# 4. Libel II:
# Actual Malice, public v. private figures, defenses

**4. Libel II**

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"*DeSantis, Aiming at a Favorite Foil, Wants to Roll Back Press Freedom*"

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# Harte-Hanks Communications v. Connaughton

491 U.S. 657 (June 22, 1989)

JUSTICE STEVENS delivered the opinion of the Court.

A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false "statement was made with `actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [J]udges in such cases have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." In this case the Court of Appeals affirmed a libel judgment against a newspaper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the subsidiary facts underlying the jury's finding of actual malice.

I

Respondent, Daniel Connaughton, was the unsuccessful candidate for the office of Municipal Judge of Hamilton, Ohio, in an election conducted on November 8, 1983. Petitioner is the publisher of the Journal News, a local newspaper that supported the reelection of the incumbent, James Dolan. A little over a month before the election, the incumbent's Director of Court Services resigned and was arrested on bribery charges. A grand jury investigation of those charges was in progress on November 1, 1983. On that date, **the Journal News ran a front-page story quoting Alice Thompson, a grand jury witness, as stating that Connaughton had used "dirty tricks" and offered her and her sister jobs and a trip to Florida "in appreciation" for their help in the investigation.**

. . .Connaughton filed an action for damages, alleging that the article was false, that it had damaged his personal and professional reputation, and that it had been published with actual malice. [P]etitioner filed a motion [to dismiss the case without trial arguing] that even if Thompson's statements were false, the First Amendment protects the accurate and disinterested reporting of serious charges against a public figure. The District Court denied the motion, noting that the evidence raised an issue of fact as to the newspaper's interest in objective reporting and that the "neutral reportage doctrine" did not apply to Thompson's statements. . .

[The jury] unanimously found by a preponderance of the evidence that the November 1 story was defamatory and that it was false. . , that the story was published with actual malice [and] awarded Connaughton $5,000 in compensatory damages and $195,000 in punitive damages. . .

The Court of Appeals affirmed. . .

* * *

II

Petitioner contends that the Court of Appeals made two basic errors. First, while correctly stating the actual malice standard announced in *New York Times*, the court actually applied a less severe standard that merely required a showing of "`highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.'" Second [omitted]

There is language in the Court of Appeals' opinion that supports petitioner's first contention. . .[T]he opinion attributes considerable weight to the evidence that the Journal News was motivated by its interest in the reelection of the candidate it supported and its economic interest in gaining a competitive advantage over the Cincinnati Enquirer, its bitter rival in the local market. Petitioner is plainly correct in recognizing that a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story - whether to promote an opponent's candidacy or to increase its circulation - cannot provide a sufficient basis for finding actual malice.

* * *

**It. . .is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. .** .[For instance, we have held that] a public figure "may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*. **Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice**. . .If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels. **Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. . .: the defendant must have made the false publication with a "high degree of awareness of . . . probable falsity," or must have "entertained serious doubts as to the truth of his publication."**

* * *

III

* * *

The jury. . .found that Connaughton was telling the truth and that Thompson's charges were false. . .[That alone does not mean the Journal News acted with actual malice.] The jury's verdict in this case, however, derived additional support from several critical pieces of information that strongly support the inference that the Journal News acted with actual malice. . .

IV

On October 27, after the interview with Alice Thompson, the managing editor of the Journal News assembled a group of reporters and instructed them to interview all of the witnesses to the conversation between Connaughton and Thompson with one exception - Patsy Stephens [Thompson's sister, who was present when Connaughton allegedly told Thompson what Thompson claimed]. No one was asked to interview her and no one made any attempt to do so. This omission. . .is utterly bewildering in light of the fact that **the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events.**

**However, if the Journal News had serious doubts concerning the truth of Thompson's remarks, but was committed to running the story, there was good reason not to interview Stephens - while denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story.**

**The remaining six witnesses, including Connaughton, . . .denied Alice Thompson's charges and corroborated Connaughton's version of the events. . .By the time the November 1 story appeared, six witnesses had consistently and categorically denied Thompson's allegations, yet the newspaper chose not to interview the one witness that both Thompson and Connaughton claimed would verify their conflicting accounts of the relevant events.**

* * *

Moreover, although also just a small part of the larger picture, Blount's October 30 editorial can be read to set the stage for the November 1 article. Significantly, **this editorial appeared before** Connaughton or any of the other witnesses were interviewed. Its prediction that further information concerning the integrity of the candidates might surface in the last few days of the campaign can be taken to indicate that **Blount had already decided to publish Thompson's allegations, regardless of how the evidence developed and regardless of whether or not Thompson's story was credible upon ultimate reflection**.

* * *

V

. . .Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of "`breathing space'" so that protected speech is not discouraged. . .

There is little doubt that "public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule,". . .As Madison observed in 1800, just nine years after ratification of the First Amendment:

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."

This value must be protected with special vigilance. When a candidate enters the political arena, he or she "must expect that the debate will sometimes be rough and personal," and cannot "`cry Foul!' when an opponent or an industrious reporter attempts to demonstrate" that he or she lacks the "sterling integrity" trumpeted in campaign literature and speeches. Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. **A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one. . .As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. In a case such as this involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."**

**. . .Based on our review of the entire record. . .the evidence did in fact support a finding of actual malice.**

* * *

It is. . .undisputed that **Connaughton made the tapes of the Stephens interview [he had conducted with her before the articles appeared] available to the Journal News and that no one at the newspaper took the time to listen to them. Similarly, there is no question that the Journal News was aware that Patsy Stephens was a key witness and that they failed to make any effort to interview her.** Accepting the jury's determination that petitioner's explanations for these omissions were not credible, **it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.**

There is a remarkable similarity between this case . . .and the facts that supported the Court's judgment in *Curtis Publishing Co. v. Butts*. In *Butts* the evidence showed that the Saturday Evening Post had published an accurate account of an unreliable informant's false description of the Georgia athletic director's purported agreement to "fix" a college football game. Although there was reason to question the informant's veracity, just as there was reason to doubt Thompson's story, the editors did not interview a witness who had the same access to the facts as the informant and did not look at films that revealed what actually happened at the game in question. This evidence of an intent to avoid the truth was not only. . .an extreme departure from professional publishing standards, but it was also sufficient to satisfy the more demanding *New York Times* standard [for actual malice].

As in Butts, the evidence in the record in this case, when reviewed in its entirety, is "unmistakably" sufficient to support a finding of actual malice. The judgment of the Court of Appeals is accordingly

Affirmed.

# Worrell-Payne v. Gannett Co., Inc.

United States Court of Appeals, Ninth Circuit (October 7, 2002)

Plaintiff-Appellant Judith E. Worrell-Payne ("Worrell-Payne"), the former executive director for the Boise City/Ada County Housing Authority (the "Authority"), brought suit against Defendant-Appellee Gannett Co., Inc. ("Gannett") for defamation, defamation by implication, intentional infliction of emotional distress, intentional interference with contract, intentional interference with prospective economic advantage, and invasion of privacy, based on a series of articles and editorials which appeared in Gannett's newspaper, *The Idaho Statesman* (*"The Statesman"* ), from 1996 to 1998 and were sharply critical of her performance as executive director of the Authority. . .

* * *

**DISCUSSION**

**I. Defamation and Defamation by Implication Claims**

The district court properly concluded that Worrell-Payne was a "public official" during the time of the publications. In her role as executive director of the Authority, Worrell-Payne acted as its representative, was responsible for the oversight of its budget, managed its employees, applied for private and public funds, and monitored its compliance with applicable rules and regulations. . .

To succeed on her claim of defamation, Worrell-Payne must therefore show [by "clear and convincing evidence"] that the statements in question were made with "actual malice," i.e., with actual knowledge of their falsity or reckless disregard for their truth or falsity. . .

The bulk of Worrell-Payne's defamation. . .claim [is] based on *The Statesman'* s multiple articles and editorials reporting that she was either "accused of," faced "allegations" or "charges" of, or was "fired amid" allegations of nepotism, frequent absenteeism, and mismanagement. Her main contention is that statements she made in her own defense at a press conference, the contents of a "corrective" information packet she provided to reporters, and other responses she gave to reporters at *The Statesman* should have made it obvious to them that the statements being made in its articles and editorials about her were false and that Gannett therefore acted with actual malice when it continued to report on the accusations.

Despite Worrell-Payne's denial of any wrongdoing and claims that she followed the appropriate procedures, however, her defamation. . .claim[] must fail. ***The Statesman*** **provided the essential facts upon which the reported allegations of "nepotism," "favoritism," and "mismanagement" were based. Furthermore, it did not ignore Worrell-Payne's response to these claims or engage in "purposeful avoidance of the truth" when it had "obvious reasons to doubt the veracity of its reporting."**

**In fact, on more than one occasion, the articles included Worrell-Payne's asserted denials**, which consisted primarily of the assertions that she had followed the correct procedures, had gotten approval from the Authority's Board of Commissioners (the "Board") for the actions, and had not given any friends or family members preferential treatment when they obtained certain benefits from the Authority questioned by the articles. Because these denials did not prove the falsity of the essential facts upon which the stories were based, the statements themselves, or the impressions being reported, Worrell- Payne is unable to meet her burden of demonstrating that a jury could reasonably find by "clear and convincing evidence" that *The Statesman* "in fact entertained serious doubts as to the truth of" or acted with a "high degree of awareness of ... probable falsity" of the statements it published. . .

* * *

**Gannett also has a further defense to the defamation claims, based on additional statements in which the "substance or gist" is true. "In a slander or libel suit it is not necessary for the defendant to prove the literal truth of his statement in every detail, rather it is sufficient for a complete defense if the substance or gist of the slanderous or libelous statement is true." . .**

* * *

CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

# Joanne Colt v. Freedom Communications

Court of Appeal of California, Fourth Appellate District (June 27, 2003)

OPINION BY RYLAARSDAM

Joanne Colt and Douglas Colt sued Freedom Communications, Inc. and Freedom Newspapers, Inc. . . .based on articles published in the Colorado Springs Gazette, a newspaper owned by the defendants, and on an affiliated website. We affirm an order striking the complaint. . .because plaintiffs failed to establish "that there is a probability that [they] will prevail on the claim."

FACTS

According to allegations in a complaint filed against him by the Securities and Exchange Commission (SEC), Douglas Colt "carried out an illegal scheme to manipulate the price of four stocks" during a two-month period in 1999 by "using a free subscription internet website called 'Fast-Trades.com.' . . .Through this scheme centered on recommending stocks, Colt drove up the short-term price for each stock by as much as 700%. By trading in advance of the stock recommendations, Colt generated more than $345,000 in total profits for himself, [and others]." The complaint continues that "by engaging in the transactions, acts, practices and courses of business alleged herein [Douglas] Colt violated the antifraud provisions of the federal securities laws."

The SEC complaint then spells out the details of the scheme and explains the involvement of others, including plaintiff Joanne Colt. . .Although the lengthy complaint only names Douglas Colt as a defendant, as noted, it also contains allegations concerning the conduct of Joanne Colt.

Plaintiffs responded to the SEC action by stipulating to the entry of a consent decree. The decree permanently enjoined them from the conduct complained of in the complaint. . .Plaintiffs also consented to an order they disgorge their illicit profits. . .Plaintiffs emphasize that they stipulated to the consent decree without admitting or denying the allegations of the SEC's complaint.

Plaintiffs' complaint alleges that articles defendants published in the Colorado Springs Gazette and on an associated internet message board libeled them by making false statements about their trading activities, the charges filed against them by the SEC, and the effect of their consenting to the entry of the decree. Plaintiffs also make much of their contention that, although they entered into the consent decree, they did so only because of financial and other pressures and either that they really did not commit the acts charged against them by the SEC or that these acts were not, in fact, fraudulent. The record, which contains a detailed summary of the allegedly libelous statements and defendants' analysis, demonstrates that there were factual discrepancies between the SEC charges and defendants' reports.

* * *

DISCUSSION

Standard of Review

* * *

Plaintiffs do not dispute defendants' contention that Joanne Colt was a "public figure" and that Douglas Colt was a "limited purpose public figure." As such, before plaintiffs can recover, they must show that defendants acted with actual malice.

* * *

Effect of the Consent Decree

Although plaintiffs determinedly deny both the truth of the SEC allegations and that one may infer guilt from their stipulating to the entry of a consent decree, **the First Amendment and Civil Code section 47, subdivision (d) permitted defendants to publish a "fair and true report" of the legal proceedings**. The question thus becomes whether the newspaper articles and internet postings qualify as being fair and true. . .

As defendants point out, the "fair and true report" requirement does not limit the privilege to statements which contain no errors. Our Supreme Court recognized that "'erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive."' *[New York Times]* **Thus the publication concerning legal proceedings is privileged as long as the substance of the proceedings is described accurately. . .The news article need not track verbatim the underlying proceeding. Only if the deviation is of such a 'substantial character' that it 'produces a different effect' on the reader will the privilege be suspended. . .**

Discrepancies Between SEC Charges and Defendants' Reports

**Plaintiffs draw fine distinctions between the misconduct charged in the SEC complaint and defendants' descriptions of this misconduct. They asked the trial court, and now ask us, to engage in a detailed parsing of words, phrases, and sentences to note the subtle differences between their misconduct and that noted in the articles. . .[T]he law does not require us to do so. *Jennings* held that even a newspaper report that plaintiff was "convicted of tax fraud" accurately conveyed the gist of judicial proceedings where plaintiff had pleaded "no contest" to failing to file tax returns. We therefore decline the offer to engage in the hermeneutical exercise to which plaintiffs have challenged us.**

We must now examine whether the facts reported by defendants so far deviated from the SEC charges as to go beyond the "the substance, the gist, the sting" of the charges against plaintiffs. The SEC complaint charges that Douglas Colt, then a law student, "carried out an illegal scheme to manipulate the price of four stocks using a free subscription internet website called 'Fast-Trades.com'" and by e-mailing recommendations to subscribers to the website. He made these recommendations after purchasing large quantities of the stock; after the recommendations resulted in an increase in the price of the stock, he and his cohorts would sell at the inflated price. They promoted the website "by posting false and misleading messages on hundred of publicly accessible internet message boards. These messages disguised the authors' connection with the site and misrepresented the investment success they achieved from following Fast-Trades' recommendations. . . . Colt also included a false 'track

record' on the Fast-Trades.com website . . . and misrepresented their trading intentions . . . ." Some 9000 persons were potentially deceived by this scheme.

Defendants do not deny that their articles contained some errors concerning the details of plaintiffs' scheme. For example, the articles misattributed ownership of a particular stock to Colt. But while he may not have owned the described stock, his scheme did involve ownership of stock mentioned on the website. Plaintiffs take issue with statements in the articles that the website published false information about the touted stock; even if this was incorrect in an overly literal reading of the phrase, the touting of specific stock constituted an implied representation about its value. The characterization of the scheme as a "pump and dump scenario" fairly described the nature of the scheme detailed in the SEC complaint.

As additional evidence of the libel, plaintiffs point to a message allegedly posted by defendants, reading "[Douglas Colt] has been caught by the SEC. [He] targeted [name of company] in March of last year. He drove the price up for a matter of hours using false information about the company, thus creating a buying frenzy, and then dumped shares." Plaintiff takes issue with the suggestion he was "caught"; but he was. Had he not been "caught," there would not be a consent decree. He argues that he did not post false information about the companies; but, as we noted, by touting the stocks, he implicitly represented that they were undervalued. **The statement fairly describes the substance of plaintiffs' scheme. Were we to accept plaintiffs' arguments, we would require that newspapers be limited to word-for-word quotations from legal documents. Of course, the law imposes no such requirement.**

Plaintiffs also take issue with statements in the articles that the stock was "worthless." They draw comfort from an alleged admission by the reporter that "everyone knows that if a stock is still trading publicly, it is worth something," which is generally true. But the point was that the victims of plaintiffs' scheme parted with valuable consideration for stock that was either substantially worthless or certainly worth a great deal less than they paid for it.

**It is not necessary to go through each of plaintiffs' parsing of words and sentences in the articles published by defendants to demonstrate that their quarrel with the language of the articles involves a level of exegesis beyond the ken of the average reader of newspaper articles. The articles fairly describe the gist of plaintiffs' misconduct. . .**

As a result, the articles are protected by the First Amendment and Civil Code Section 47, subdivision (d). And therefore, plaintiffs have failed to demonstrate "that there is a probability that [they] will prevail on the claim."

Lack of Actual Malice

As noted earlier, before plaintiffs can demonstrate the existence of a prima facie case, they must present clear and convincing evidence of actual malice. This they failed to do. Their inability to provide such evidence provides an additional basis requiring us to affirm the judgment.

In support of their claim there was evidence of actual malice, plaintiffs argue that defendants' reporter acknowledged he had known statements to be untrue when he made them. . .[W]e presume that this contention is based on the e-mails from defendants' **reporter wherein he acknowledges having made an error when stating that Fast-Trades posted false information; he explains the error by stating "I was in a rush when I posted the message and it somehow came out wrong." This may qualify as negligence, but it is hardly clear and convincing evidence of malice.**

Plaintiffs offer another bit of evidence, . . .a statement made by the reporter that "Doug Colt used the website 'solely to offer bogus stock tips to get investors to buy worthless stock that he owned.'" Although this does not precisely describe the scheme employed by plaintiffs, it certainly describes the gist of it and is far from clear and convincing evidence of malice. Other contentions of the existence of evidence of actual malice are of the same inconsequential nature.

Conclusion

Plaintiffs fail to acknowledge that the newspaper was entitled to draw conclusions from their consenting to the entry of a decree based on the SEC complaint. The fact that they "admitted no wrongdoing" did not provide them with a shield from adverse publicity. . .

DISPOSITION

The judgment of dismissal is affirmed.

# Rolling Stone's investigation: 'A failure that was avoidable'

By Sheila Coronel, Steve Coll, and Derek Kravitz,
Columbia Journalism Review April 5, 2015

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**Note: Before reading this report from the Columbia Journalism Review, please review the original story. Warning: both contain graphic descriptions of sexual violence. The *Rolling Stone* article is also false. Although Rolling Stone retracted and pulled the story, it can be found here: https://archive.is/2I04n**

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# Rolling Stone's investigation: 'A failure that was avoidable'

By Sheila Coronel, Steve Coll, and Derek Kravitz, Columbia Journalism Review
April 5, 2015

Last July 8, Sabrina Rubin Erdely, a writer for Rolling Stone, telephoned Emily Renda, a rape survivor working on sexual assault issues as a staff member at the University of Virginia. **Erdely said she was searching for a single, emblematic college rape case that would show "what it's like to be on campus now … where not only is rape so prevalent but also that there's this pervasive culture of sexual harassment/rape culture," according to Erdely's notes of the conversation.**

Renda told Erdely that many assaults take place during parties where "the goal is to get everyone blackout drunk." She continued, "There may be a much darker side of this" at some fraternities. "One girl I worked with closely alleged she was gang-raped in the fall, before rush, and the men who perpetrated it were young guys who were not yet members of the fraternity, and she remembers one of them saying to another … 'C'mon man, don't you want to be a brother?'"

