privilege, and that the U.S. Supreme Court had never ruled on whether such a privilege arose out of the First Amendment.⁹⁵ The court conducted a thorough review of the Supreme Court's actual malice defamation cases beginning with *New York Times v. Sullivan*, and ultimately concluded that "the existing case law from the U.S. Supreme Court indicates that the high Court would not so sharply tilt the balance against the protection of reputation, and in favor of protecting the media, so as to jettison the actual malice standard in favor of the neutral reportage doctrine."⁹⁶

What disturbed the *Norton* court about the privilege was that as a matter of constitutional law it would relieve the media of liability even in situations in which it had acted with actual malice, an idea the court found "radical."⁹⁷ The court felt that immunizing the media from liability even when it had published with knowledge of falsity or a reckless disregard for the truth would upset the balance the Supreme Court had established between free speech and the protection of reputation.⁹⁸ Animating the *Norton* court's analysis

91. See 860 A.2d 48 (Pa. 2004), *cert. denied*, Troy Publ'g Co. v. Norton, 125 S. Ct. 1700 (2005).

92. *Id.* at 50.

93. *Id.*

94. *Id.* at 51-52.

95. *Id.* at 57.

96. *Id.* In fact, the Supreme Court rejected the *New York Times'* argument for absolute immunity against public official defamation claims in *Sullivan*. See 376 U.S. 254. See Anthony Lewis, *MAKE NO LAW* 113-19, 130-32, 146-47 (Random House 1991) (recounting the *Times'* advocacy of absolute immunity in the brief and argument of the case).

97. *Norton*, 860 A.2d at 53.

98. *Id.* at 58.

was a concern that creating a constitutional exception for the actual malice fault standard would go too far in blocking an individual's right to protect his or her reputation against the dissemination of speech that the republisher knew or strongly suspected was false.⁹⁹

In a concurring opinion, Justice Castille articulated the strong policy argument for adopting the privilege, while nevertheless agreeing that doing so was beyond the scope of a state court interpreting an issue of federal constitutional law unresolved by the Supreme Court.¹⁰⁰ As Justice Castille wrote:

I am concerned also with the practical difficulties the press will encounter in trying to walk the very fine line between accurately reporting public governance-related comments such as these, while avoiding liability for doing so. Absent a privilege, the newspaper may be forced to sanitize the report or resort to vagaries — highly subjective changes which inevitably will operate to mislead the public as to the seriousness or rashness of the accusations. Moreover, by forcing newspapers to recharacterize what actually occurred, the absence of a privilege essentially requires the substitution of editorial opinion for accurate transcription. Such a transformation of the actual event inevitably alters its context and content. In addition to being inaccurate, news reports altered for fear of litigation would be of far lesser value to the general public in learning of and passing upon the appropriateness of the public behavior of their elected officials. Such a stilted reporting regime would contravene the United States Supreme Court's seminal statement that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁰¹

Justice Castille clearly appreciated the cost to public discourse that would attend exposure of the press to liability for accurate reports on matters of considerable public interest.¹⁰² In a powerful rejoinder

99. *Id.*

100. *Id.* at 60.

101. *Id.* (quoting *Sullivan*, 376 U.S. at 270).

102. *Id.*

der to the majority, he cited *Sullivan* right back to them to support his view that the legal result did not comport with public policy.¹⁰³ The U.S. Supreme Court declined to review the question of whether the Pennsylvania courts' rejection of the neutral reportage privilege was proper.¹⁰⁴

IV. RECONCILING PRACTICE WITH POLICY IN THE COURTS: CASES PROTECTING THE MEDIA'S ACCURATE REPORTING ON GOVERNMENT INVESTIGATIONS

A growing number of recent cases have employed reasoning and holdings that conceptually invoke the fair report and neutral reportage privileges, without actually relying on, or in some cases even referencing, the two privileges. These cases avoid requiring the media to establish the truth of the underlying allegations and instead limit the truth inquiry to the question of whether an investigation had been conducted. Although these cases are often similar in approach and result, the opinions lack clarity because no legal principle is articulated or applied to limit application of the republication doctrine. Looked at collectively, however, these cases make clear that the republication doctrine should be limited to the first-level truth inquiry when press reports accurately state that an individual or entity is the subject of a government investigation.

The most recent example of this phenomenon is *Global Relief Foundation, Inc. v. New York Times Co.*¹⁰⁵ As discussed earlier, Global Relief took issue with the district court's holding that the articles at issue were all substantially true, arguing that defendants should be required to demonstrate "not only that they accurately reported the government's suspicions but that [Global Relief] was actually guilty of the conduct for which the government was investigating the group."¹⁰⁶ Instead, the Seventh Circuit noted that none of the articles concluded that Global Relief was actually guilty of the underlying conduct, and that "all of the reports were either true or substantially true recitations of the government's suspicions about

103. *Id.* at 59. Justice Castille also expressed his belief that the reporting may prove to be protected by the fair report privilege, a defense not before the Pennsylvania Supreme Court but potentially available to the defendant on remand. *Id.* at 62.

104. See *Norton*, 125 S. Ct. 1700 (2005).

105. 390 F.3d 973 (7th Cir. 2004).

106. *Id.* at 980.

and actions against [Global Relief].”¹⁰⁷ The opinion did not discuss either the fair report or the neutral reportage privileges, nor did it discuss the republication doctrine, though argued by Global Relief.

Neither the fair report or the neutral reportage privilege as commonly formulated would have offered protection to the press defendants in *Global Relief*, as most of the challenged reporting took place prior to there being any official action against Global Relief, and because the parties involved do not fit within the conventional ambit of the neutral reportage privilege. Had the court taken a strict interpretation of the republication doctrine, the defendants would have had the extremely difficult task of establishing as fact that Global Relief was a terrorist organization in order to prevail on summary judgment.

What we see in *Global Relief* is a court refusing to mechanically apply the republication doctrine when such an application violates important First Amendment policies. This allows the court to reach a result in keeping with the First Amendment, but necessitates that the court either elide over or contravene the republication doctrine. Courts should formally limit the scope of the republication doctrine when applied to reports on government investigations by limiting the inquiry to whether the facts of the investigation itself were accurately reported, not to the question of whether the plaintiff committed the actual conduct that is under investigation.

The principle that a press defendant who accurately reports on an investigation need not establish the truth of the underlying allegations has been most firmly established by the state courts of Texas, which have recognized this several times in recent years. Texas’s adoption of this principle began in *McIlwain v. Jacobs*, in which the Texas Supreme Court found that an accurate report of an investigation by a city’s public integrity group of the city’s water maintenance division was substantially true as to the investigation and therefore not actionable as a matter of law.¹⁰⁸

Expanding on the decision in *McIlwain*, the Texas Court of Appeals held in *KTRK Television v. Felder* that when the press merely reports that allegations were made and under investigation, it need

107. *Id.* at 986.

108. 794 S.W.2d 14 (Tex. 1990).

only prove the truth of the investigation, and not the truth of the allegations themselves, to establish a substantial truth defense to a defamation claim.¹⁰⁹ *Felder* concerned a report of a school district's investigation of a teacher who had allegedly physically threatened students.¹¹⁰ The court compellingly articulated the policy rationale for limiting the truth analysis to the first level:

Otherwise, the media would be subject to potential liability everytime it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today.¹¹¹

The Texas Court of Appeals' decision in *Felder* distills not only the constitutional and policy rationales supporting a "first level" truth analysis, but also the intuitive practical difficulties that attend any other standard — difficulties that place at risk speech of vital public import.¹¹²

Texas state courts have continued to follow *McIlwain* and *Felder* in applying this principle.¹¹³ In addition, a Texas federal court has

109. 950 S.W.2d 100 (Tex. App. 1997).

110. *Id.* at 101.

111. *Id.* at 106.