Renda added, "And obviously, maybe her memory of it isn't perfect."

**Erdely's notes set down her reply: "I tell her that it's totally plausible."**

Renda put the writer in touch with a rising junior at UVA who would soon be known to millions of Rolling Stone readers as "Jackie," a shortened version of her true first name. Erdely said later that when she first encountered Jackie, she felt the student "had this stamp of credibility" because a university employee had connected them. Earlier that summer, Renda had even appeared before a Senate committee and had made reference to Jackie's allegations during her testimony – another apparent sign of the case's seriousness.

"I'd definitely be interested in sharing my story," Jackie wrote in an email a few days later.

On July 14, Erdely phoned her. Jackie launched into a vivid account of a monstrous crime. She said, according to Erdely's notes, that in September 2012, early in her freshman year, a third-year student she knew as a fellow lifeguard at the university's aquatic center had invited her to "my first fraternity party ever." After midnight, her date took her upstairs to a darkened bedroom. "I remember looking at the clock and it was 12:52 when we got into the room," she told Erdely. Her date shut the door behind them. Jackie continued, according to the writer's notes:

> My eyes were adjusting to the dark. And I said his name and turned around. … I heard voices and I started to scream and someone pummeled into me and told me to shut up. And that's when I tripped and fell against the coffee table and it smashed underneath me and this other boy, who was throwing his weight on top of me. Then one of them grabbed my shoulders. … One of them put his hand over my mouth and I bit him – and he straight-up punched me in the face. … One of them said, 'Grab its motherfucking leg.' As soon as they said it, I knew they were going to rape me.

The rest of Jackie's account was equally precise and horrifying. The lifeguard coached seven boys as they raped her one by one. Erdely hung up the phone "sickened and shaken," she said. **She remembered being "a bit incredulous" about the vividness of some of the details Jackie offered**, such as the broken glass from the smashed table. Yet Jackie had been "confident, she was consistent." (Jackie declined to respond to questions for this report. Her lawyer said it "is in her best interest to remain silent at this time." The quotations attributed to Jackie here come from notes Erdely said she typed contemporaneously or from recorded interviews.) [Footnote 1]

Between July and October 2014, Erdely said, she interviewed Jackie seven more times. The writer was based in Philadelphia and had been reporting for Rolling Stone since 2008. She specialized in true-crime stories like "The Gangster Princess of Beverly Hills," about a high-living Korean model and self-styled Samsung heiress accused of transporting 7,000 pounds of marijuana. She had written about pedophile priests and sexual assault in the military. Will Dana, the magazine's managing editor, considered her "a very
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thorough and persnickety reporter who's able to navigate extremely difficult stories with a lot of different points of view."

Jackie proved to be a challenging source. At times, she did not respond to Erdely's calls, texts and emails. At two points, the reporter feared Jackie might withdraw her cooperation. Also, **Jackie refused to provide Erdely the name of the lifeguard who had organized the attack on her**. She said she was still afraid of him. That led to tense exchanges between Erdely and Jackie, but **the confrontation ended when Rolling Stone's editors decided to go ahead without knowing the lifeguard's name or verifying his existence.** After that concession, Jackie cooperated fully until publication.

**It was the worst day of my professional life.**

Erdely believed firmly that Jackie's account was reliable. So did her editors and the story's fact-checker, who spent more than four hours on the telephone with Jackie, reviewing every detail of her experience. "She wasn't just answering, 'Yes, yes, yes,' she was correcting me," the checker said. "She was describing the scene for me in a very vivid way. … I did not have doubt." (Rolling Stone requested that the checker not be named because she did not have decision-making authority.)

Rolling Stone published "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" on Nov. 19, 2014. It caused a great sensation. "I was shocked to have a story that was going to go viral in this way," Erdely said. "My phone was ringing off the hook." The online story ultimately attracted more than 2.7 million views, more than any other feature not about a celebrity that the magazine had ever published.

A week after publication, on the day before Thanksgiving, Erdely spoke with Jackie by phone. "She thanked me many times," Erdely said. Jackie seemed "adrenaline-charged … feeling really good."

Erdely chose this moment to revisit the mystery of the lifeguard who had lured Jackie and overseen her assault. Jackie's unwillingness to name him continued to bother Erdely. Apparently, the man was still dangerous and at large. "This is not going to be published," the writer said, as she recalled. "Can you just tell me?"

**Jackie gave Erdely a name. But as the reporter typed, her fingers stopped. Jackie was unsure how to spell the lifeguard's last name. Jackie speculated aloud about possible variations.**

**"An alarm bell went off in my head," Erdely said. How could Jackie not know the exact name of someone she said had carried out such a terrible crime against her – a man she professed to fear deeply?**

Over the next few days, worried about the integrity of her story, the reporter investigated the name Jackie had provided, but she was unable to confirm that he worked at the pool, was a member of the fraternity Jackie had identified or had other connections to Jackie or her description of her assault. She discussed her concerns with her editors. Her work faced new pressures. The writer Richard Bradley had published early if speculative doubts about the plausibility of Jackie's account. Writers at Slate had challenged Erdely's reporting during a podcast interview. She also learned that T. Rees Shapiro, a Washington Post reporter, was preparing a story based on interviews at the University of Virginia that would raise serious doubts about Rolling Stone's reporting.

Late on Dec. 4, Jackie texted Erdely, and the writer called back. It was by now after midnight. "We proceeded to have a conversation that led me to have serious doubts," Erdely said.

She telephoned her principal editor on the story, Sean Woods, and said she had now lost confidence in the accuracy of her published description of Jackie's assault. Woods, who had been an editor at Rolling Stone since 2004, "was just stunned," he said. He "raced into the office" to help decide what to do next. Later that day, the magazine published an editor's note that effectively retracted Rolling Stone's reporting on Jackie's allegations of gang rape at the University of Virginia. "It was the worst day of my professional life," Woods said.

**Failure and Its Consequences**

Rolling Stone's repudiation of the main narrative in "A Rape on Campus" is a story of journalistic failure that was avoidable. The failure encompassed reporting, editing, editorial supervision and fact-checking. The magazine set aside or rationalized as unnecessary essential practices of reporting that, if pursued, would likely have led the magazine's editors to reconsider publishing Jackie's narrative so prominently, if at all. The published story glossed over the gaps in the magazine's reporting by using pseudonyms and by failing to state where important information had come from.

In late March, after a four-month investigation, the Charlottesville, Va., police department said that it had "exhausted all investigative leads" and had concluded, "There is no substantive basis to support the account alleged in the Rolling Stone article." [Footnote 2]

The story's blowup comes as another shock to journalism's credibility amid head-swiveling change in the media industry. The particulars of Rolling Stone's failure make clear the need for a revitalized consensus in newsrooms old and new about what best journalistic practices entail, at an operating-manual-level of detail.

As at other once-robust print magazines and newspapers, Rolling Stone's editorial staff has shrunk in recent years as print advertising revenue has fallen and shifted online. The magazine's full-time editorial ranks, not including art or photo staff, have contracted by about 25 percent since 2008. Yet Rolling Stone continues to invest in professional fact-checkers and to fund time-consuming investigations like Erdely's. The magazine's records and interviews with participants show that the failure of "A Rape on Campus" was not due to a lack of resources. The problem was

methodology, compounded by an environment where several journalists with decades of collective experience failed to surface and debate problems about their reporting or to heed the questions they did receive from a fact-checking colleague.

**Erdely and her editors had hoped their investigation would sound an alarm about campus sexual assault and would challenge Virginia and other universities to do better**. Instead, the magazine's failure may have spread the idea that many women invent rape allegations. (Social scientists analyzing crime records report that the rate of false rape allegations is 2 to 8 percent.) At the University of Virginia, "It's going to be more difficult now to engage some people … because they have a preconceived notion that women lie about sexual assault," said Alex Pinkleton, a UVA student and rape survivor who was one of Erdely's sources.

There has been other collateral damage. "It's completely tarnished our reputation," said Stephen Scipione, the chapter president of Phi Kappa Psi, the fraternity Jackie named as the site of her alleged assault. "It's completely destroyed a semester of our lives, specifically mine. It's put us in the worst position possible in our community here, in front of our peers and in the classroom."

The university has also suffered. Rolling Stone's account linked UVA's fraternity culture to a horrendous crime and portrayed the administration as neglectful. Some UVA administrators whose actions in and around Jackie's case were described in the story were depicted unflatteringly and, they say, falsely. Allen W. Groves, the University dean of students, and Nicole Eramo, an assistant dean of students, separately wrote to the authors of this report that the story's account of their actions was inaccurate. [Footnote 3]

In retrospect, Dana, the managing editor, who has worked at Rolling Stone since 1996, said the story's breakdown reflected both an "individual failure" and "procedural failure, an institutional failure. … Every single person at every level of this thing had opportunities to pull the strings a little harder, to question things a little more deeply, and that was not done."

Yet the editors and Erdely have concluded that their main fault was to be too accommodating of Jackie because she described herself as the survivor of a terrible sexual assault. Social scientists, psychologists and trauma specialists who support rape survivors have impressed upon journalists the need to respect the autonomy of victims, to avoid re-traumatizing them and to understand that rape survivors are as reliable in their testimony as other crime victims. These insights clearly influenced Erdely, Woods and Dana. "Ultimately, we were too deferential to our rape victim; we honored too many of her requests in our reporting," Woods said. "We should have been much tougher, and in not doing that, we maybe did her a disservice."

Erdely added: "If this story was going to be about Jackie, I can't think of many things that we would have been able to do differently. … Maybe the discussion should not have been so much about how to accommodate her but should have been about whether she would be in this story at all." **Erdely's reporting led her to other, adjudicated cases of rape at the university that could have illustrated her narrative, although none was as shocking and dramatic as Jackie's.**

**Yet the explanation that Rolling Stone failed because it deferred to a victim cannot adequately account for what went wrong. Erdely's reporting records and interviews with participants make clear that the magazine did not pursue important reporting paths even when Jackie had made no request that they refrain. The editors made judgments about attribution, fact-checking and verification that greatly increased their risks of error but had little or nothing to do with protecting Jackie's position.**

It would be unfortunate if Rolling Stone's failure were to deter journalists from taking on high-risk investigations of rape in which powerful individuals or institutions may wish to avoid scrutiny but where the facts may be underdeveloped. There is clearly a need for a more considered understanding and debate among journalists and others about the best practices for reporting on rape survivors, as well as on sexual assault allegations that have not been adjudicated. This report will suggest ways forward. It will also seek to clarify, however, why Rolling Stone's failure with "A Rape on Campus" need not have happened, even accounting for the magazine's sensitivity to Jackie's position. That is mainly a story about reporting and editing.

### 'How Else Do You Suggest I Find It Out?'

By the time Rolling Stone's editors assigned an article on campus sexual assault to Erdely in the spring of 2014, high-profile rape cases at Yale, Harvard, Columbia, Vanderbilt and Florida State had been in the headlines for months. The Office of Civil Rights at the federal Department of Education was leaning on colleges to reassess and improve their policies. Across the country, college administrators had to adjust to stricter federal oversight as well as to a new generation of student activists, including women who declared openly that they had been raped at school and had not received justice.

There were numerous reports of campus assault that had been mishandled by universities. At Columbia, an aggrieved student dragged a mattress around campus to call attention to her account of assault and injustice. The facts in these cases were sometimes disputed, but they had generated a wave of campus activism. "My original idea," Dana said, was "to look at one of these cases and have the story be more about the process of what happens when an assault is reported and the sort of issues it brings up."

Jackie's story seemed a powerful candidate for such a narrative. **Yet once she heard the story, Erdely struggled to decide how much she could independently verify the details Jackie provided without jeopardizing Jackie's cooperation. In the end, the reporter relied heavily on Jackie for help in getting access to corroborating evidence and interviews.** Erdely asked Jackie for introductions to

friends and family. She asked for text messages to confirm parts of Jackie's account, for records from Jackie's employment at the aquatic center and for health records. She even asked to examine the bloodstained red dress Jackie said she had worn on the night she said she was attacked.

Jackie gave the reporter some help. She provided emails from a pool supervisor as evidence of her employment there. She introduced Erdely to Rachel Soltis, a freshman-year suitemate. Soltis confirmed that in January 2013, four months after the alleged attack, Jackie had told her that she had been gang-raped.

Yet Jackie could also be hard to pin down. Other interviews Jackie said she would facilitate never materialized. "I felt frustrated, but I didn't think she didn't want to produce" corroboration, Erdely said. Eventually, Jackie told Erdely that her mother had thrown away the red dress. She also said that her mother would be willing to talk to Erdely, but the reporter said that when she called and left messages several times, the mother did not respond.

**There were a number of ways that Erdely might have reported further, on her own, to verify what Jackie had told her. Jackie told the writer that one of her rapists had been part of a small discussion group in her anthropology class. Erdely might have tried to verify independently that there was such a group and to identify the young man Jackie described. She might have examined Phi Kappa Psi's social media for members she could interview and for evidence of a party on the night Jackie described. Erdely might have looked for students who worked at the aquatic center and sought out clues about the lifeguard Jackie had described. Any one of these and other similar reporting paths might have led to discoveries that would have caused Rolling Stone to reconsider its plans. But three failures of reporting effort stand out. They involve basic, even routine journalistic practice – not special investigative effort. And if these reporting pathways had been followed, Rolling Stone very likely would have avoided trouble.**

***Three friends and a 'shit show'***

During their first interview, Jackie told Erdely that after she escaped the fraternity where seven men, egged on by her date, had raped her, she called three friends for help.

She described the two young men and one woman – now former friends, she told Erdely – as Ryan, Alex and Kathryn. She gave first names only, according to Erdely's notes. She said they met her in the early hours of Sept. 29, 2012, on the campus grounds. Jackie said she was "crying and crying" at first and that all she could communicate was that "something bad" had happened. She said her friends understood that she had been sexually assaulted. (In interviews for this report, Ryan and Alex said that Jackie told them that she had been forced to perform oral sex on multiple men.) In Jackie's account to Erdely, Ryan urged her to go to the university women's center or a hospital for treatment. But Alex and Kathryn worried that if she reported a rape, their social lives would be affected. "She's going to be the girl who cried 'rape' and we'll never be allowed into any frat party again," Jackie recalled Kathryn saying.

Jackie spoke of Ryan sympathetically, but the scene she painted for Rolling Stone's writer was unflattering to all three former friends. Journalistic practice – and basic fairness – require that if a reporter intends to publish derogatory information about anyone, he or she should seek that person's side of the story.

Erdely said that while visiting UVA, she did ask Alex Pinkleton, a student and assault survivor, for help in identifying or contacting the three. (Pinkleton was not the "Alex" to whom Jackie referred in her account.) But Pinkleton said she would need to ask Jackie for permission to assist the writer. Erdely did not follow up with her. It should have been possible for Erdely to identify the trio independently. Facebook friend listings might have shown the names. Or, Erdely could have asked other current students, besides Pinkleton, to help.

Instead, Erdely relied on Jackie. On July 29, she asked Jackie for help in speaking to Ryan, "about corroborating that night, just a second voice?" Jackie answered, according to the writer's notes, that while "Ryan may be awkward, I don't understand why he wouldn't." But Jackie did not respond to follow-up messages Erdely left.

On Sept. 11, Erdely traveled to Charlottesville and met Jackie in person for the first time, at a restaurant near the UVA campus. With her digital recorder running, the reporter again asked about speaking to Ryan. "I did talk to Ryan," Jackie disclosed. She said she had bumped into him and had asked if he would be interested in talking to Rolling Stone. Jackie went on to quote Ryan's incredulous reaction: "No! … I'm in a fraternity here, Jackie, I don't want the Greek system to go down, and it seems like that's what you want to happen. … I don't want to be a part of whatever little shit show you're running."

"Ryan is obviously out," Erdely told Jackie a little later.

**Yet Jackie never requested – then or later – that Rolling Stone refrain from contacting Ryan, Kathryn or Alex independently. "I wouldn't say it was an obligation" to Jackie, Erdely said later. She worried, instead, that if "I work round Jackie, am I going to drive her from the process?" Jackie could be hard to get hold of, which made Erdely worry that her cooperation remained tentative. Yet Jackie never said that she would withdraw if Erdely sought out Ryan or conducted other independent reporting.**

"They were always on my list of people" to track down, Erdely said of the three. However, she grew busy reporting on UVA's response to Jackie's case, she said. She doesn't remember having a distinct conversation about this issue with Woods, her editor. "We just kind of agreed. … We just gotta leave it alone." Woods, however, recalled more than one conversation with Erdely about this. When Erdely said she had exhausted all the avenues for finding the friends, he said he agreed to let it go.

If Erdely had reached Ryan Duffin – his true name – he would have said that he had never told Jackie that he would not participate in Rolling Stone's "shit show," Duffin said in an interview for this report. The entire conversation with Ryan that Jackie described to Erdely "never happened," he said. Jackie had never tried to contact him about cooperating with Rolling Stone. He hadn't seen Jackie or communicated with her since the previous April, he said.

If Erdely had learned Ryan's account that Jackie had fabricated their conversation, she would have changed course immediately, to research other UVA rape cases free of such contradictions, she said later.

If Erdely had called Kathryn Hendley and Alex Stock – their true names – to check their sides of Jackie's account of Sept. 28 and 29, they would have denied saying any of the words Jackie attributed to them (as Ryan would have as well). They would have described for Erdely a history of communications with Jackie that would have left the reporter with many new questions. For example, the friends said that Jackie told them that her date on Sept. 28 was not a lifeguard but a student in her chemistry class named Haven Monahan. (The Charlottesville police said in March they could not identify a UVA student or any other person named Haven Monahan.) All three friends would have spoken to Erdely, they said, if they had been contacted.

The episode reaffirms a truism of reporting: Checking derogatory information with subjects is a matter of fairness, but it can also produce surprising new facts.

***'Can you comment?'***

Throughout her reporting, Erdely told Jackie and others that she wanted to publish the name of the fraternity where Jackie said she had been raped. Erdely felt Jackie "was secure" about the name of the fraternity: Phi Kappa Psi.

Last October, as she was finishing her story, Erdely emailed Stephen Scipione, Phi Kappa Psi's local chapter president. "I've become aware of allegations of gang rape that have been made against the UVA chapter of Phi Kappa Psi," Erdely wrote. "Can you comment on those allegations?"

**It was a decidedly truncated version of the facts that Erdely believed she had in hand. She did not reveal Jackie's account of the date of the attack. She did not reveal that Jackie said Phi Kappa Psi had hosted a "date function" that night, that prospective pledges were present or that the man who allegedly orchestrated the attack was a Phi Kappa Psi member who was also a lifeguard at the university aquatic center.** Jackie had made no request that she refrain from providing such details to the fraternity.

The university's administration had recently informed Phi Kappa Psi that it had received an account of a sexual assault at the fraternity that had reportedly taken place in September 2012. Erdely knew that the fraternity had received a briefing from UVA but did not know its specific contents. In fact, in this briefing, Scipione said in a recent interview, UVA provided a mid-September date as the night of the assault – not Sept. 28. And the briefing did not contain the details that Jackie had provided Erdely. The university said only that according to the account it had received, a freshman woman had been drinking at a party, had gone upstairs and had been forced to have oral sex with multiple men.