112. *Id.*

113. *Basic Capital Management, Inc. v. Dow Jones & Co.*, 96 S.W.3d 475, 480 (Tex. App. 2002) ("Because the parties agree that the challenged statements only characterize the allegations of the indictment, and do not purport to portray the underlying events described therein, our task is necessarily limited to determining whether the articles accurately report the charges set forth in the indictment."); *Dolcefino v. Turner*, 987 S.W.2d 100, 109 (Tex. App. 1998), *aff'd*, 38 S.W.3d 103 (Tex. 2000) (noting that *McIlwain* and *Felder* established that the media must only show that third party allegations were in fact made and under investigation to establish truth; the press need

also applied *McIlwain* and its progeny in granting a press defendant summary judgment for its accurate reporting on a federal investigation. In *Mullens v. New York Times*, the *New York Times* accurately reported on the fact that law enforcement affidavits filed in support of a warrant application discussed an investigation into plaintiff's suspected criminal activity.¹¹⁴ Although plaintiff sought to establish the report's falsity by arguing that he had not engaged in any criminal conduct, the court found that the allegations originated not with the paper but with federal law enforcement, and that the article truthfully relayed the substance of those accusations.¹¹⁵

A California court reached a similar conclusion in *Jackson v. Paramount Pictures Corp.*¹¹⁶ *Jackson* concerned a broadcast reporting on the search for a purported videotape showing singer Michael Jackson engaging in sexual activity with an underage boy.¹¹⁷ The trial court granted summary judgment to the defendants on the basis that the statements at issue truthfully reported on the possible existence of a videotape, and further stated that its existence had not been independently confirmed.¹¹⁸ The California Court of Appeals agreed, finding that the broadcast "truthfully relayed the information that an open but inactive investigation had been revived in order to investigate the report of new evidence."¹¹⁹ In so doing, the court noted the reach of the republication doctrine, but declined to require the press to do more than accurately report that law enforcement was looking for the purported videotape, rather than focus the truth inquiry on whether the tape actually existed and documented a sex crime.¹²⁰

Just as the fair report and neutral reportage privileges are by definition limited to fair and neutral reporting, so too may a "first level" truth analysis be influenced by whether reports go beyond mere statements that an investigation is taking place and explicitly or implicitly endorse the view that the suspect committed the un-

not demonstrate the truth of the underlying allegations); *Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex. App. 2000).

114. 1996 WL 787413 (N.D. Tex. July 30, 1996).

115. *Id.* at *4.

116. 80 Cal. Rptr.2d 1 (Cal. Ct. App. 1998).

117. *Id.* at 14.

118. *Id.* at 25.

119. *Id.* at 30.

120. *Id.* at 35-36.

derlying illegal or unethical conduct. This question faced the court in *Jewell v. NYP Holdings*, a case arising out of the investigation of security guard Richard Jewell as a suspect in the bombing at the 1996 Olympics in Atlanta.¹²¹ Jewell sued the *New York Post* for defamation based on several articles and columns about him, alleging they went beyond official accounts by referring to him as the “prime” and “main” suspect in the attack, thus imputing guilt.¹²² The court rejected Jewell’s contention, given his concession in the complaint that he had been investigated by the FBI in connection with the bombing.¹²³ The court found that the *New York Post*’s characterization of Jewell as a “prime” or “main” suspect was thus substantially true, and dismissed Jewell’s defamation claim regarding these characterizations.¹²⁴

A recent high-profile case addressing this issue in the context of whether an article conveyed a defamatory meaning is *Hatfill v. New York Times*.¹²⁵ In *Hatfill*, the *New York Times* initially successfully moved to dismiss a defamation claim brought by Steven Hatfill, a scientist who was a suspect in the FBI’s investigation of the 2001 anthrax mailings.¹²⁶ The articles in question were columns by Nicholas Kristof which focused primarily on criticizing the FBI’s anthrax investigation, rather than on Hatfill, who was originally identified in the columns only as “Mr. Z.”¹²⁷ Hatfill ultimately held a press conference identifying himself as the previously unnamed “person of interest” in the FBI’s anthrax investigation and denying any involvement, after which Kristof’s column acknowledged that Hatfill was “Mr. Z.”¹²⁸

In granting the *New York Times*’ motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court framed the issue as “whether the challenged columns reasonably can be read to accuse Hatfill of actually being the anthrax

121. 23 F. Supp.2d 348 (S.D.N.Y. 1998).