On Oct. 15, Scipione replied to Erdely's request for comment. He had learned, he wrote to her by email, "that an individual who remains unidentified had supposedly reported to someone who supposedly reported to the University that during a party there was a sexual assault." He added, "Even though this allegation is fourth hand and there are no details and no named accuser, the leadership and fraternity as a whole have taken this very seriously."

Erdely next telephoned Shawn Collinsworth, then Phi Kappa Psi's national executive director. Collinsworth volunteered a summary of what UVA had passed on to the fraternity's leaders: that there were allegations of "gang rape during Phi Psi parties" and that one assault "took place in September 2012."

Erdely asked him, according to her notes, "Can you comment?"

**If Erdely had provided Scipione and Collinsworth the full details she possessed instead of asking simply for "comment," the fraternity might have investigated the facts she presented**. After Rolling Stone published, Phi Kappa Psi said it did just that. Scipione said in an interview that a review of the fraternity's social media archives and bank records showed that the fraternity had held no date function or other party on the night Jackie said she was raped. A comparison of fraternity membership rolls with aquatic center employment records showed that it had no members who worked as lifeguards, Scipione added.

Erdely said Scipione had seemed "really vague," so she focused on getting a reply from Collinsworth. "I felt that I gave him a full opportunity to respond," she said. "I felt very strongly that he already knew what the allegations were because they'd been told by UVA." As it turned out, however, the version of the attack provided to Phi Kappa Psi was quite different from and less detailed than the one Jackie had provided to Erdely.

Scipione said that Rolling Stone did not provide the detailed information the fraternity required to respond properly to the allegations. "It was complete bullshit," he said. "They weren't telling me what they were going to write about. They weren't telling me any dates or details." Collinsworth said that he was also not provided the details of the attack that ultimately appeared in Rolling Stone.

There are cases where reporters may choose to withhold some details of what they plan to write while seeking verification for fear that the subject might "front run" by rushing out a favorably spun version pre-emptively. There are sophisticated journalistic subjects in politics and business that sometimes burn reporters in this way. Even so, it is risky for a journalist

to withhold detailed derogatory information from any subject before publication. Here, there was no apparent need to fear "front-running" by Phi Kappa Psi.

**Even if Rolling Stone did not trust Phi Kappa Psi's motivations, if it had given the fraternity a chance to review the allegations in detail, the factual discrepancies the fraternity would likely have reported might have led Erdely and her editors to try to verify Jackie's account more thoroughly.**

***The mystery of "Drew"***

In her interviews, Jackie freely used a first name – but no last name – of the lifeguard she said had orchestrated her rape. On Sept. 16, for the first time, Erdely raised the possibility of tracking this man down.

"Any idea what he's up to now?" Erdely asked, according to her notes.

"No, I just know he's graduated. I've blocked him on Facebook," Jackie replied. "One of my friends looked him up – she wanted to see him so she could recognize and kill him," Jackie said, laughing. "I couldn't even look at his Facebook page."

"How would you feel if I reached out to him for a comment?" Erdely asked, the notes record.

**"I'm not sure I would be comfortable with that."**

That exchange inaugurated a six-week struggle between Erdely and Jackie. For a while, it seemed to Erdely as if the stalemate might lead Jackie to withdraw from cooperation altogether.

On Oct. 20, Erdely asked again for the man's last name. "I'm not going to use his name in the article, but I have to do my due diligence anyway," Erdely told Jackie, according to the writer's notes. "I imagine he's going to say nothing, but it's something I need to do."

**"I don't want to give his last name," Jackie replied. "I don't even want to get him involved in this**. … He completely terrifies me. I've never been so scared of a person in my entire life, and I've never wanted to tell anybody his last name. … I guess part of me was thinking that he'd never even know about the article."

"Of course he's going to know about the article," Erdely said. "He's going to read it. He probably knows about the article already."

**Jackie sounded shocked, according to Erdely's notes. "I don't want to be the one to give you the name," Jackie said.**

"How else do you suggest I find it out?"

"I guess you could ask Phi Psi for their list," Jackie suggested.

After this conversation, Jackie stopped responding to Erdely's calls and messages. "There was a point in which she disappeared for about two weeks," Erdely said, "and we became very concerned" about Jackie's well-being. "Her behavior seemed consistent with a victim of trauma."

Yet Jackie made no demand that Rolling Stone not try to identify the lifeguard independently. She even suggested a way to do so – by checking the fraternity's roster. Nor did she condition her participation in the story on Erdely agreeing not to try to identify the lifeguard.

Ultimately, we were too deferential to our rape victim; we honored too many of her requests in our reporting. We should have been much tougher, and in not doing that, we maybe did her a disservice.

Erdely did try to identify the man on her own. She asked Jackie's friends if they could help. They demurred. She searched online to see if the clues she had would produce a full name. This turned up nothing definitive. "She was very aggressive about contacting" the lifeguard, said Pinkleton, one of the students Erdely asked for assistance.

With the benefit of hindsight, to succeed, Erdely probably would have had to persuade students to access the aquatic center's employment records, to find possible name matches. That might have taken time and luck.

By October's end, with the story scheduled for closing in just two weeks, Jackie was still refusing to answer Erdely's texts and voicemails. Finally, on Nov. 3, after consulting with her editors, Erdely left a message for Jackie proposing to her a "solution" that would allow Rolling Stone to avoid contacting the lifeguard after all. The magazine would use a pseudonym; "Drew" was eventually chosen.

After Erdely left this capitulating voicemail, Jackie called back quickly. According to Erdely, she now chatted freely about the lifeguard, still without using his last name. From that point on, through the story's publication, Jackie cooperated.

In December, Jackie told The Washington Post in an interview that after several interviews with Erdely, she had asked to be removed from the story, but that Erdely had refused. Jackie told the Post she later agreed to participate on condition that she be allowed to fact-check parts of her story. Erdely said in an interview for this report that she was completely surprised by Jackie's statements to the Post and that Jackie never told her she wanted to withdraw from the story. There is no evidence of such an exchange between Jackie and Erdely in the materials Erdely submitted to Rolling Stone.

There was, in fact, an aquatic center lifeguard who had worked at the pool at the same time as Jackie and had the first name she had used freely with Erdely. He was not a member of Phi Kappa Psi, however. The police interviewed him and examined his personal records. They found no evidence to link him to Jackie's assault.

If Rolling Stone had located him and heard his response to Jackie's allegations, including the verifiable fact that he did not belong to Phi Kappa Psi, this might have led

Erdely to reconsider her focus on that case. In any event, Rolling Stone stopped looking for him.

**'What Are They Hiding?'**

"A Rape on Campus" had ambitions beyond recounting one woman's assault. It was intended as an investigation of how colleges deal with sexual violence. The assignment was timely. The systems colleges have put in place to deal with sexual misconduct have come under intense scrutiny. These systems are works in progress, entangled in changing and sometimes contradictory federal rules that seek at once to keep students safe, hold perpetrators to account and protect every student's privacy.

The legal issues date to 1977, when five female students sued Yale University, arguing that they had been sexually harassed. The students invoked Title IX of the Education Amendments of 1972, a federal law that bans gender discrimination in education. They lost their case, but their argument – that sexual harassment and violence on campus threatened women's access to education – prevailed over time. By the mid-1980s, hundreds of colleges had adopted procedures to manage sexual misconduct, from stalking to rape. If universities failed to do so adequately, they could lose federal funding.

In late 2009, the Center for Public Integrity began to publish a series of articles that helped inspire even stricter federal guidelines. The articles bared problems with the first generation of campus response: botched investigations by untrained staff members; adjudication processes shrouded in secrecy; and sanctions so lacking that they sometimes allowed rapists, including repeat offenders, to remain on campus while their victims fled school.

The Obama administration took up the cause. It pressured colleges to adopt more rigorous systems, and it required a lower threshold of guilt to convict a student before school tribunals. The new pressure caused confusion, however, and, in some cases, charges of injustice. Last October, a group of Harvard Law School professors wrote that its university's revised sexual misconduct policy was "jettisoning balance and fairness in the rush to appease certain federal administrative officials."

Erdely's choice of the University of Virginia as a case study was well timed. The week she visited campus, an 18-year-old UVA sophomore went missing and was later found to have been abducted and killed. The university had by then endured a number of highly visible sexual assault cases. The Department of Education's Office of Civil Rights had placed the school, along with 54 others, under a broad compliance review.

"The overarching point of the article," Erdely wrote in response to questions from The Washington Post last December, was not Jackie, but "the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

Erdely saw her reporting about UVA as an examination, she said in an interview for this report, of "the way colleges handle these types of things." Jackie "was just the most dramatic example."

***'A chilling effect'***

After she heard Jackie's shocking story, Erdely zeroed in on the obligation of universities under federal law to issue timely warnings when there is a "serious or continuing" threat to student safety. Erdely understood from Jackie that eight months after the alleged assault, she had reported to UVA about being gang-raped at the Phi Kappa Psi house on campus grounds, in what appeared to be a hazing ritual. The university, Rolling Stone reported in its published story, was remiss in not warning its students about this apparently predatory fraternity.

According to the Charlottesville police, Jackie did meet with assistant dean of students Nicole Eramo on May 20, 2013. During that meeting, Jackie described her assault differently than she did later for Erdely, the police said, declining to provide details. According to members of the UVA community knowledgeable about the case, who asked not to be identified in order to speak about confidential university matters, Jackie recounted to Eramo the same story she had told her friends on the night of Sept. 28: She was forced to have oral sex with several men while at a fraternity party. Jackie did not name the fraternity where the assault occurred or provide names or details about her attackers, the sources said. No mention was made of hazing. (Citing student privacy and ongoing investigations, the UVA administration, through its communications office, declined to answer questions about the case.)

Over the years, the Department of Education has issued guidelines that stress victim confidentiality and autonomy. This means survivors decide whether to report and what assistance they would like. "If she did not identify any individual or Greek organization by name, the university was very, very limited in what it can do," said S. Daniel Carter, a campus safety advocate and director of the nonprofit 32 National Campus Safety Initiative.

As Rolling Stone reported, at their May 2013 meeting, Eramo presented Jackie her options: reporting the assault to the police or to the university's Sexual Misconduct Board. The dean also offered counseling and other services. She checked with Jackie in succeeding weeks to see whether she wanted to take action. She introduced Jackie to One Less, a student group made up of sexual assault survivors and their advocates.

The university did not issue a warning at this point because Jackie did not file a formal complaint and her account did not include the names of assailants or a specific fraternity, according to the UVA sources. It also made no mention of hazing.

I guess maybe I was surprised that nobody said, 'Why haven't you called them?' But nobody did, and I wasn't going to press that issue.

Between that time and April 2014, the university received no further information about Jackie's case, according to the police and UVA sources.

On April 21, 2014, Jackie again met with Eramo, according to the police. She told the dean that she was now coming under pressure for her visible activism on campus with assault prevention groups such as Take Back the Night, according to the UVA sources. Three weeks earlier, she said, she had been hit in the face by a bottle thrown by hecklers outside a Charlottesville bar. She also added a new piece of information to her earlier account of the gang rape she had endured. She named Phi Kappa Psi as the fraternity where the assault had taken place, the police said later. Moreover, she mentioned to Eramo two other students who she said had been raped at that fraternity. But she did not reveal the names of these women or any details about their assaults.

When there is credible information about multiple acts of sexual violence by the same perpetrator that may put students at risk, Department of Education guidelines indicate the university should take action even when no formal complaint has been filed. The school should also consider whether to issue a public safety warning. Once more, the University of Virginia did not issue a warning. Whether the administration should have done so, given the information it then possessed, is a question under review by the University of Virginia's governing Board of Visitors, aided by fact-finding and analysis by the law firm O'Melveny & Myers. (On March 30, UVA updated its sexual assault policy to include more clearly defined procedures for assessing threats and issuing timely warnings.)

The day after her meeting with the dean, Jackie met with Charlottesville and UVA police in a meeting arranged by Eramo. Jackie reported both the bottle-throwing incident and her assault at the Phi Kappa Psi house. The police later said that she declined to provide details about the gang rape because "[s]he feared retaliation from the fraternity if she followed through with a criminal investigation." The police also said they found significant discrepancies in Jackie's account of the day she said she was struck by the bottle.

That summer, Erdely began interviewing multiple UVA assault survivors. University officials still hoped that Jackie and the two other victims she had mentioned would file formal charges, the UVA sources said. Erdely knew this: On July 14, Emily Renda, who had graduated in May and taken a job in the university's student affairs office, told the reporter that it might be unwise for Rolling Stone to name Phi Kappa Psi in its story because "there are two other women who have not come forward fully yet, and we are trying to persuade them to get punitive action against the fraternity." Renda wrote later in an email for this report that she had tried to dissuade the writer "because of due process concerns and the way in which publicly accusing a fraternity might both prevent any future justice, but also infringe on their rights." Renda's warning to Erdely – a notice from a UVA employee that Phi Kappa Psi was under university scrutiny over allegations made by Jackie and two others – added to the impression that UVA regarded Jackie's narrative as reliable.

As it turned out, however, all of the information that the reporter, Renda and UVA possessed about the two other reported victims, in addition to Jackie, came only from Jackie. One of the women filed an anonymous report through the UVA online system – Jackie told Erdely she was there when the student pressed the "send" button – but neither of the women has been heard from since.

***'I'm afraid it may look like we're trying to hide something'***

In early September, Erdely asked to interview Eramo. The request created a dilemma for UVA. Universities must comply with a scaffold of federal laws that limit what they can make public about their students. The most important of these is the Family Educational Rights and Privacy Act, or FERPA, which protects student privacy and can make it difficult for university staff members to release records or answer questions about any enrollee.

Eramo was willing to talk if she wasn't asked about specific cases, but about hypothetical situations, as Erdely had cleverly suggested as a way around student privacy limitations.

"Since [Erdely] was referred to me by the students she interviewed, I'm afraid it may look like we are trying to hide something for me not to speak with her," Eramo said in an email to the UVA communications staff, recently released in response to a Freedom of Information Act request.

The communications office endorsed the interview, but Vice President for Student Life Patricia Lampkin vetoed the idea. "This is not reflective of Nicole," she wrote in an email, "but of the issue and how reporters turn the issue." Asked to clarify that statement for this review, Lampkin said she felt that given FERPA restrictions, there was nothing Eramo could say in an interview that would give Erdely "a full and balanced view of the situation."

**The distrust was mutual. "I had actually gone to campus thinking that they were going to be very helpful," Erdely said. Now she felt she was being stonewalled.** Among other things, she said Jackie and Alex Pinkleton told her that after Rolling Stone started asking questions on campus, UVA administrators contacted Phi Kappa Psi for the first time about the allegations of sexual assault at the fraternity house.

To Erdely, UVA looked as if it was in damage control mode. "So I think that instead of being skeptical of Jackie," she said, "I became skeptical of UVA. … What are they hiding and why are they acting this way?"

It is true that UVA did not get in touch with Phi Kappa Psi until Erdely showed up on campus. University sources offered an explanation. They said that administrators had contemplated suspending the fraternity's charter, but that would mean no university oversight over Phi Kappa Psi. They had also put off contacting the fraternity in the summer in the hope that Jackie and the other alleged victims would file charges. That hadn't happened, so they decided to act, even

before Erdely started asking questions, these sources said. (At the time of the writing of this report, the university had released no documentary evidence to support the decision-making sequence these sources described.) In any event, there was reason for Rolling Stone to be skeptical. UVA's history of managing sexual misconduct is checkered, as Erdely illustrated in other cases she reported on.

On Oct. 2, Erdely interviewed UVA President Teresa Sullivan. The reporter asked probing questions that revealed the gap between the number of assault cases that the university reported publicly and the cases that had been brought to the university's attention internally. Erdely described the light sanctions imposed on students found guilty of sexual misconduct. She asked about allegations of gang rapes at Phi Kappa Psi. Sullivan said that a fraternity was under investigation but declined to comment further about specific cases.

Following the recent announcement by the Charlottesville police that they could find no basis for Rolling Stone's account of Jackie's assault, Sullivan issued a statement. "The investigation confirms what federal privacy law prohibited the university from sharing last fall: That the university provided support and care to a student in need, including assistance in reporting potential criminal conduct to law enforcement," she said.

Erdely concluded that UVA had not done enough. "Having presumably judged there to be no threat," she wrote in her published story, UVA "took no action to warn the campus that an allegation of gang rape had been made against an active fraternity." Overall, she wrote, "rapes are kept quiet" at UVA in part because of "an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal."

During the six months she worked on the story, Erdely concentrated her reporting on the perspectives of victims of sexual violence at the University of Virginia and other campuses. She was moved by their experiences and their diverse frustrations. Her access to the perspectives of UVA administrators was much more limited, in part because some of them were not permitted to speak with her but also because Erdely came to see them as obstacles to her reporting.

In the view of some of Erdely's sources, the portrait she created was unfair and mistaken. "The university's response is not, 'We don't care,'" said Pinkleton, Jackie's confidante and a member of One Less. "When I reported my own assault, they immediately started giving me resources."

For her part, Eramo rejects the article's suggestion that UVA places its own reputation above protecting students. In an email provided by her lawyers, the dean wrote that the article falsely attributes to her statements she never made (to Jackie or otherwise) and that it "trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also providing for the safety of our communities."

"UVA does have plenty of room to grow in regard to prevention and response, as most if not all, colleges do," said Sara Surface, a junior who co-chairs UVA's Sexual Violence Prevention Coalition. She added, "The administrators and staff that work directly with and advocate for survivors are not more interested in the college's reputation over the well-being of its students."

### The Editing: 'I Wish Somebody Had Pushed Me Harder'

Sean Woods, Erdely's primary editor, might have prevented the effective retraction of Jackie's account by pressing his writer to close the gaps in her reporting. He started his career in music journalism but had been editing complex reported features at Rolling Stone for years. Investigative reporters working on difficult, emotive or contentious stories often have blind spots. It is up to their editors to insist on more phone calls, more travel, more time, until the reporting is complete. Woods did not do enough.

Rolling Stone publisher Jann Wenner said he typically reads about half of the stories in each issue before publication. He read a draft of Erdely's narrative and found Jackie's case "extremely strong, powerful, provocative. … I thought we had something really good there." But Wenner leaves the detailed editorial supervision to managing editor Will Dana, who has been at the magazine for almost two decades. Dana might have looked more deeply into the story drafts he read, spotted the reporting gaps and insisted that they be fixed. He did not. "It's on me," Dana said. "I'm responsible."

**In hindsight, the most consequential decision Rolling Stone made was to accept that Erdely had not contacted the three friends who spoke with Jackie on the night she said she was raped. That was the reporting path, if taken, that would have almost certainly led the magazine's editors to change plans.**

Erdely said that as she was preparing to write her first draft, she talked with Woods about the three friends. "Sean advised me that for now we should just put this aside," she said. "He actually suggested that I change their names for now." Woods said that he intended this decision to be temporary, pending further reporting and review.

**Erdely used pseudonyms in her first draft: "Randall," "Cindy" and "Andrew." She relied solely on Jackie's information and wrote vividly about how the three friends had reacted** after finding Jackie shaken and weeping in the first hours of Sept. 29:

> The group looked at each other in a panic. They all knew about Jackie's date that evening at Phi Kappa Psi, the house looming behind them. "We have got to get her to the hospital," Randall declared. The other two friends, however, weren't convinced. Is that such a good idea?" countered Cindy. … "Her reputation will be shot for the next four years." Andrew seconded the opinion. … The three friends launched into a heated discussion about the social price of reporting Jackie's

rape, while Jackie stood behind them, mute in her bloody dress.

**Erdely inserted a note in her draft, in bold type: "she says – all her POV" – to indicate to her editors that the dialogue had come only from Jackie.**

"In retrospect, I wish somebody had pushed me harder" about reaching out to the three for their versions, Erdely said. "I guess maybe I was surprised that nobody said, 'Why haven't you called them?' But nobody did, and I wasn't going to press that issue." Of course, just because an editor does not ask a reporter to check derogatory information with a subject, that does not absolve the reporter of responsibility.

Woods remembered the sequence differently. After he read the first draft, he said, "I asked Sabrina to go reach" the three friends. "She said she couldn't. … I did repeatedly ask, 'Can we reach these people? Can we?' And I was told no." He accepted this because "I felt we had enough." The documentary evidence provided by Rolling Stone sheds no light on whose recollection — Erdely's or Wood's – is correct.

**Woods said he ultimately approved pseudonyms because he didn't want to embarrass the three students by having Jackie's account of their self-involved patter out there for all their friends and classmates to see. "I wanted to protect them," he said.**

For his part, Dana said he did not recall talking with Woods or Erdely about the three friends at all.

***'We need to verify this'***

None of the editors discussed with Erdely whether Phi Kappa Psi or UVA, while being asked for "comment," had been given enough detail about Jackie's narrative to point out holes or contradictions. Erdely never raised the subject with her editors.

As to "Drew," the lifeguard, Dana said he was not even aware that Rolling Stone did not know the man's full name and had not confirmed his existence. Nor was he told that "we'd made any kind of agreement with Jackie to not try to track this person down."

As noted, there was no such explicit compact between Erdely and Jackie, according to Erdely's records. Jackie requested Erdely not to contact the lifeguard, but there was no agreement.

"Can you call the pool? Can you call the frat? Can you look at yearbooks?" Woods recalled asking Erdely after he read the first draft. "If you've got to go around Jackie, fine, but we need to verify this," meaning Drew's identity. He remembered having this discussion "at least three times."

But when Jackie became unresponsive to Erdely in late October, Woods and Dana gave in. They authorized Erdely to tell Jackie they would stop trying to find the lifeguard. Woods resolved the issue as he had done earlier with the three friends: by using a pseudonym in the story.

***'I had a faith'***

It is not possible in journalism to reach every source a reporter or editor might wish. A solution is to be transparent with readers about what is known or unknown at the time of publication.

There is a tension in magazine and narrative editing between crafting a readable story – a story that flows – and providing clear attribution of quotations and facts. It can be clunky and disruptive to write "she said" over and over. There should be room in magazine journalism for diverse narrative voicing – if the underlying reporting is solid. But the most egregious failures of transparency in "A Rape on Campus" cannot be chalked up to writing style. They obfuscated important problems with the story's reporting.

– Rolling Stone's editors did not make clear to readers that Erdely and her editors did not know "Drew's" true name, had not talked to him and had been unable to verify that he existed. That was fundamental to readers' understanding. In one draft of the story, Erdely did include a disclosure. She wrote that Jackie "refuses to divulge [Drew's] full name to RS," because she is "gripped by fears she can barely articulate." Woods cut that passage as he was editing. He "debated adding it back in" but "ultimately chose not to."

– Woods allowed the "shit show" quote from "Randall" into the story without making it clear that Erdely had not gotten it from him but from Jackie. "I made that call," Woods said. Not only did this mislead readers about the quote's origins, it also compounded the false impression that Rolling Stone knew who "Randall" was and had sought his and the other friends' side of the story.

The editors invested Rolling Stone's reputation in a single source. "Sabrina's a writer I've worked with for so long, have so much faith in, that I really trusted her judgment in finding Jackie credible," Woods said. "I asked her a lot about that, and she always said she found her completely credible."

Woods and Erdely knew Jackie had spoken about her assault with other activists on campus, with at least one suitemate and to UVA. They could not imagine that Jackie would invent such a story. Woods said he and Erdely "both came to the decision that this person was telling the truth." They saw her as a "whistle blower" who was fighting indifference and inertia at the university.

**The problem of confirmation bias – the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones – is a well-established finding of social science. It seems to have been a factor here.** Erdely believed the university was obstructing justice. She felt she had been blocked. Like many other universities, UVA had a flawed record of managing sexual assault cases. Jackie's experience seemed to confirm this larger pattern. Her story seemed well established on campus, repeated and accepted.

"If I had been informed ahead of time of one problem or discrepancy with her overall story, we would have acted upon that very aggressively," Dana said. "There were plenty of other stories we could have told in this piece." If anyone had raised doubts about how verifiable Jackie's narrative was, her case could have been summarized "in a paragraph deep in the story."

No such doubts came to his attention, he said. As to the apparent gaps in reporting, attribution and verification that had accumulated in the story's drafts, Dana said, "I had a faith that as it went through the fact-checking that all this was going to be straightened out."

**Fact-Checking: 'Above My Pay Grade'**

At Rolling Stone, every story is assigned to a fact-checker. At newspapers, wire services and in broadcast newsrooms, there is no job description quite like that of a magazine fact-checker. At newspapers, frontline reporters and editors are responsible for stories' accuracy and completeness. Magazine fact-checking departments typically employ younger reporters or college graduates. Their job is to review a writer's story after it has been drafted, to double-check details like dates and physical descriptions. They also look at issues such as attribution and whether story subjects who have been depicted unfavorably have had their say. Typically, checkers will speak with the writer's sources, sometimes including confidential sources, to verify facts within quotations and other details. To be effective, checkers must be empowered to challenge the decisions of writers and editors who may be much more senior and experienced.

In this case, the fact-checker assigned to "A Rape on Campus" had been checking stories as a freelancer for about three years, and had been on staff for one and a half years. She relied heavily on Jackie, as Erdely had done. She said she was "also aware of the fact that UVA believed this story to be true." That was a misunderstanding. What Rolling Stone knew at the time of publication was that Jackie had given a version of her account to UVA and other student activists. A university employee, Renda, had made reference to that account in congressional testimony. UVA had placed Phi Kappa Psi under scrutiny. None of this meant that the university had reached a conclusion about Jackie's narrative. The checker did not provide the school with the details of Jackie's account to Erdely of her assault at Phi Kappa Psi.

The checker did try to improve the story's reporting and attribution of quotations concerning the three friends. She marked on a draft that Ryan – "Randall" under pseudonym – had not been interviewed, and that his "shit show" quote had originated with Jackie. "Put this on Jackie?" the checker wrote. "Any way we can confirm with him?" She said she talked about this problem of clarity with Woods and Erdely. "I pushed. … They came to the conclusion that they were comfortable" with not making it clear to readers that they had never contacted Ryan.

She did not raise her concerns with her boss, Coco McPherson, who heads the checking department. "I have instructed members of my staff to come to me when they have problems or are concerned or feel that they need some muscle," McPherson said. "That did not happen." Asked if there was anything she should have been notified about, McPherson answered: "The obvious answers are the three friends. These decisions not to reach out to these people were made by editors above my pay grade."

McPherson read the final draft. This was a provocative, complex story heavily reliant on a single source. She said later that she had faith in everyone involved and didn't see the need to raise any issues with the editors. She was the department head ultimately responsible for fact-checking.

Natalie Krodel, an in-house lawyer for Wenner Media, conducted a legal review of the story before publication. Krodel had been on staff for several years and typically handled about half of Rolling Stone's pre-publication reviews, sharing the work with general counsel Dana Rosen. [Footnote 4] It is not clear what questions the lawyer may have raised about the draft. Erdely and the editors involved declined to answer questions about the specifics of the legal review, citing instructions from the magazine's outside counsel, Elizabeth McNamara, a partner at Davis Wright Tremaine. McNamara said Rolling Stone would not answer questions about the legal review of "A Rape on Campus" in order to protect attorney-client privilege.

**The Editor's Note: 'I Was Pretty Freaked Out'**

On Dec. 5, following Erdely's early-morning declaration that she had lost confidence in her sourcing, Rolling Stone posted an editor's note on its website that effectively withdrew the magazine's reporting on Jackie's case.

The note was composed and published hastily. The editors had heard that The Washington Post intended to publish a story that same day calling the magazine's reporting into question. They had also heard that Phi Kappa Psi would release a statement disputing some of Rolling Stone's account. Dana said there was no time to conduct a "forensic investigation" into the story's issues. He wrote the editor's note "very quickly" and "under a lot of pressure."

He posted it at about noon, under his signature. "In the face of new information, there now appear to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced," it read. That language deflected blame from the magazine to its subject and it attracted yet more criticism. Dana said he rued his initial wording. "I was pretty freaked out," he said. "I regretted using that phrase pretty quickly." Early that evening, he changed course in a series of tweets. "That failure is on us – not on her," he wrote. A revised editor's note, using similar language, appeared the next day.

Yet the final version still strained to defend Rolling Stone's performance. It said that Jackie's friends and student activists at UVA "strongly supported her account." That implied that these friends had direct knowledge of the reported rape. In fact, the students supported Jackie as a survivor, friend and fellow

campus reformer. They had heard her story, but they could not independently confirm it.

## Looking Forward

### *For Rolling Stone: An Exceptional Lapse or a Failure of Policy?*

The collapse of "A Rape on Campus" does not involve the kinds of fabrication by reporters that have occurred in some other infamous cases of journalistic meltdown. In 2003, The New York Times reporter Jayson Blair resigned after editors concluded that he had invented stories from whole cloth. In February, NBC News suspended anchor Brian Williams after he admitted that he told tall tales about his wartime reporting in Iraq. There is no evidence in Erdely's materials or from interviews with her subjects that she invented facts; the problem was that she relied on what Jackie told her without vetting its accuracy.

"It's been an extraordinarily painful and humbling experience," Woods said. "I've learned that even the most trusted and experienced people – including, and maybe especially, myself – can make grave errors in judgment."

Yet Rolling Stone's senior editors are unanimous in the belief that the story's failure does not require them to change their editorial systems. "It's not like I think we need to overhaul our process, and I don't think we need to necessarily institute a lot of new ways of doing things," Dana said. "We just have to do what we've always done and just make sure we don't make this mistake again." Coco McPherson, the fact-checking chief, said, "I one hundred percent do not think that the policies that we have in place failed. I think decisions were made around those because of the subject matter."

Yet better and clearer policies about reporting practices, pseudonyms and attribution might well have prevented the magazine's errors. The checking department should have been more assertive about questioning editorial decisions that the story's checker justifiably doubted. Dana said he was not told of reporting holes like the failure to contact the three friends or the decision to use misleading attributions to obscure that fact.

Stronger policy and clearer staff understanding in at least three areas might have changed the final outcome:

Pseudonyms. Dana, Woods and McPherson said using pseudonyms at Rolling Stone is a "case by case" issue that requires no special convening or review. Pseudonyms are inherently undesirable in journalism. They introduce fiction and ask readers to trust that this is the only instance in which a publication is inventing details at its discretion. Their use in this case was a crutch – it allowed the magazine to evade coming to terms with reporting gaps. Rolling Stone should consider banning them. If its editors believe pseudonyms are an indispensable tool for its forms of narrative writing, the magazine should consider using them much more rarely and only after robust discussion about alternatives, with dissent encouraged.

Checking Derogatory Information. Erdely and Woods made the fateful agreement not to check with the three friends. If the fact-checking department had understood that such a practice was unacceptable, the outcome would almost certainly have changed.

Confronting Subjects With Details. When Erdely sought "comment," she missed the opportunity to hear challenging, detailed rebuttals from Phi Kappa Psi before publication. The fact-checker relied only on Erdely's communications with the fraternity and did not independently confirm with Phi Kappa Psi the account Rolling Stone intended to publish about Jackie's assault. If both the reporter and checker had understood that by policy they should routinely share specific, derogatory details with the subjects of their reporting, Rolling Stone might have veered in a different direction.

### *For Journalists: Reporting on Campus Rape*

Rolling Stone is not the first news organization to be sharply criticized for its reporting on rape. Of all crimes, rape is perhaps the toughest to cover. The common difficulties that reporters confront – including scarce evidence and conflicting accounts – can be magnified in a college setting. Reporting on a case that has not been investigated and adjudicated, as Rolling Stone did, can be even more challenging.

There are several areas that require care and should be the subject of continuing deliberation among journalists:

Balancing sensitivity to victims and the demands of verification. Over the years, trauma counselors and survivor support groups have helped journalists understand the shame attached to rape and the powerlessness and self-blame that can overwhelm victims, particularly young ones. Because questioning a victim's account can be traumatic, counselors have cautioned journalists to allow survivors some control over their own stories. This is good advice. Yet it does survivors no good if reporters documenting their cases avoid rigorous practices of verification. That may only subject the victim to greater scrutiny and skepticism.

Problems arise when the terms of the compact between survivor and journalist are not spelled out. Kristen Lombardi, who spent a year and a half reporting the Center for Public Integrity's series on campus sexual assault, said she made it explicit to the women she interviewed that the reporting process required her to obtain documents, collect evidence and talk to as many people involved in the case as possible, including the accused. She prefaced her interviews by assuring the women that she believed in them but that it was in their best interest to make sure there were no questions about the veracity of their accounts. She also allowed victims some control, including determining the time, place and pace of their interviews.

If a woman was not ready for such a process, Lombardi said, she was prepared to walk away.

Corroborating survivor accounts. Walt Bogdanich, a Pulitzer Prize-winning investigative reporter for The New York Times who has spent the past two years

reporting on campus rape, said he tries to track down every available shred of corroborating evidence – hospital records, 911 calls, text messages or emails that have been sent immediately after the assault. In some cases, it can be possible to obtain video, either from security cameras or from cellphones.

Many assaults take place or begin in semipublic places such as bars, parties or fraternity houses. "Campus sexual violence probably has more witnesses, bystanders, etc. than violence in other contexts," said Elana Newman, a University of Tulsa psychology professor who has advised journalists on trauma. "It might be useful for journalists to think about all the early signals and signs" and people who saw or ignored them early on, she said.

Every rape case has multiple narratives, Newman said. "If there are inconsistencies, explain those inconsistencies." Reporters should also bear in mind that trauma can impair a victim's memory and that this can be a cause of fragmentary and contradictory accounts.

Victims often interact with administrators, counselors and residence hall staff members. "I've always found that the people most willing to talk are these front-line staff," said Lombardi, who said she phoned or visited potential sources at home and talked to them on background because of their concerns about student privacy.

FERPA restrictions are severe, yet the law allows students to access their own school records. Students at public universities can also sign privacy waivers that would allow reporters to obtain their records, including case files and reports.

Moreover, there's a FERPA exception: In sexual assault cases that have reached final disposition and a student has been found responsible, campus authorities can release the name of the student, the violation committed and any sanction imposed. (The Student Press Law Center provides good advice on navigating FERPA.)

Holding institutions to account. Given the difficulties, journalists are rarely in a position to prove guilt or innocence in rape. "The real value of what we do as journalists is analyzing the response of the institutions to the accusation," Bogdanich said. This approach can also make it easier to persuade both victims and perpetrators to talk. Lombardi said the women she interviewed were willing to help because the story was about how the system worked or didn't work. The accused, on the other hand, was often open to talking about perceived failings of the adjudication process.

To succeed at such reporting, it is necessary to gain a deep understanding of the tangle of rules and guidelines on campus sexual assault. There's Title IX, the Clery Act and the Violence Against Women Act. There are directives from the Office of Civil Rights and recommendations from the White House. Congress and state legislatures are proposing new laws.

The responsibilities that universities have in preventing campus sexual assault – and the standards of performance they should be held to – are important matters of public interest. Rolling Stone was right to take them on. The pattern of its failure draws a map of how to do better.

**Footnotes**

1. Rolling Stone provided a 405-page record of Erdely's interviews and research notes as well as access to original audio recordings. Erdely turned this record over to Rolling Stone before she or the magazine believed there were any problems with the story. Erdely said she typed notes contemporaneously on a laptop during phone and in-person interviews. In some cases, she taped interviews and meetings and transcribed them later. We compared transcripts Erdely submitted of her recorded interviews with Jackie with the audio files and found the transcripts to be accurate. Erdely's typed notes of interviews contain her own questions or remarks, sometimes placed in brackets, as well as those of her interview subject. Erdely said that she sometimes typed her own questions or remarks contemporaneously but that other times she typed them after the interview was over, summarizing the questions she had asked or the comments she had made.

2. Rolling Stone's retraction of its reporting about Jackie concerned the story it printed. The retraction cannot be understood as evidence about what actually happened to Jackie on the night of Sept. 28, 2012. If Jackie was attacked and, if so, by whom, cannot be established definitively from the evidence available.

Jackie's phone records from September 2012 would provide strong evidence about what might have befallen her. But the Charlottesville police said the company they asked to produce Jackie's phone records no longer had her records from 2012. After interviewing about 70 people and obtaining access to some university and fraternity records, the Charlottesville police could say only that they found no evidence of the gang rape Rolling Stone described. This finding, said Police Chief Timothy Longo, "doesn't mean that something terrible didn't happen to Jackie" that night.

3. In a letter, Groves objected to Rolling Stone's portrayal of his actions during a University of Virginia Board of Visitors meeting last September. A video of the meeting is available on a UVA website. Groves wrote that Erdely "did not disclose the significant details that I had offered into the scope" of a Department of Education compliance review of UVA. Groves's full letter is here.

In the email sent through her lawyer, Eramo wrote, Rolling Stone "made numerous false statements and misleading implications about the manner in which I conducted my job as the Chair of University of Virginia's Sexual Misconduct Board, including allegations about specific student cases. Although the law prohibits me from commenting on those specific cases in order to protect the privacy of the students who I counsel, I can say that the account of my actions in

Rolling Stone is false and misleading. The article trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also providing for the safety of our communities. As a general matter, I do not — and have never — allowed the possibility of a media story to influence the way I have counseled students or the decisions I have made in my position. And contrary to the quote attributed to me in Rolling Stone, I have never called the University of Virginia "the rape school," nor have I ever suggested — either professionally or privately — that parents would not "want to send their daughter" to UVA. As a UVA alumna, and as someone who has lived in the Charlottesville community for over 20 years, I have a deep and profound love for this University and the students who study here."

4. Last December, Rosen left Wenner Media for ALM Media, where she is general counsel. Rosen said her departure had no connection with "A Rape on Campus" and that she had played no part in reviewing the story before publication. She said she began talking with ALM in September, before Erdely's story was filed, about the position she ultimately accepted.