122. *Id.* at 356–57.

123. *Id.* at 357. Jewell does not appear to have argued that the *Post* should be required to establish that he was actually responsible for the bombing.

124. *Id.* at 367.

125. 33 Media L. Rep. 1129 (E.D. Va. 2004), *rev’d*, 416 F.3d 320 (4th Cir. 2005).

126. *Id.*

127. Nicholas D. Kristof, *Anthrax? The FBI Yawns*, N.Y. TIMES, July 2, 2002, at A1.

128. *Hatfill*, 33 Media L. Rep. at 1131.

mailer.”¹²⁹ The court found that the “principle that an accurate report of ongoing investigation or an allegation of wrongdoing does not carry the implication of guilt . . . is mandated by the First Amendment.”¹³⁰ The court stressed that the columns neither made accusations nor expressed “a belief in [Hatfill’s] guilt,” but rather merely raised questions.¹³¹ The court noted that courts “across the country have repeatedly rebuffed efforts to transform reports raising questions about matters of public concern into defamatory assertions of guilt.”¹³² The columns at issue “accurately report questions being raised in the context of an ongoing public controversy.”¹³³ The court therefore concluded that “[c]ritiquing the propriety of the FBI’s investigation and raising questions of legitimate concern to the public is not the same as a direct accusation of wrongdoing, and does not subject defendants to a claim for libel.”¹³⁴ Because the holding focused on the threshold issue of the defamatory meaning of the challenged article, the district court did not address the issues of republication, truth, or the fair report or neutral reportage privileges.

A panel of the Fourth Circuit reversed, with one judge dissenting.¹³⁵ The circuit court held that Hatfill’s complaint adequately alleged that Kristoff’s columns were capable of defamatory meaning.¹³⁶ After summarizing the “assertions” it perceived in Kristoff’s columns, the court concluded that “a reasonable reader of Kristoff’s columns likely would conclude that Hatfill was responsible for the anthrax mailings in 2001.”¹³⁷ In a footnote to the above-quoted passage, the circuit court stated that, in the context of a 12(b)(6) motion to dismiss, there was no evidence to establish whether Kristoff’s columns were accurate reports of an ongoing investigation.¹³⁸ Moreover, the court suggested that this question was not properly

129. *Id.* at 1133.

130. *Id.*

131. *Id.* at 1134.

132. *Id.* (citing *Chapin*, 993 F.2d at 1091; *Green v. CBS Broad., Inc.*, 286 F.3d 281, 282-84 (5th Cir. 2002)).

133. *Hatfill*, 33 MEDIA L. REP. at 1134.

134. *Id.*

135. *Hatfill v. New York Times*, 416 F.3d 320 (4th Cir. 2005).

136. *Id.* at 332.

137. *Id.* at 333.

138. *Id.* at 333 n.5.

before the court in determining whether a statement is capable of defamatory meaning.¹³⁹ The court also made clear that in its view Kristoff's columns did not merely report on law enforcement suspicions regarding Hatfill, but that they "generated" suspicion by asserting facts implicating him in the anthrax mailings.¹⁴⁰ Judge Niemeyer, in dissent, argued that Kristoff's columns did not accuse Hatfill of being behind the anthrax mailings, but simply pointed out the circumstantial evidence making Hatfill a plausible suspect.¹⁴¹

The circuit court's decision in *Hatfill* suggests that truth, rather than defamatory meaning, is the strongest defense for a press defendant who has accurately reported on a government investigation. The opinion also suggests, however, that truth will not necessarily be a full defense when the press defendant takes issue with, or urges additional action upon, the official investigation. The circuit court's opinion leaves unresolved whether Kristoff's column will ultimately be deemed a truthful report on the investigation and therefore not subject to a defamation claim, but it demonstrates a willingness by that court to find that Kristoff went beyond simply describing the investigation when he criticized the government for not investigating Hatfill more aggressively given the circumstantial evidence linking him to the crime. Presumably, courts will look beyond the first level of truth in circumstances in which the press is not simply reporting the mere fact of an investigation but is instead implicitly or explicitly suggesting that an individual deserves more aggressive scrutiny or is in fact guilty of the crime being investigated.