# Behind closed doors: How domestic violence among Pacific Islanders remains in the shadows

Peninsula Press

*UPDATE Sept. 13, 2018: Because of concern for Lana's safety, everyone in the story was given a pseudonym, and Victor was not contacted for comment. Lana's abuse was documented through interviews with witnesses, hospital records, text messages, and other reporting. Since this story was published, a relative of Victor contacted Peninsula Press to dispute Lana's account of the abuse.*

The sun was up when Lana and Victor began arguing in their O'ahu laundromat. Lana said she had confronted Victor because he kept throwing side glances at a woman he appeared to know, someone Lana suspected he was sleeping with.

Lana stormed outside, sat in the passenger's seat of their car—where they had been living just a few months prior—and punched the dashboard in anger. Victor followed her and got in the driver's seat, according to Lana's account. He saw that Lana had broken one of the plastic rungs on the A/C vent, she said.

Victor allegedly grabbed his pregnant girlfriend by the hair and began to hit her. He dragged her out of the car through the driver's door and to a nearby lot spilling with tall weeds and grasses, Lana recalled. She said, after he beat her, Victor left.

It was dark, Lana recalled, when Victor returned to take her back to their small studio apartment, but it wasn't long before he had to take her to the hospital. The pain that had crippled Lana for those hours lying in that empty lot was a series of contractions, she said. She had gone into labor.

Domestic violence among U.S. Pacific Islanders is not well-studied. But according to Lana, her experiences being beaten by her now ex-husband were so commonplace in her Polynesian community that when it happened in public, bystanders often did not take notice.

According to Lana, their daughter Sonia was born eight weeks early that night. Lana said she held her daughter only briefly before the nurse rushed her from the delivery room for treatment.

Sonia was eventually diagnosed with a particularly rare genetic disorder that affects about one in 87,000 Americans. While her condition is genetic, Lana blames herself; she believes she could have saved her daughter if she had left Victor sooner.

For the safety of Lana and her family, all people referenced in her story have been given pseudonyms. Her accounts of abuse were verified by medical records, police complaints, text messages and interviews with friends and family, who did not want to be named out of concern for their safety and relationships.

**Hidden Data**

In the wake of noteworthy sexual assault allegations in the government and Hollywood, the nation is being forced to reckon with the pervasiveness of gender-based violence. But for Pacific Islanders, a population that is small in the U.S. even for a minority group, the prevalence of assault and abuse is easily overlooked by agencies that serve entire cities or counties.

Black, Hispanic and Asian communities make up 12.3, 17.8 and 5.4 percent of the U.S. population respectively, data from the 2016 American Community Survey shows. Native Hawaiians and Pacific Islanders, together, make up just two-tenths of a percent of the U.S. population.

Because the populations from each Pacific Island and Asian nation are so small in the U.S., data from those groups are often collected together, forming the Asian Pacific Islander (often called API) group. But if the larger API groups score better in wellness surveys – such as reporting low rates of domestic violence – their data can obscure problems in the smaller groups.

Of API women in the U.S., 18.3 percent reported being a victim of domestic violence, the lowest rate of all ethnic groups in a 2010-2012 Center for Disease Control survey.

This figure stands in stark contrast with the rates of intimate partner violence in the Pacific Islands: 64 percent of women in Fiji, 46 percent in Samoa and 40 percent in Tonga reported experiencing intimate partner violence in their lifetime, according to survey results released by the United Nations Population Fund.

Within the Pacific Islander (commonly referred to as PI) community, everyone knows someone who has experienced domestic violence, according to Malissa Netane-Jones, a Tongan American who has overseen a San Mateo County Pacific Islander outreach program since 2011. But between cultural taboos and the tendency to handle disputes within the family, Bay Area advocates like Netane-Jones struggle to identify the victims and connect them with resources.

"We've found that there was a small number of reported cases of domestic violence among Pacific Islanders," Netane-Jones said. "Yet, on the coconut wire [a term used primarily in Hawai'i to describe word of mouth], we know it's very prevalent."

The "impulse" for collecting data for all Asian subgroups together was an effort to bolster solidarity and "broaden the impact and the understanding of this population group in the U.S.," said Chic Dabby, executive director of Asian Pacific Institute on Gender-Based Violence, which curates research on

domestic violence in the API community.

While data science faces a lot of statistical challenges with small minority populations, Dabby also believes the expectation was that the data would eventually be disaggregated.

Last year, her organization released a report on Pacific Island history in the hope that advocates could "build on [their] skills in cultural humility and provide better support to Pacific Islander survivors of domestic violence and sexual assault." The report also said that the need to disaggregate API data in the U.S. was "apparent," and that domestic abuse in the Pacific Islands was "horrifyingly prevalent."

One advantage of aggregated data is that smaller minority groups are members of larger groups that receive resources. In theory, those resources should trickle into the subgroups. That doesn't always happen, according to Netane-Jones.

"Not only does that [lack of disaggregation from the Asian population] change funding and resources, it changes how our stories are being told," Netane-Jones said.

"That's really frustrating, especially when we know there's a problem," she added.

Race and ethnicity aside, experts believe that domestic violence in the United States is significantly underreported. One 2006-2015 report from the Bureau of Justice Statistics estimated that nearly half of all U.S. domestic violence cases are never reported. But, in addition to their hidden data, Pacific Islander domestic violence victims face unique barriers to reporting their abuse that could lead to higher rates of underreporting.

For Lana, being abused by a male partner was so common in her family and neighborhood that she rarely thought to call the police or file a report.

"What America calls 'abuse' is something normal in our Polynesian culture," Lana said in an interview.

**Barriers to leaving: 'aiga and shame**

In Polynesia, the eastern subset of what are generally considered Pacific Islands, extended family ('aiga in Samoan) is treated with the same obligation as the nuclear family – including family by marriage.

When Victor began abusing Lana, she said, she was just 16. Her mother, who was raised in American Samoa, kicked her out of the house for bringing violence into their home. Lana faced judgment for her abuse, and even today struggles to communicate with her family about the impact Victor's violence has on her life.

In the U.S., more than a quarter of domestic violence victims reported speaking to a mental health professional about their abuse, according to a 2003 Center for Disease Control report. On average, abuse victims reported attending more appointments with a mental health professional than did victims of intimate partner rape or stalking.

Even so, Lana's family is averse to discussing mental health and domestic abuse. One sister told Lana that her depression sounded like a "white people problem."

Shame is a barrier to domestic violence reporting in the Polynesian community, according to Dr. Susan J. Wurtzburg, a sociology lecturer at University of Hawai'i. Word of domestic violence reflects poorly on the entire 'aiga, Wurtzburg noted in a report advising New Zealand police on domestic violence among Polynesians. But families tend to blame the woman, even though the male partner is often the abuser.

Because extended families often live together (as was Lana's case in Honolulu), there are also often socioeconomic barriers to leaving an abusive relationship.

At $1,534, Hawai'i has nearly the highest median monthly housing cost in the U.S., second only to Washington, D.C., according to data from the 2016 American Community Survey. Those costs increase in more urban areas.

Often, victims searching for ways out of abusive relationships are not only considering their own cost of living, according to Amanda Pump, director of O'ahu programs at Child & Family Service. Many women seeking help from the domestic violence shelters through Pump's organization have children with them.

"Leaving that relationship [with their batterer] really means leaving their financial stability," Pump said in an interview.

For Lana, the police responding to calls about Victor were often Polynesian and were not a viable source of help.

On one of several occasions when Victor beat Lana in public and a bystander called the police, Lana said it did more damage than good. At the time, she was still five months pregnant with Sonia.

When she refused to calm down and get back in the car with Victor, an officer ran her ID and found a warrant for an outstanding traffic ticket. The officer cuffed Lana and brought her to the jail until she could post a $150 bail.

Domestic violence in PI communities is often treated as a spousal disagreement, not a crime, according to Netane-Jones, the San Mateo outreach director. Women are more likely to tell a family member or church leader than the police.

Pacific Island nations have been slow to criminalize domestic violence. Tuvalu, a small island nation in the British Commonwealth, passed a Family Protection and Domestic Violence Bill in 2009 to clarify law enforcement's responsibilities in domestic violence cases and to introduce protective orders for women.

Tonga and Samoa passed their domestic violence and family safety bills in 2013. But their effectiveness has not been well evaluated. In Aug. 2017, the United Nations announced it would launch an investigation

into violence against women in Samoa after their rates of reported domestic violence went from 200 in 2012 to 723 in 2015.

Hawai'i is the state with not only the highest percent PI population, but also the highest percent minority population in the U.S. Even so, it is still a struggle for women's advocates to combat domestic violence in PI communities, according to Pump.

Some barriers are a result of poor translations. In her outreach, Pump found that some PI languages don't have good translations for terms like "trauma." Even for English-speaking members of those communities, the concept of "trauma" doesn't resonate.

While her office is diverse, it is not nearly representative of the ethnic and cultural backgrounds of all the families they serve. Sometimes, her organization resorts to outreach through local churches, but she feels like that can be an intrusion on a sacred and spiritual space.

"I would be lying if I said it was easy," Pump said.

**Recovery**

Victor has been arrested twice since Dec. 2017 and charged for violating another woman's protective order. In the days leading up to his first arrest, Lana said he called her twice and threatened her.

Today, Lana and her fiancé sleep in the living room of their one-bedroom apartment in Oakland, where they moved in 2012. (The Bay Area has one of the largest Pacific Islander populations in the United States.) Their now five children cluster into the bedroom, the youngest ones often crawling in with their parents.

Lana can't afford childcare. Absent support from friends or family, she stays at home, stringing leis to sell for big events like weddings and graduations.

Aside from the stresses of parenting five children, Lana is, in many ways, still dealing with the aftermath of her abuse. She relies on Medi-Cal, California's Medicaid program, for weekly therapy. Recently, she said she has been searching for a program that will help pay to repair the molars that broke during one of Victor's alleged attacks (most domestic violence dental programs only cover front teeth).

Her most consuming worry is for her eldest daughter – whenever Sonia's symptoms worsen or she is bullied in school for being different from the other children, Lana said she is overcome with guilt for not leaving Victor sooner.

"I don't know why I didn't leave him," Lana said in an interview. "I can't give an answer to, 'Why?' But I honestly felt like I had nowhere to go."

Correction: A previous version of this article said that Victor had called Lana to threaten her between the periods he was in jail. The article has been updated to reflect that Victor made those calls just before he was arrested the first time in Dec. 2017, according to Lana.

Correction: The article previously stated that Lana has seven children when in fact, she has five children. She lives in a household with seven people.

If you or someone you know is being abused, help is available. For more information, go to the National Domestic Violence Hotline or call 1-800-799-7233/TTY 1-800-787-3224.

# Memo on "Behind Closed Doors"

Note: What follows is a memorandum and outline prepared by the reporter after *Behind Closed Doors* ran as print and video pieces, and a complaint was received by a relative of Victor. This outline details the source for every fact in the story that relates to Victor and the allegations, and the reasons why he was not contacted for the story per Lana's request. To continue to protect Lana, all names have been redacted or replaced with pseudonyms.

2. The key facts related to domestic violence and how each of those facts were verified. (Remember, the video and the print story have different details, so please lay out the facts for both the video and the print story) Items in red indicate disputed facts.
    a. Victor was physically violent toward Lana.
        i. Medical records, doctors/nurses noted reports of domestic violence, also some records from the E.R. when she reported trauma, not necessarily indicating abuse
        ii. Victor and Lana's friend, Doe 1, corroborated
        iii. Screenshot of a text conversation between Lana and Victor's relative "Cristy," indicate that the relative was happy Lana had left Victor. The end of the message reads, "( sorry to hear bout you n [Victor], honestly I knew you were better off without him. I despise men who beat women. Since that first night in 03 first time I seen you, you was getting beaten up by him. Since then I never liked [Victor] n especially his father) Sorry to come out with that. Forgive me if I offended you. Much alofas and remain blessed"
        iv. Screenshot sent after article published of conversation with another relative of Victor, "Dorothy." Part of the message reads, "Im so proud of you u found a man that can love u n not hurt you…….even tho [Victor] is my cussin I dont care im Happy for you."
        v. Images of the police report Lana filed after Victor took their daughter to Washington
        vi. Lana's account
    b. Victor and Lana were intimate partners.
        i. Lana's account
        ii. Victor and Lana's friend, Doe 1, corroborated
        iii. Lana's name change, pictures of her and Victor together
    c. Victor beat Lana outside Nanakuli laundromat in O'ahu.
        i. Lana's account
        ii. I visited the site, nothing there that would make her account not feasible (e.g. the area was remote, the layout of the parking lot and empty lot were consistent with her account)
    d. Victor and Lana were homeless and had been living in their car.
        i. Lana's account
        ii. Corroborated after-the-fact by Lana and Victor's friend, Doe 2
    e. Lana went into a premature labor after Victor physically assaulted her.
        i. Medical records confirm premature birth
        ii. Lana's account
    f. Lana's and Victor's daughter has a genetic disorder.
        i. Medical records confirm complications after birth
        ii. Research paper confirm eventual diagnosis: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3897791/
        iii. Lana's account (corroborated after the fact by Victor's relative)
    g. Victor began abusing Lana when she was 16.
        i. Lana's account
        ii. Message from "Cristy" indicates she witnessed Victor abuse Lana for the first time in 03, when Lana was about 16
    h. Lana's mother was raised in American Samoa.
        i. Lana's account
    i. Lana's mother kicked her out of the house when she was a teenager.
        i. Lana's account
        ii. Unstable living situation corroborated by former GED teacher, Doe 3
    j. At times, Lana lived with extended family while in Hawai'i.
        i. Lana's account
    k. For Lana, the police responding to calls about Victor were often Polynesian and were not a viable source of help.
        i. Lana's account
        ii. Used the Bureau of Justice breakdown from this site: http://www.governing.com/gov-data/safety-justice/police-department-officer-demographics-minority-representation.html to see if it was likely that Polynesian officers often responded to her calls. Almost a third of the officers were categorized as Asian, which includes Pacific Islanders.
    l. On one occasion when the police were called, Lana was the one arrested because of a traffic ticket, and her bail was set at $150.
        i. I believe I used the Nexis People Finder for this, but I don't have access anymore.
        ii. Lana's account
    m. Victor has been arrested twice since Dec. 2017 and charged for violating another woman's protective order.

i. King County Jail Inmate Lookup Service (search: "Victor")
ii. Lana's account (conversations with Victor's relative also corroborated these arrests)

n. In the days leading up to his first arrest, Lana said he called her twice and threatened her.
i. Lana's account

o. Lana's molars were damaged as a result of Victor abusing her
i. Lana's account

p. Lana feels guilty about her daughter's condition because she believes the abuse caused it.
i. Lana's account

q. Victor punched Lana in the face while sitting in a car.
i. Lana's account

r. Victor was physically violent toward Lana in the hospital room after she gave birth to their daughter.
i. Lana's account

s. On one occasion, Victor pushed Lana down and she hit her head on a metal bar. He then pulled her down the block and tore her clothes.
i. Lana's account
ii. I visited the site, nothing there that would make her account not feasible. Before showing Lana the footage I took, she said to look for a part where the upper bar bends downward. She said that is the spot where her head hit. As we went through the footage, I found that the bar was bent where she said it would be.

3. Any specific facts that are being disputed, who claims it and what is being provided to support those claims.

Victor's sister, Doe 4, is the only person who has contacted me to dispute the story. She has mentioned multiple times that she is not the only person who feels this way. I have told her that she may give out my contact information, and that people are welcome to reach out to me.

Her key claims and grievances are:

a. Victor could not have abused Lana in the hospital room after she gave birth. She says that Lana's mom was there and that she arrived the next day. She did not offer evidence to dispute Lana's account.
b. Victor did not abuse Lana until after they separated and he began using drugs. She did not offer evidence to dispute Lana's account.
c. The video implies that Victor is responsible for his daughter's condition, even though it is genetic.
d. The video implies that the bar bent on impact when Lana's head hit it, which Doe 4 doesn't believe is possible. I told her that I did not interpret my interview with Lana to mean that; rather, the bar was bent prior to Lana's head hitting it, and she remembers seeing that the bar was bent.
e. The daughter was not born premature, from what Doe 4 can recall. She did not offer evidence to dispute Lana's account.
f. She says the "main reason" her and her family disagree with the piece has to do with Lana's second child, who they believe is also Victor's. Both children have the same genetic condition.

4. Any specific requests from those disputing the facts. Do they want a correction? What are they asking us to do?

Victor's sister, Doe 4, wants the article and video taken down.

5. Is there anything being disputed that undermines the veracity of the story as a whole? If not, what do any of these complaints do to the veracity of the story?

That Victor abused Lana is not disputed. In Doe 4's letter, she wrote, "If Im not mistaken, I believe the domestic violence happens while she was pregnant with her second child; baby boy."

I believe the key claims are that no abuse took place before their divorce and that the video implies that Victor is responsible for the daughter's condition. If the first claim were true, almost all of Lana's accounts of abuse included in the story would be false.

Regarding the second claim, Lana at no point says that Victor caused their daughter's condition. She says that she believes, had she left, her daughter would have been okay, but she was too scared to leave at the time.

6. Do you have additional notes for him to consider related to the following topics:

a. The approach of using the pseudonyms and not getting any comment from Victor or his family due to the subject's safety and verifying details in other ways.

Just to summarize: At the point when I felt it was time to reach out to Victor for comment, we considered whether contacting him would be a risk to Lana's safety. Lana told me he had called and threatened to hurt her. She also said he had been arrested. I looked up the charges against him and found that he had violated a protective order. At that point, we decided not to contact him or identify him. In order to not identify him, we also gave Lana a pseudonym.

b. A discussion on whether reaction by the family constitutes a threat to the subject's safety.

I find the last paragraph of Doe 4's message concerning (italicizing for emphasis):

"Even with the revised and changes with this article, we disagree and will *take it to the next step* if its not taken down or state facts. People who seen the video are now accusing my brother of why [the child] is like this. Its not true. *Wait til he watches the video, then its gonna be bad*. Cause [the child] is his life and she is still crying for her father."

I have been checking in with Lana, and she says no one has threatened her since the piece was published. She is not concerned about her safety.

# Howard v. Antilla

United States Court of Appeals, First Circuit (June 28, 2002)

TORRUELLA, Circuit Judge

The plaintiff, chairman of a publicly-traded company, brought suit against the defendant, a newspaper reporter, for defamation and false light invasion of privacy. At the end of the trial, the jury returned a sizeable verdict in favor of the plaintiff on his claim for false light invasion of privacy, but a take-nothing verdict on the defamation claim. For the reasons stated below, we vacate the jury's verdict on the false light claim and order an entry of judgment in favor of the defendant.

I.

Defendant-appellant Susan Antilla ("Antilla") was a business reporter for The New York Times ("The Times"), where her writing focused mostly on explaining the financial world to the average investor. At the time of the events in this case, Antilla had approximately 18 years of experience reporting on business news for a variety of publications. Her experience included stints as a reporter at Dunn's Review, as a stock market reporter at USA Today, and as the financial news bureau chief in New York for the Baltimore Sun. Antilla was also an adjunct professor at New York University, teaching business journalism in the graduate journalism department.

In the fall of 1994, Antilla learned of a rumor circulating on Wall Street concerning plaintiff-appellee Robert Howard ("Howard"), who was then the chairman of two publicly-traded companies. . .that Howard was in fact Howard Finkelstein ("Finkelstein"), a convicted felon. Finkelstein, who had been known to use the name Robert Howard as an alias, had prior convictions for securities fraud, violation of the White Slave Act, conspiracy to defraud, and interstate transportation of stolen property.

Antilla learned of the rumor from confidential sources whom she knew to be "short sellers". . .a transaction in which an investor borrows shares of stock, sells them, and later buys an equivalent amount of shares to return the borrowed shares. The potential for profit in short selling lies in the possibility that the stock price will decline between the time the short seller sells the borrowed stock and. . .purchase[s] replacement shares to repay the borrowed stock.

Antilla perceived a newsworthy correlation between the circulation of the short sellers' "dual identity" rumor and recent fluctuations in the price of [the] stock. In order to generate a story on the topic, she investigated the rumor for over a month, interviewing roughly thirty people including Howard himself, Howard's son, and officials from the Securities and Exchange Commission ("SEC").

The article was published on October 27, 1994. Headlined "Is Howard Really Finkelstein? Money Rides on It," the article begins with the question "Is Robert Howard really Howard Finkelstein? A lot of investors in Mr. Howard's Presstek Inc. would like to know. But not even the Securities and Exchange Commission can say for sure. And the lingering mystery has roiled a hot stock and left the S.E.C. blushing."

A significant portion of the article details Antilla's efforts to obtain confirmation of the rumor's truth or falsity from the SEC. None of the three SEC officials with whom she spoke could definitively resolve the short sellers' rumor, in part because the agency had failed to input aliases into its computer record-keeping system. However, one SEC official stated that the SEC's "records don't indicate that [Howard] is anyone [other than who he claims to be]."

The article goes on to report that Howard had unequivocally denied the rumor and, further, that Howard's son, Dr. Lawrence Howard, had supplied "extensive documents" to show both his father's addresses at various times and that Howard and Finkelstein had different birth dates. However, the article also casts doubt on Dr. Howard's effort's to clear his father's name by noting his "reluctance ... to be forthcoming about several questions." In particular, the article recounts that, when asked to supply names of his father's children and stepchildren, Dr. Howard "would entertain the question only if first supplied with the names of Mr. Finkelstein's children and stepchildren." The article also states that Dr. Howard had declined to provide a full copy of testimony his father had given in a proceeding before the SEC earlier that year.

At the same time, the article also casts doubt on the credibility of short sellers who were pushing the rumor and who stood to profit from a decline in Presstek stock. For example, a separate side bar (under the headline "Wall St. Story: Jumbled Fact") detailed false information that the short sellers had provided to Antilla, including an erroneous report that Howard had earlier admitted to going by the name Finkelstein and a bogus tip that directory assistance gave the same telephone number for both Robert Howard and Howard Finkelstein.

On the day of publication, lawyers for Howard met with senior management for The Times as well as Antilla. During that meeting Howard's representatives provided additional information, including passports not previously shown to Antilla, that corroborated Howard's denial of the rumor. Howard's representatives also disclosed that Howard would be returning to the United States from France to be fingerprinted by the SEC in order to conclusively refute the rumor.

That same day, Antilla received a phone call from Fred Newman ("Newman"), a lawyer who previously had represented Finkelstein. Before the article's publication, Antilla had tried to reach Newman unsuccessfully to obtain independent confirmation of the truth or falsity of the rumor. Newman had not returned Antilla's calls, but after reading the article he telephoned her to say that, based upon the picture of Howard in The Times, the men were not the same person.

Based upon the information provided by Howard's representatives during the October 27 meeting, Howard's willingness to be fingerprinted, and the information received from attorney Newman, The Times published a correction and a front page business section article on October 28, 1994, stating that it had found "no credible evidence" to support the rumor and expressing regret that the rumor had been published.

The SEC continued to take no public position on the truth of the rumor until November 1, 1994, when, on the basis of a fingerprint analysis conducted by the FBI, the SEC formally announced that Howard is not Finkelstein.

Almost three years later Howard filed the present action, naming Antilla, but not The Times, as a defendant. . .

At the end of the trial the jury returned a verdict in favor of Antilla on the defamation claim, but found in favor of Howard on the false light claim. The jury awarded Howard $480,000 in compensatory damages.

* * *

III.

* * *

B.

* * *

**"The standard of actual malice is a daunting one." The plaintiff cannot succeed merely by demonstrating "an extreme departure from professional standards." Instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of ... probable falsity." The actual malice test thus mandates a *subjective* inquiry.** And in a case such as this, where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant's article, "he must show with clear and convincing evidence that the defendant[ ] intended or knew of the implications that the plaintiff is attempting to draw...."

Turning to the article at the center of this dispute, we think it is questionable, even doubtful, that the article is actually capable of bearing the harmful implication charged by Howard--namely, that he *is* Finkelstein. To be sure, the article repeats the short sellers' rumor that Howard is Finkelstein and proceeds to cast doubt on some of Howard's attempts to dispel the rumor. **But read as a whole, the article points out flaws in both sides of the story and never places the author in a position of evaluating the truth or falsity of any party's account. In Antilla's words, the article remained "agnostic" with respect to the truth of the short sellers' rumor.**[*]

The evidence presented to the jury reveals that the "agnostic" tenor of the article was not accidental. As Antilla testified, her intent in writing the article was "to be clear that [she] didn't know the answer" to the question of Howard's true identity. During the editing process, **Antilla's editors emphasized that the article must be clear that it takes no stand on the truth or falsity of the rumor and that the article should focus on the SEC's inability to resolve the rumor despite its role in policing the market.**

There is no dispute that Antilla included certain facts tending to support the short sellers' story: Howard Finkelstein was a convicted felon who had, in fact, used the alias "Robert Howard"; the SEC was unable to confirm or deny the rumor; Dr. Howard's son was reluctant to provide Antilla with certain information; and Finkelstein's former lawyer stated that he thought a photo of Howard depicted his former client. Yet countervailing facts were also included. At Antilla's insistence the editors retained the sidebar that discredited some of the supposed proof short sellers had offered in support of their rumor. The article also makes explicit that the story concerning Howard was indeed a "rumor," and it discloses that short sellers have a keen interest in pushing the rumor "regardless of whether it is true" in order to drive the price of Presstek stock downward. Finally, the article discusses some of the documentation provided by Dr. Howard that showed that his father's date of birth differed from that of Finkelstein.

* * *

. . .Howard's attempt to build a case of actual malice for implications arising from Antilla's article must be doomed to fail. . .Antilla's article is essentially an account of two sides of an issue in which she merely raises questions concerning the authorities' treatment of the dispute. . .

. . .Howard argues that the jury could have found malice by clear and convincing evidence based on significant omissions of fact in Antilla's article. In particular, Howard points to evidence at trial demonstrating that Antilla was in possession of a copy of Howard's passport, which showed that Howard was traveling abroad while Finkelstein was reported to be either in prison or out on bail pending sentencing for violations of federal securities law. Antilla's article does not include this information, which Howard argues would have clearly refuted the short sellers' rumor.

**This evidence is certainly probative of subjective awareness of probable falsity. However, Antilla's omissions cannot carry the heavy freight of establishing actual malice by the measure of convincing clarity.** In *Connaughton,* the newspaper used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe. In addition, the author deliberately refused to listen to tape recordings that clearly exonerated the plaintiff of the accused wrongdoing. Based on these facts, the Supreme Court upheld the jury's finding of actual malice. Unlike the article's author in *Connaughton,* however, Antilla sought information regarding her story from upwards of thirty sources. She compared the rumors circulated by the short sellers with the information that Howard and his son were willing to divulge. She also sought independent confirmation of the facts from the SEC and lawyers that had previously represented Finkelstein. While Antilla was clearly stingy in providing facts from which a reader might infer that Howard was probably not Finkelstein, this is not enough to sustain the conclusion that her article intentionally or reckless

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* Although we decide this case on actual malice grounds, we think it is important to note that the article might also be nonactionable for the reasons set out in our recent decision in *Riley v. Harr,* 292 F.3d 282, 288-91 (1st Cir.2002), even if it could reasonably be read to constitute an implied assertion that Howard is Finkelstein. To the extent that Antilla offers a balanced account of the Howard/Finkelstein controversy – reporting evidence consistent with the hypothesis that Howard is Finkelstein but also evidence tending to negate that hypothesis – and does not imply that she is in possession of undisclosed facts indicating that Howard is Finkelstein, the article would probably qualify as protected expression under the First Amendment even if it did not remain agnostic as to Howard's true identity.

asserted that Howard was in fact Finkelstein.

**Antilla admits that her failure to correlate the dates in Howard's passport with Finkelstein's jail time was an oversight, and concedes that she "should have seen it." However, she explains her failure to appreciate the significance of these facts by pointing to the 1500 pages of notes and documents in her investigative file. . .Thus, this is not a situation involving an obdurate refusal to listen to a clearly exculpatory tape, but, at worst, a negligent failure to connect the dots in a voluminous paper trail.**

* * *

In sum, based on our constitutionally-mandated independent review of the evidence on actual malice, we can conclude only that, even if Antilla's article was capable of communicating the accusation that Howard is a convicted felon, such a false accusation was not shown to be either intentional or treated with reckless disregard. Thus, a verdict in Howard's favor cannot be supported.

IV.

For the reasons stated above, we *vacate* the jury's verdict on the false light claim and *remand* the case to the district court with instructions that judgment be entered in favor of the defendant/appellant.

# Khalid Iqbal Khawar v. Globe International

Supreme Court of California, 19 Cal.4th 254, decided November 2, 1998

[Justice Kennard delivered the unanimous opinion of the Court.]

We granted review to. . .address the definition of a "public figure". . ., the existence in this state of a privilege for "neutral reportage," and the showings required to support awards of compensatory and punitive damages for the republication of a defamatory falsehood.

On these issues, we conclude: (1) A young journalist who was photographed near a nationally prominent politician moments before the politician's assassination, but who was never a suspect in the government's investigation of the assassination, whose views on the assassination were never publicized, and who never sought to influence public discussion about the assassination, was not a public figure in relation to a tabloid newspaper's article reporting a book's false accusation that the journalist assassinated the politician; (2) this state does not recognize a neutral reportage privilege for republication of a libel concerning a private figure (and we need not and do not decide here whether this state recognizes a neutral reportage privilege for republication of a libel concerning a public official or public figure); and (3) the evidence produced at the trial in this case supports the jury's finding[] of. . .actual malice, which in turn support the award[] of. . .punitive damages.

## I. FACTS

In November 1988, Roundtable Publishing, Inc., (Roundtable) published a book written by Robert Morrow (Morrow) and entitled The Senator Must Die: The Murder of Robert Kennedy (the Morrow book). The Morrow book alleged that the Iranian Shah's secret police (SAVAK), working together with the Mafia, carried out the 1968 assassination of United States Senator Robert F. Kennedy (Kennedy) in California and that Kennedy's assassin was not Sirhan Sirhan, who had been convicted of Kennedy's murder. . .but a man named Ali Ahmand, whom the Morrow book described as a young Pakistani who, on the evening of the Kennedy assassination, wore a gold-colored sweater and carried what appeared to be a camera but was actually the gun with which Ahmand killed Kennedy. The Morrow book contained four photographs of a young man the book identified as Ali Ahmand standing in a group of people around Kennedy at the Ambassador Hotel in Los Angeles shortly before Kennedy was assassinated.

Globe International, Inc., (Globe) publishes a weekly tabloid newspaper called Globe. Its issue of April 4, 1989, contained an article on page 9 under the headline: Former CIA Agent Claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA (the Globe article). Another headline, appearing on the front page of the same issue, stated: Iranian secret police killed Bobby Kennedy. The Globe article, written by John Blackburn (a freelance reporter and former Globe staff reporter), gave an abbreviated, uncritical summary of the Morrow book's allegations. The Globe article included a photograph from the Morrow book showing a group of men standing near Kennedy; Globe enlarged the image of these individuals and added an arrow pointing to one of these men and identifying him as the assassin Ali Ahmand.

In August 1989, Khalid Iqbal Khawar (Khawar) brought this action against Globe, Roundtable, and Morrow, alleging that he was the person depicted in the photographs and identified in the Morrow book as Ali Ahmand, and that the book's accusation, repeated in the Globe article, that he had assassinated Kennedy was false and defamatory and had caused him substantial injury. . .

Morrow defaulted, and Roundtable settled with. . .Khawar. . .before trial. As part of the settlement, Roundtable executed a retraction disavowing "any and all statements, intimations, or references that Khalid Iqbal Khawar [was] in any way associated with or committed the assassination of United States Senator Robert F. Kennedy." A jury trial ensued on the claims against Globe.

The evidence at trial showed that in June 1968, when Kennedy was assassinated, Khawar was a Pakistani citizen and a free-lance photojournalist working on assignment for a Pakistani periodical. At the Ambassador Hotel's Embassy Room, he stood on the podium near Kennedy so that a friend could photograph him with Kennedy, and so that he could photograph Kennedy. He was aware that television cameras and the cameras of other journalists were focused on the podium and that his image would be publicized. When Kennedy left the Embassy Room, Khawar did not follow him; Khawar was still in the Embassy Room when Kennedy was shot in the hotel pantry area. Both the Federal Bureau of Investigation (FBI) and the Los Angeles Police Department questioned Khawar about the assassination, but neither agency ever regarded him as a suspect.

In April 1989, 21 years later, when the Globe article was published, Khawar was a naturalized United States citizen living with his wife and children in Bakersfield, California, where he owned and operated a farm. . .After Khawar read the Globe article, he became very frightened for his own safety and that of his family. He received accusatory and threatening telephone calls about the article from as far away as Thailand, he and his children received death threats, and his home and his son's car were vandalized. A Bakersfield television station interviewed Khawar about the Globe article.

The trial court. . .the jury [found]: (1) the Globe article contained statements about Khawar that were false and defamatory; (2) Globe published the article negligently and with malice or oppression; (3) with respect to Kennedy's assassination, Khawar was a private rather than a public figure; and (4) the Globe article was a neutral and accurate report of the Morrow book. The. . .jury's findings on the last two issues [was] advisory only. The jury awarded Khawar $100,000 for injury to his reputation, $400,000 for emotional distress, $175,000 in presumed damages, and, after a separate punitive damages phase, $500,000 in punitive damages.

* * *

Globe appealed from the judgment. . .The Court of

Appeal affirmed the judgment.

We granted Globe's petition for review raising these issues: (1) When a published book places a person at the center of a public controversy, is that person an involuntary public figure for the limited purpose of a media report about that book and that controversy? (2) Does the First Amendment to the federal Constitution mandate a privilege for a media defendant's publication of a neutral and accurate report about a controversial book's allegations regarding matters of public concern? 3) [was there evidence of malice to support the punitive damage award? (4)-(5) omitted.]

## II. PUBLIC FIGURE

We consider first Globe's contention that. . . Khawar is a private rather than a public figure for purposes of this defamation action.

### A. Background

The federal Constitution's First Amendment. . . guarantees freedom of speech and of the press. In New York Times Co. v. Sullivan, the United States Supreme Court. . .held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' ; that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The. . .publisher of a defamatory statement acts with reckless disregard amounting to actual malice if, at the time of publication, the publisher "in fact entertained serious doubts as to the truth of his publication." [T]his "actual malice" requirement for defamation actions brought by public officials applie[s] also to defamation actions brought by "public figures."

In Gertz v. Robert Welch, Inc., the court explained that it had imposed the actual malice requirement on . . .both public officials and public figures because such persons "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" and because they "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Concerning the latter justification, the court stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."

The court then explained that there are two types of public figures: "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." The court reiterated the distinction in these words: "[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More 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. In either case such persons assume special prominence in the resolution of public questions."

The court contrasted these two types of public figures. . .with an ordinary private individual: "[T]he private individual has not accepted public office or assumed an 'influential role in ordering society.'. . .Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." . . .

* * *

### B. Analysis

* * *

[W]e note, first, that Globe does not contend that Khawar is a public figure for all purposes but merely that he is a public figure for limited purposes relating to particular public controversies[, namely,] Kennedy's assassination and that Khawar is therefore an involuntary public figure for the limited purpose of a report on [Morrow's book about the assassination]. Globe relies on the language in *Gertz*, that it is possible for a person "to become a public figure through no purposeful action of his own" and that a person can become a public figure by being "drawn into a particular public controversy". . .

**We find Globe's argument unpersuasive because characterizing Khawar as an involuntary public figure would be inconsistent with the reasons that the United States Supreme Court has given for requiring public figures to prove actual malice in defamation actions. . . [T]he high court has never stated or implied that it would be proper. . .to characterize an individual as a public figure [if] the individual had neither engaged in purposeful activity inviting criticism nor acquired substantial media access in relation to the controversy at issue**. . .Thus, assuming a person may ever be accurately characterized as an involuntary public figure, this characterization is proper only when that person, although not having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.

We find in the record no substantial evidence that Khawar acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in the Globe article. . .[B]efore publication of the Morrow book, no reporter contacted Khawar to request an interview about the assassination. Nor was there any reason for a reporter to do so: Khawar was not a suspect in the investigation, he did not testify at the trial of the perpetrator of the assassination, and. . .his own views about the assassination were never publicized.

Nothing in the record demonstrates that Khawar acquired any significant media access as a result of publication of either the Morrow book or the other book, RFK Must Die (1970) by Robert Blair Kaiser, in which, according to Globe, questions were raised about Khawar's activities in relation to the assassination. . .[N]either book enjoyed substantial sales or was reviewed in widely circulated publications. [W]hen the Globe article appeared, Roundtable had sold only 500 of the 25,000. . .copies of the Morrow book, and. . .although Roundtable had sent 150 copies of the Morrow book to various media entities, only Globe published a report concerning it. . .

The interview by the Bakersfield television station, which was the only interview in which Khawar ever participated. . .occurred after and in response to the publication of the Globe article. Although this single interview demonstrates that Khawar enjoyed some media access,. . .[i]f such access were sufficient to support a public figure characterization, any member of the media. . .could confer public figure status simply by publishing sensational defamatory accusations against any private individual. This the United States Supreme Court has consistently declined to permit. As the court has repeatedly said, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."

[We reject Globe's further argument] that Khawar's involvement with the Kennedy assassination controversies was not entirely involuntary because, immediately before the assassination, Khawar sought and obtained a position close to Kennedy on the podium knowing that there would be substantial media coverage of the event. . .

First, Khawar's conduct occurred before any relevant controversy arose. . .Khawar did not know. . .that Kennedy would be assassinated moments later, much less that a book would be published 20 years thereafter containing the theory proposed in the Morrow book. . .