Lastly, a number of courts have focused on the first level of truth in adjudicating cases against the press based on its reporting of allegations leveled by private third parties rather than by the government. *Green v. CBS Broadcasting, Inc.*, arose out of a television program that focused on how winning the lottery had affected the lives of a group of winners.¹⁴² The ex-wife of one of those profiled claimed to have been libeled by the broadcast's inclusion of a state-

139. *Id.*

140. *Id.*

141. *Id.* at 337-38.

142. 286 F.3d 281 (5th Cir. 2002).

ment by her former husband that she had brought accusations of child sexual abuse against him in an attempt to obtain more of his lottery winnings during their divorce.¹⁴³ The court concluded that many of the challenged statements were legally non-actionable as defamation “because they merely report allegations In cases involving media defendants . . . the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported.”¹⁴⁴

In *Janklow v. Newsweek, Inc.*, Janklow, a former South Dakota Attorney General, brought suit against *Newsweek* for an article regarding his attempt to bring a Native American activist back to the state for sentencing on two felonies.¹⁴⁵ Specifically, the article detailed the activist’s claim that his criminal prosecution was in retaliation for his having accused Janklow of rape.¹⁴⁶ In contrast to *Cianci*, the *Janklow* court refused to find that the magazine article had libeled Janklow by implying he was guilty of the alleged rape, noting that to “the extent the publication of the rape allegation has caused harm to Janklow’s reputation, this harm is the result of a materially accurate report of historical fact, not of an assertion by *Newsweek* that Janklow committed the alleged crime.”¹⁴⁷ Therefore, “because the article in question cannot be read to imply that *Newsweek* espoused the validity of the rape allegation, we find no error in the District Court’s judgment for *Newsweek* on this claim.”¹⁴⁸

In *Basilus v. Honolulu Publishing Co.*, the plaintiff claimed that an article had implicated him in a murder.¹⁴⁹ At issue was the article’s reporting on letters received by the victim’s relatives that implicated the plaintiff in that crime.¹⁵⁰ Finding the case before it analogous to *Janklow*, the court held that the article truthfully presented, but did not adopt, the allegations, and that the article was therefore substantially true.¹⁵¹ The court therefore declined to

143. *Id.* at 283.

144. *Id.* at 284.

145. *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985).

146. Connie Leslie & Martin Kasindorf, *Dennis Bank’s Last Stand*, NEWSWEEK, Feb. 21, 1983, at 28.

147. *Janklow*, 759 F.2d at 649.

148. *Id.*

149. 711 F. Supp. 548 (D. Haw. 1989).

150. *Id.* at 550.

151. *Id.* at 552.

address the neutral reportage defense put forward by the publisher.¹⁵²

V. CONCLUSION: THE NEED FOR A PRINCIPLED APPROACH

In reviewing the case law on the media's accurate reporting on government investigations, we find a small body of correctly decided decisions in search of an overarching principle that would articulate and justify their result. The cases reflect courts' willingness to vindicate important First Amendment and public policy principles — principles consistent with the fair report privilege — in order to allow the media to accurately report on newsworthy accusations and investigations which may not otherwise be protected from defamation claims. They serve to illustrate the need for express judicial recognition that the First Amendment demands such an approach to protect a limited category of speech currently unprotected by the related privileges.

This problem calls for recognition of a First Amendment-based limit on the republication doctrine when the press is providing accurate reports on government accusations and investigations. This would serve the important constitutional policy objective of keeping the public fully informed about the workings of government. It would also fill a gap that neither the fair report nor the neutral reportage privilege reliably covers. The scope of this exception is by definition a limited one; moreover, the republisher is still fully responsible for accurately reporting the fact of an investigation. A newspaper that falsely reports that an individual is a target of a criminal investigation would receive no protection. This approach would provide constitutional recognition that the press should not face liability for accurately reporting about government investigations into criminal activity. It would also provide a sound rationale to support the inclination courts have exhibited to exempt such reporting from an overly rigid application of the republication doctrine.

152. *Id.*