Second, even as to the public issues. . .relating to Kennedy's candidacy [for President, as opposed the issues regarding the assassination], the role. . .that Khawar voluntarily assumed by standing near Kennedy on the podium was trivial at best. . ."A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.". . .[A] journalist who is photographed with other journalists crowded around a political candidate does not thereby assume any special prominence in relation to the political campaign issues.

* * *

Having concluded that Khawar did not voluntarily elect to encounter an increased risk of media defamation and that before publication of the Globe article he did not enjoy media access sufficient to prevent resulting injury to his reputation, we [find] that, for purposes of this defamation action, Khawar is a private rather than a public figure.

## III. Neutral Reportage Privilege

Globe contends that the trial court and the Court of Appeal erred in holding that the neutral reportage privilege does not apply to insulate from defamation liability its republication of the Morrow book's defamatory falsehoods.

### A. Background

At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations (see, e.g., Civ. Code, § 47).

[U]nder certain circumstances, as an exception to the common law republication rule, the federal Constitution's **First Amendment mandates an absolute privilege for the republication of defamatory statements. This privilege has since come to be known as the neutral reportage privilege. . . : "[W]hen a responsible, prominent organization makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity."**

The theory underlying the privilege is that the reporting of defamatory allegations relating to an existing public controversy has significant informational value for the public regardless of the truth of the allegations: If the allegations are true, their reporting provides valuable information about the target of the accusation; if the allegations are false, their reporting reflects in a significant way on the character of the accuser. In either event, according to the theory, the very making of the defamatory allegations sheds valuable light on the character of the controversy (its intensity and perhaps viciousness). As we understand it, the theory also rests on a distinction between publication and republication. Applying this distinction, **proponents of the neutral reportage privilege urge that the reporting of a false and defamatory accusation should be deemed neither defamatory nor false if the report accurately relates the accusation, makes it clear that the republisher does not espouse or concur in the accusation, and provides enough additional information (including, where practical, the response of the defamed person) to allow the readers to draw their own conclusions about the truth of the accusation.**

**The United States Supreme Court has not stated whether it agrees with this theory**, and it has never held that the First Amendment mandates a neutral reportage privilege (see Harte-Hanks Communications v. Connaughton at fn. 1[declining to decide the issue]). . .

* * *

### B. Analysis

. . .Globe argues that. . .the neutral reportage privilege extends to defamatory falsehoods about private figures. . .

Because the United States Supreme Court has never held that the First Amendment requires recognition of a neutral reportage privilege, the very existence of the privilege as a matter of constitutional law is uncertain. Deciding whether either the federal or the state Constitution mandates some form of neutral reportage privilege is a task that we leave for another day. **Even if some form of the privilege is constitutionally required, we are satisfied that any required privilege would not immunize defamatory statements about private figures like Khawar.**

As originally articulated. . ., **the constitutional neutral reportage privilege applies only to publications of defamatory statements concerning public officials or public figures.** Among the courts that recognize the privilege in one form or another, almost all acknowledge this limitation. . .

Some commentators have argued that the privilege should apply to a published report of an accusation that a public figure has made against a private figure because "the public has a greater interest in knowing what its public figures are saying than it does in protecting private figures from accusations by public figures." They reason like this: "Through an

understanding of who is saying what, public figures may be analyzed more insightfully, their statements reflecting as much about themselves as they do about the target. Inevitably, the conflicting interests are considered in a balancing test. It is more important to refrain from chilling republication of speech made by public figures, often the political speech at the core of the first amendment, than to protect the reputations of private figure targets." Under this view, the neutral reportage privilege would protect the Globe article, even though it reported a false and defamatory accusation against a private figure, if the person who made the original accusation (that is, Morrow) was a public figure.

Because we do not accept this view of the neutral reportage privilege, we do not decide whether Morrow was a public figure. We find more persuasive the arguments of other commentators that republication of accusations made against private figures are never protected by the neutral reportage privilege, whether or not the person who made the original accusation was a public figure. [A]lthough the public has a legitimate interest in knowing that prominent individuals have made charges, perhaps unfounded, against a private figure, recognition of an absolute privilege for the republication of those charges would be inconsistent with the United States Supreme Court [rulings]: "If the scope of the privilege were to include defamations of private figures, a neutral reportage route out of liability could emasculate the. . .distinction between private and public figure plaintiffs."

We agree. Only rarely will the report of false and defamatory accusations against a [private figure] provide information of value in the resolution of a controversy over a matter of public concern. On the other hand, the report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations. . .

**Khawar is a private figure and. . .most jurisdictions. . .that recognize a neutral reportage privilege agree that it should extend only to defamatory statements made about public figures or public officials.. . .We hold. . .that "in California there is no neutral reportage privilege extending to reports regarding private figures."**

## IV. Other issues

Globe raises three other, more fact-specific issues. It contends: (1) the Court of Appeal erred in holding that the evidence presented at trial is sufficient to support the jury's finding of actual malice; [(2) and (3) omitted.]

### A. Actual Malice

* * *

Because in this defamation action Khawar is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But Khawar was required to prove actual malice to recover punitive or presumed damage. . .

[W]e agree. . .that clear and convincing proof supports the jury's finding of actual malice.

[A]ctual malice means that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his publication." . . .

. . .When, as in this case, a finding of actual malice is based on the republication of a third party's defamatory falsehoods,. . .the actual malice finding may be upheld "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" and the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations or to consult relevant documentary sources.

There were, to say the least, obvious reasons to doubt the accuracy of the Morrow book's accusation that Khawar killed Kennedy. The assassination. . .had been painstakingly and exhaustively investigated by both the FBI and state prosecutorial agencies [which] accumulated a vast quantity of evidence pointing to the guilt of Sirhan as the lone assassin. As a result, Sirhan alone was charged with Kennedy's murder. At Sirhan's trial, "it was undisputed that [Sirhan] fired the shot that killed Senator Kennedy" and "[t]he evidence also established conclusively that he shot the victims of the assault counts." The jury returned a verdict finding beyond a reasonable doubt that Sirhan was guilty of first degree murder. On Sirhan's appeal. . . ,this court carefully reviewed the evidence and found it sufficient to sustain the first degree murder conviction. In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that results of the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal, were all fundamentally mistaken.

**Because there were obvious reasons to doubt the accuracy of the Morrow book's central claim, and because that claim was an inherently defamatory accusation against Khawar, the jury could properly conclude that Globe acted with actual malice in republishing that claim if. . .Globe failed to use readily available means to verify the accuracy of the claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence. . .**

Preliminarily, we note that this was not a situation in which time pressures made it impossible or impractical to investigate the truth of the accusation. . . Before publishing an article accusing a private figure of a sensational murder, Globe could well have afforded to take the time necessary to investigate the matter with sufficient thoroughness to form an independent judgment. . .But Globe did not do so.

N[o one] contacted any of the eyewitnesses to the assassination. . .Nor is there any evidence that anyone working for Globe reviewed the voluminous public records of the government investigation of the Kennedy assassination or the Sirhan trial. Indeed, **Globe's managing editor. . . conceded. . .that Globe made no attempt to independently investigate the truth of any of the statements in the Morrow book. In short, . . ."it is likely that [Globe]'s inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the Morrow book]'s charges.". . ."Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."**

. . .Globe argues generally that it had no duty to

verify the claims, no matter how improbable, of a prominent and responsible source like Morrow. . .We are not persuaded.

[W]e find in the record no substantial evidence. . .that would justify unquestioning reliance on Morrow's highly improbable accusations. Globe had no prior experience with Morrow [to] form a judgment that Morrow. . .was likely to provide reliable information on matters such as the Kennedy assassination. Morrow did not hold high public office or a position of great social responsibility, nor is there evidence that Morrow's reputation in the scientific, academic, or journalistic community qualified him as a credible and reliable commentator on public affairs.

* * *

[T]he evidence at trial strongly supports an inference that Globe purposefully avoided the truth and published the Globe article despite serious doubts regarding the truth of the accusation against Khawar. In short, we conclude that clear and convincing evidence supports the jury's finding that in republishing the Morrow book's false accusation against Khawar, Globe acted with actual malice ; that is, with reckless disregard of whether the accusation was false or not.

* * *

# Texas Civil Practice and Remedies Code

Chapter 96. False Disparagement of Perishable Food Products

§ 96.001. Definition

In this chapter, "perishable food product" means a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.

§ 96.002. Liability

(a) A person is liable as provided by Subsection (b) if:

(1) the person disseminates in any manner information relating to a perishable food product to the public;

(2) the person knows the information is false; and

(3) the information states or implies that the perishable food product is not safe for consumption by the public.

(b) A person who is liable under Subsection (a) is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person's dissemination of the information.

§ 96.003. Proof

In determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.

§ 96.004. Certain Marketing or Labeling Excluded

A person is not liable under this chapter for marketing or labeling any agricultural product in a manner that indicates that the product:

(1) was grown or produced by using or not using a chemical or drug;

(2) was organically grown; or

(3) was grown without the use of any synthetic additive.

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For a comprehensive site of more information about “Veggie Libel,” visit:

http://www.cspinet.org/foodspeak/

# Farmers' Right to Sue Grows, Raising Debate on Food Safety

By Melody Petersen, The New York Times, June 1, 1999

Every week, it seems, brings a new food scare. And each scare, whether valid or dead wrong, has the potential to jolt the nation's diet.

But ever since apple sales plummeted a decade ago, after a report by CBS News demonized the chemical Alar, food producers, crying foul, have been fighting back.

At their urging, 13 states passed laws to help protect farmers and food companies from criticism that could lead consumers to shun their products. One such law was used, unsuccessfully, by a group of Texas cattlemen to seek damages from Oprah Winfrey, the talk-show host, after she made disparaging remarks about beef.

Now, though, critics say those laws are putting a chill on the continuing debate about what the public should eat.

Though some publishers and broadcasters continue to put out new reports on food, other media companies, especially smaller ones worried about the high cost of defending a lawsuit, have stricken information from manuscripts, avoided certain food issues or, in one case, dropped a book project that was already at the printer.

Food producers say they need protection against irresponsible claims, but critics say the laws cut off debate on evolving health issues.

"It's like the Catholic Church telling Galileo in the 1620's that he was not allowed to trumpet a new viewpoint," said Bruce E. H. Johnson, a Seattle lawyer who represented CBS in the apple growers' suit. "These laws are designed to lock orthodoxy in place."

If the laws had been in place in the 1960's, Mr. Johnson said, Rachel Carson might not have found a publisher willing to print "Silent Spring," her groundbreaking book on the dangers of pesticides.

"If society wants to continue to have safe food," he said, "you need to have free and open discussion of the risks."

The laws are not as strict as traditional libel laws because they do not usually require proof of malice or of the false defamation of a specific person or product. They differ in each state, but because books and television shows must play to a national audience, the statutes in effect are reaching across state borders, causing consumers everywhere to get less information about food safety.

Alec Baldwin, the actor, said he had recently approached several television channels with a proposal for a documentary called "The History of Food." Mr. Baldwin contended that one executive at the Discovery Channel balked when he explained that a part of the four-hour show would be devoted to pesticides, herbicides and some disputed practices used to raise beef.

"He said, 'Oh no, we could never do that,' " Mr. Baldwin said. "You could see that these program people that we pitched this to did not want these things discussed."

Karen Baratz, publicity director for the Discovery Channel, which is a unit of Discovery Communications, said the executive recalled the discussion with Mr. Baldwin differently. The executive said he had not made a decision about the project because he had not received a written proposal.

Last year, editors at Renaissance Books in Los Angeles called J. Robert Hatherill, a research scientist at the University of California at Santa Barbara, to tell him they had cut long passages from the manuscript of his book "Eat to Beat Cancer." Gone was information on growth hormones administered to dairy cows, Professor Hatherill said, as well as facts from a study showing the amounts of lead found in over-the-counter calcium supplements.

"The book is a very watered-down version of what I intended," he said.

Renaissance, through a spokesman, declined to comment.

And a year ago, Vital Health Publishing of Bloomingdale, Ill., canceled a book, "Against the Grain: Biotechnology and the Corporate Takeover of Your Food," after the manuscript had been sent to the printers. The publisher had received a letter from a lawyer at the Monsanto Company who said he believed the manuscript, which he had not seen, included false statements that would disparage a herbicide called Roundup, made by Monsanto.

Marc Lappe, a toxicologist and co-author of the book, said the manuscript had already been approved by the publisher's lawyer. But Monsanto's letter changed the lawyer's mind, Mr. Lappe said, because of concerns that the publisher could be sued under the food libel laws in other states. Lawmakers in Illinois have defeated efforts to enact a similar law.

David Richard, the owner of Vital Health, said he had been trying to get insurance to protect against libel actions when he received Monsanto's letter.

"I was scared," Mr. Richard said. "As soon as I told my insurance agent about the letter, he would not return any of my calls. I had no choice. I had to let go of the book."

Lisa Drake, a spokeswoman for Monsanto, said the company did not intend to suppress publication. She said Monsanto lawyers had worried that the book would contain errors after they read a magazine article written by its two authors that, she said, included inaccuracies. The company was asking only that those errors be corrected, she said.

"We're respectful of differing points of view," Ms. Drake said.

Mr. Lappe and his co-author, Britt Bailey, later took their manuscript to another publisher, Common Courage Press, which published the book in November -- and has not heard from Monsanto.

Many people have brushed off the state laws as silly, so absurd that they could have got former President George Bush in trouble for shunning broccoli.

And many lawyers who have studied the 13 laws say they believe many will eventually be overturned as unconstitutional.

Floyd Abrams, a lawyer who is an expert on First Amendment issues, said many of his clients, which include large media companies, did not view the state laws as a threat because they appear to be unconstitutional. But other media companies, those that cannot afford hefty legal fees, may feel differently, he said.

"A lot of smaller publishers do not want to be sued," Mr. Abrams said. "They do not want to be part of some test case."

The agriculture groups that have been lobbying to have many other states approve similar laws say the measures are doing just what they were intended to do: causing people to think twice before they make damaging comments that are exaggerated or untrue.

"Farmers are tired of being victimized," said Steven L. Kopperud, senior vice president at the American Feed Industry Association, which first had the idea for the special laws to protect food producers.

**"The laws don't inhibit anyone from stating their opinion," Mr. Kopperud said, "as long as, if they are challenged, they can prove it."** [Ed: emphasis added]

In the early 1990's, the association, which is based in Alexandria, Va., sent a model law drafted by a Washington law firm to state agricultural groups, many of which were angry after the 1989 report by the CBS News program "60 Minutes" about the Alar sprayed on apple trees. The program cited scientific studies that had concluded that Alar was a probable a carcinogen.

After the report, many consumers panicked, schools pulled apples off lunch menus, and apple prices sank. Even though most apple trees were not sprayed with Alar, all apple farmers lost money, and some farms went bankrupt.

Apple farmers in Washington State sued CBS, but a judge dismissed the case in 1993, saying the farmers had not proved that the report was false. If the new laws had been on the books, the farmers might have had an easier time, though that is far from clear.

In statehouses around the country, farmers pointed to the apple growers' losses when lobbying for the laws. Between 1991 and 1997, Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota and Texas passed different versions of the model law.

State Representative Robert R. Turner of Texas, a sheep rancher who helped write the Texas law, said farmers need protection because often they cannot sue under normal libel laws that prohibit false, damaging statements about a product. Under those laws, a company or person must be named by the party making the false statements to be able to recover damages.

But if someone, say, questions the safety of melons, Mr. Turner said, all melon farmers, named or not, may lose money. "Individual farmers were falling through the cracks," he said.

In early May, Mr. Turner helped defeat an attempt by media companies and civil liberties groups to repeal the Texas law. Three lawsuits were filed under that law, including one that emu ranchers filed against Honda as a result of an advertisement that made fun of emus and another that a sod company filed against a Texas agricultural agent for a report critical of its product. The emu suit was dropped, and the sod suit was dismissed. The third suit was the high-profile case against Ms. Winfrey.

The cattlemen sued her after her 1996 television show on the possible threat of "mad cow" disease to the American beef supply. During the show, after listening to comments by an anti-meat activist, Ms. Winfrey exclaimed: "It has just stopped me cold from eating another burger!" The cattlemen said the show caused cattle prices to drop, costing them millions of dollars.

But during the trial of their suit, a Federal judge ruled that live cattle were not a perishable agricultural product and that the cattlemen could not sue under the Texas law, known as the False Disparagement of Perishable Food Products Act of 1995. Instead, the cattlemen faced the higher burden of proving malice, under regular product disparagement laws.

In February 1998, a jury in Amarillo, Tex., ruled in Ms. Winfrey's favor. The cattlemen have appealed. Ms. Winfrey has so far spent more than $1 million on legal fees, her lawyer said.

Some people who have studied the laws say they believe they are having a greater effect than can readily be seen.

"These laws make people wary about what they say," said Rodney A. Smolla, a law professor at the University of Richmond who specializes in First Amendment issues and has criticized the laws. "It is very hard to document people who don't speak. You're documenting silence."

Some agriculture groups have used the laws to try to quiet food critics. In 1997, the United Fresh Fruit and Vegetable Association sent a letter from its law firm to an environmental group in Vermont called Food and Water that insisted that Food and Water stop distributing reports questioning the safety of irradiating fruits and vegetables.

"As you are no doubt aware, nearly 30 state legislatures have passed or are considering legislation which codifies a cause of action against persons who disseminate false statements regarding agricultural products," the letter warned. "We must advise you that Food and Water's actions will be closely scrutinized."

Thomas E. Stenzel, president of the United Fresh Fruit and Vegetable Association, said his group did not want to cut off debate but questioned the accuracy of Food and Water's statements.

And in Ohio, where lawmakers passed a food libel law in 1996, some people who have spoken out on food issues in the past say they now hesitate.

"When I give speeches, I look around and think, 'Does someone have a tape recorder?' " said Laurel Hopwood, a nurse and volunteer at the Ohio Sierra Club who speaks to groups about genetically engineered food. "I'm even afraid to say, 'This might be unsafe,' " she said, "because I'm fearful I could get sued."

Ms. Hopwood said she recently spent hours fretting over the words in a brochure she wrote about genetically modified food. On Earth Day in April, she asked other volunteers to help her hand out the pamphlet. "They were afraid," she said. "They kept asking, 'Can we get sued?' "

# Barrett v. Rosenthal

California Supreme Court (Nov. 20, 2006)

In the Communications Decency Act of 1996 [“CDA”], Congress declared [in section 230]: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. The immunity has been applied regardless of the traditional distinction between "publishers" and "distributors." Under the common law, "distributors" like newspaper vendors and book sellers are liable only if they had notice of a defamatory statement in their merchandise. The publisher of the newspaper or book where the statement originally appeared, however, may be held liable even without notice.

* * *

We granted review to decide whether section 230 confers immunity on "distributors" [and] "user[s,]" [and] whether the immunity analysis is affected if a user engages in active rather than passive conduct. We conclude that section 230 prohibits "distributor" liability for Internet publications. We further hold that section 230 immunizes individual "users" of interactive computer services, and. . .no. . .distinction can be drawn between active and passive use.

We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Dr. Stephen J. Barrett and Dr. Timothy Polevoy, operated Web sites devoted to exposing health frauds. Defendant Ilena Rosenthal directed the Humantics Foundation for Women and operated an Internet discussion group. Plaintiffs alleged that Rosenthal. . .committed libel by. . .distributing defamatory statements in e-mails and Internet postings, impugning plaintiffs' character and competence and disparaging their efforts to combat fraud. They alleged that Rosenthal republished various messages even after Dr. Barrett warned her they contained false and defamatory information.[*]

Rosenthal. . .argued that. . .she was immune under section 230. She also contended her statements were not actionable.

The [trial] court granted the motion, finding that Rosenthal's statements. . .were, for the most part, not actionable because they contained no provably false assertions of fact [and] the only actionable statement appeared in an article Rosenthal received via e-mail [that] Rosenthal [re]posted. . .on the Web sites of two newsgroups devoted to alternative health issues and the politics of medicine. . .Rosenthal [called] these newsgroups. . ."the wild west of the Internet," with "no administrators and no one to enforce rules of conduct." The trial court ruled that this republication was immunized by section 230(c)(1).

The Court of Appeal [reversed and] . . .held that section 230 did not protect Rosenthal from liability as a "distributor" under the common law of defamation.

## II. DISCUSSION

The leading case on section 230 immunity rejected the "distributor" liability theory adopted by the Court of Appeal here. (Zeran v. America Online, Inc.) We. . .agree with the Zeran court that Congress did not intend to create such an exception to section 230 immunity.[**]

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* The complaint summarizes the defamatory statements as follows:

> "Dr. Barrett is arrogant, bizarre, closed-minded; emotionally disturbed, professionally incompetent, intellectually dishonest, a dishonest journalist, sleazy, unethical, a quack, a thug, a bully, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, extortion, filing a false police report, and other unspecified acts.)"
>
> "Dr. Polevoy is dishonest, closed-minded; emotionally disturbed, professionally incompetent, unethical, a quack, a fanatic, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, stalking of females, and other unspecified acts) and has made anti-Semitic remarks."

** Section 230 includes the following provisions relevant to our discussion:

> (c) (1) Treatment of publisher or speaker. **No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.**
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of-
>
> "(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> "(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [(A)].
>
> * * *
>
> (e) Effect on other laws.
>
> * * *
>
> (3) State law. . .**No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with**

Rosenthal, however, is not a service provider, at least with respect to the newsgroups where she posted the Bolen article. . .[W]e asked the parties to brief the meaning of the term "user" in section 230, and whether any distinction might be drawn between active and passive use under the statute. In part C of our discussion, we conclude that Congress employed the term "user" to refer simply to anyone using an interactive computer service, without distinguishing between active and passive use.

A. Zeran

Kenneth Zeran was bombarded with angry and derogatory telephone calls, including death threats, after an unidentified person posted a message on AOL bulletin board [that] advertised t-shirts with offensive slogans referring to the Oklahoma City bombing. . .and instructed prospective purchasers to call Zeran's home telephone number. Zeran notified AOL of the problem, and the posting was eventually removed. However,. . .he sued AOL for unreasonable delay in removing the defamatory messages, refusing to post retractions, and failing to screen for similar postings.

. . .The Fourth Circuit Court of Appeals [held] that the plain language of section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content--are barred."

. . .[T]he Zeran court reasoned that. . .[w]hile original posters of defamatory speech do not escape accountability, Congress "made a policy choice. . .not to deter harmful online speech [by] imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." This policy reflects a concern that if service providers faced tort liability for republished messages on the Internet, they "might choose to severely restrict the number and type of messages posted."

The court noted that another important purpose of section 230 was "to encourage service providers to self-regulate the dissemination of offensive material over their services." [In an early case] a service provider was held liable for defamatory comments posted on one of its bulletin boards, based on a finding that the provider had adopted the role of "publisher" by actively screening and editing postings. "Fearing that the specter of liability would . . . deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity," which "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."

Zeran made the same argument adopted by the Court of Appeal here: that Congress intended to distinguish between "publishers" and "distributors," immunizing publishers but leaving distributors exposed to liability. At common law, "primary publishers," such as book, newspaper, or magazine publishers, are liable for defamation on the same basis as authors. Book sellers, news vendors, or other "distributors," however, may only be held liable if they knew or had reason to know of a publication's defamatory content. . .*

The Zeran court held that the publisher/distributor distinction makes no difference for purposes of section 230 immunity. . .

Subjecting service providers to. . .liability [if they received a notice of the offensive material as AOL did there] would defeat "the dual purposes" of section 230. . .A provider would be at risk for liability each time it received notice of a potentially defamatory statement in any Internet message, requiring an investigation. . . a legal judgment. . .and an editorial decision on whether to continue the publication. ". . .the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."

* * *

"More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to [both] create the basis for future lawsuits [and act as a censor of speech they disliked]. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply 'notify' the relevant service provider, claiming the information to be legally defamatory. . . ." [If the post is not instantly removed they have created a lawsuit against which the service provider has no defense. Conversely, swift removal gives the third parties an easy means to censor speech they do not like by simply "noticing" the provider, who would have no real choice but to immediately remove the targeted content whether it was true or false.]

The Zeran court's views [rejecting notice liability] have been broadly accepted [by all] courts. . .

* * *

1. The Meaning of "Publisher"

---

**this section.**

* * *

(f) Definitions. As used in this section:

(1) Internet. The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. . . .

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* The distinction is a practical one. Publishers are ordinarily aware of the content of their copy. It is not reasonable, however, to expect distributors to be familiar with the particulars of every publication they offer for sale. Therefore, only a distributor who is aware of defamatory content shares liability with the publisher.

* * *

We conclude the Zeran court's construction of the term "publisher" is sound. The terms of section 230(c)(1) are broad and direct: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.". . .[T]here is little reason to. . .address [distributors and publishers] separately. . .

* * *

We [also] note that it is far from clear how the distinction between traditional print publishers and distributors would apply in the Internet environment, with its many and various forms of discourse. As the high court noted, "[a]ny person or organization with a computer connected to the Internet can 'publish' information." Whenever such information is copied from another source, its publication might also be described as a "distribution." [A] distinction. . .based on rules developed in the post-Gutenberg, pre-cyberspace world, would foster disputes over which category the defendant should occupy. . .

* * *

3. Practical Implications of Notice Liability

The Zeran court identified. . .deleterious effects that would flow from reading section 230 to permit liability upon notice. [A] service provider who received notice] of a defamatory message would be subject to liability only [if it] maintain[ed] the message, [but not if it] remov[ed] it. . .[which] would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech. . .

* * *

. . .Notice-based liability for service providers would allow complaining parties to [censor] Internet speech by lodging complaints whenever they were displeased by an online posting. The. . .United States Supreme Court has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech.

. . .We conclude the Zeran court accurately diagnosed the problems that would attend notice-based liability for service providers.

* * *

C. "User" Liability

. . .Individual Internet "users" like Rosenthal. . .are. . .different from institutional service providers. . .In particular, individuals do not face the massive volume of third-party postings that providers encounter. . .Furthermore, service providers. .typically bear less responsibility for that content than do the users. Users are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material. These considerations bring into question the scope of the term "user" in section 230, and whether it matters if a user is engaged in active or passive conduct for purposes of the statutory immunity.

"User" is not defined. . .[but] plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service.

* * *

. . .Rosenthal used the Internet to gain access to newsgroups where she posted Bolen's article about Polevoy. She was therefore a "user" under the CDA. . .[T]here [is no] basis for concluding that Congress intended to treat service providers and users differently when it declared that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker . . . ."

Polevoy urges us to distinguish between "active" and "passive" Internet use, and to restrict the statutory term "user" to those who engage in passive use. . .Polevoy reasons that the term "user" . . .refer[s] only to those who receive offensive information. . .He argues that those who actively post or republish information on the Internet are [instead] "information content providers" unprotected by the statutory immunity. "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. . . ."

Polevoy's view fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any "user" as "the publisher or speaker of any information provided by another information content provider.". . .*

* * *

[T]he congressional purpose of fostering free speech on the Internet supports the extension of section 230 immunity to active individual "users.". . .

We conclude there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet use. By declaring that no "user" may be treated as a "publisher" of third party content, Congress has comprehensively immunized republication by individual Internet users.

D. Conclusion

We share the concerns of those who have expressed reservations about the Zeran court's broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not permit Internet service providers or users to be sued as "distributors," nor does it expose "active users" to liability.

Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action.

III. DISPOSITION

The judgment of the Court of Appeal is reversed.

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* At some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source. . .Rosenthal made no changes in the article she republished on the newsgroups. . .[H]owever. . .courts have reasoned that participation going no further than the traditional editorial functions of a publisher [retain] section 230 immunity.

# DeSantis, Aiming at a Favorite Foil, Wants to Roll Back Press Freedom

**The Florida governor and possible presidential candidate is the latest in a string of Republicans to target the Supreme Court decision that has long protected journalists accused of defamation.**

Gov. Ron DeSantis is among the most influential conservatives calling on the Supreme Court to revisit The New York Times Company v. Sullivan.

By Ken Bensinger, New York Times Feb. 10, 2023

When Gov. Ron DeSantis of Florida convened a round-table discussion about the news media this week, he spared no effort to play the part, perching at a faux anchor's desk in front of a wall of video screens while firing questions to his guests like a seasoned cable TV host.

But the panel's message was as notable as its slick presentation: Over the course of an hour, Mr. DeSantis and his guests laid out a detailed case for revisiting a landmark Supreme Court decision protecting the press from defamation lawsuits.

Mr. DeSantis is the latest figure, and among the most influential, to join a growing list of Republicans calling on the court to revisit the 1964 ruling, known as The New York Times Company v. Sullivan.

The decision set a higher bar for defamation lawsuits involving public figures, and for years it was viewed as sacrosanct. That standard has empowered journalists to investigate and criticize public figures without fear that an unintentional error will result in crippling financial penalties.

But emboldened by the Supreme Court's recent willingness to overturn longstanding precedent, conservative lawyers, judges, legal scholars and politicians have been leading a charge to review the decision and either narrow it or overturn it entirely.

Mr. DeSantis, a likely Republican presidential candidate, put the effort at the center of his war against the mainstream media.

"How did it get to be this doctrine that has had really profound effects on society?" he said at the event, which featured two libel lawyers known for suing news organizations and a conservative scholar who recently published an essay titled "Overturn New York Times v. Sullivan."

Under Sullivan, public figures who sue for defamation must show not only that a report contained false and damaging information, but also that its publisher acted with "actual malice" by knowing that the report was false or by recklessly disregarding the truth.

The precedent applies not only to mainstream media organizations, but also individuals, companies, partisan websites and podcasters that could face far greater exposure to defamation lawsuits if the standard of proof were lowered.

During the panel discussion on Tuesday, Mr. DeSantis accused the press of using Sullivan as a shield to intentionally "smear" politicians and said the precedent discouraged people from running for office. Would the current Supreme Court, he asked the panelists, be "receptive" to revisiting the case?

Donald J. Trump, who talked of changing libel laws as president, raised the same question in a court filing in December. The motion, part of a defamation lawsuit Mr. Trump filed against CNN, asked whether the high court "should reconsider whether Sullivan's standard truly protects the democratic values embodied by the First Amendment." His lawyers called the lawsuit, which accuses the network of unfairly comparing Mr. Trump to Adolf Hitler and seeks $475 million in damages, a "perfect vehicle" for revisiting the precedent.

CNN, which declined to comment, has denied the accusations and in November moved to dismiss the case. That motion is still pending.

A defamation lawsuit filed by Sarah Palin, the former governor of Alaska, against The New York Times, was once seen as a potential test of the "actual malice" standard first set by Sullivan. But a jury rejected her claim after a trial early last year, and a judge denied her bid for a second trial. The case is on appeal.

It's not clear whether the court is ready to revisit Sullivan. Two justices on the conservative-majority Supreme Court, Clarence Thomas and Neil M. Gorsuch, have indicated their willingness to roll back the ruling in written dissents in recent years, but it would require two more votes for a challenge to even be heard.

The Supreme Court has a conservative majority, and two justices have signaled they are willing to roll back Sullivan.Credit...Erin Schaff/The New York Times

Last June, the court declined to hear a defamation suit brought by a Christian organization against the Southern Poverty Law Center, which had called it a "hate group." Justice Thomas dissented, writing that he "would grant certiorari in this case to revisit the 'actual malice' standard."

Floyd Abrams, a First Amendment lawyer who represented The Times in the Pentagon Papers case in the early 1970s, said there was "a growing sense in the conservative community that this is their day to set aside New York Times v. Sullivan."

Mr. Abrams and other legal experts point to the court's recent decisions on abortion and gun rights as signs that it may be willing to revisit other longstanding precedents.

For Mr. Abrams, the attacks on what he considers "the gold standard in the world for the protection of the press" are thinly veiled attempts to shelter the country's most powerful figures from the scrutiny that a healthy democracy requires.

"Essentially what they're saying is that they want

to crack down on American journalism," he said.

Some of those pushing for a review of Sullivan argue that state legislatures, rather than the federal courts, should determine the scope and magnitude of libel law and press protections. Mr. DeSantis's office last year drafted legislation that would have made it difficult, if not impossible, for journalists to use anonymous sources. (The bill was never filed to the Florida Legislature.)

Another complaint among critics is that subsequent rulings by the Supreme Court allowed Sullivan to expand beyond public officials to include a larger group of public figures that includes people cast unwillingly into the spotlight by news events.

"I believe the pendulum has swung too far for the average person who is wronged by false media reports," said Harmeet Dhillon, a California lawyer who specializes in defamation cases and recently lost her bid for leader of the Republican National Committee.

Ms. Dhillon and others point to Nicholas Sandmann, who in 2019 found himself at the center of a national controversy after he was filmed facing a Native American elder at the Lincoln Memorial while wearing a MAGA hat. He sued multiple news outlets, including The New York Times, claiming they relied on the statements of the Native American elder without verifying them and subjected him to mass ridicule and derision. Mr. Sandmann reached settlements with CNN, The Washington Post and NBC. The lawsuit against The Times and other outlets was thrown out by a federal judge.

Mr. Sandmann, who has appealed the decision, appeared on Tuesday's panel, which was staged in a studio outside Miami and streamed online. As Mr. DeSantis sat in front of screens reading "Speak the Truth," Mr. Sandmann said his experience had "predetermined part of what the rest of my future is," which is why, he said, "we need to look at defamation."

The attack on Sullivan by Mr. DeSantis underscores some conservatives' increasing hostility against the mainstream media. But the crosscurrents of this issue reflect a more complex picture: Some of the outlets most favored by Mr. DeSantis and his allies have faced serious defamation challenges and have turned to the Sullivan case to defend against them.

Also on the panel was Libby Locke, a well-known media defamation lawyer who has pushed for judicial review of Sullivan, as well as state-level legislation that could make it easier for plaintiffs to bring and win libel cases.

Ms. Locke's presence alongside Mr. DeSantis drew rebukes from many on the right, particularly Trump supporters, who noted that one of her firm's clients is Dominion Voting Systems, the voting machine company that has been the target of unfounded accusations of election fraud from the former president's backers.

Ms. Locke's firm filed a $1.6 billion defamation suit against Fox News on Dominion's behalf. Fox has invoked Sullivan as part of its defense. Last month, the Fox chairman Rupert Murdoch was deposed in the case, which is set to go to trial in April.

"DeSantis isn't just trolling Trump. He's now trolling us," Ali Alexander, an organizer of the Jan. 6, 2021, rallies in Washington, wrote in a tweet on Tuesday.

In a statement, Fox said it was "confident we will prevail as freedom of the press is foundational to our democracy and must be protected," adding that the lawsuit was "nothing more than a flagrant attempt to deter our journalists from doing their jobs."

Ms. Locke's firm, Clare Locke, declined to comment.

Although his political rise was in part fueled by his appearances on Fox News, Mr. DeSantis has become one of the news media's most aggressive critics. He rarely grants interviews to national, nonpartisan news organizations. A top communications aide, Christina Pushaw, has publicly dismissed reporters as "partisan legacy media" and "Democratic activists posing as a Capitol Press Corps."

Mr. DeSantis's office did not respond to requests for comment.

In 2021, Mr. DeSantis pointedly echoed the Sullivan standard in his statement blasting a "60 Minutes" report about the state's Covid-19 vaccine distribution contract. Although he never sued, he accused the show's network, CBS News, of "malicious intent and a reckless disregard for the truth." At the time, CBS News said it stood behind its reporting and this week declined to comment further.

On Tuesday, Mr. DeSantis brought up the "60 Minutes" segment, telling his viewers that he had been a victim of a "hit piece" that was "fundamentally unfair." He added that he has "a thick skin" but that others don't have the platform he has to defend themselves, characterizing the debate as being about "standing up for the little guy against these massive media conglomerates."

Eugene Volokh, a professor of law specializing in First Amendment issues at the University of California, Los Angeles, said that overturning Sullivan would go far beyond bolstering the rights of people like Mr. Sandmann and could have a chilling effect on news outlets worried about being sued for making unwitting mistakes while covering politicians and the government.

"The protection to criticize public officials is very important," Mr. Volokh said. Although he would support reviewing subsequent Supreme Court rulings that expanded upon Sullivan, he questioned the motivations of politicians including Mr. DeSantis in calling for a complete reversal.

"Is this about the little guy or the big guy?" he asked.

# Donald J. Trump v. Mary L. Trump, The New York Times Company, Susanne Craig, David Barstow, Russell Buettner

New York State Supreme Court (May 3, 2023)

Honorable Robert R. Reed

In this lawsuit, Donald J. Trump ("plaintiff '), a former president of the United States, asserts various claims against his niece, Mary L Trump ("Mary Trump"), The New York Times Company. . .("The Times"), . . .journalists Susanne Craig ("Craig"), David Barstow ("Barstow") and Russell Buettner ("Buettner"). . .(collectively "defendants"), for their actions related to the publishing of The Times' 2018 article, *"Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father."*. . .The Times, Craig, Barstow and Buettner move. . .to dismiss each of the claims asserted against them and for an order, based on New York's. . .anti-SLAPP law, directing plaintiff to pay moving defendants' attorneys' fees and costs incurred defending against plaintiff's claims.

The crux of plaintiff s claim is that a reporter for The Times caused his niece, Mary Trump, to take 20-year-old tax and financial documents held by her lawyer and disclose them in violation of a 2001 settlement agreement. The Times, it is alleged, then used those documents to publish a lengthy article in 2018 that reported that plaintiff had allegedly participated in dubious tax and other financial schemes during the 1990s. . .**[P]laintiff does not specifically dispute the truth of any statements made in the article**. **Rather, plaintiff alleges that The Times defendants' interaction with Mary Trump resulted in her breach of certain confidentiality provisions of the 2001 settlement agreement, rendering The Times and its journalists liable for . . .interference with contract [and other related claims]. . .Plaintiff demands $100 million in damages.**

Plaintiff s claims. . ., as an initial matter, fail as a matter of constitutional law. **Courts have long recognized that reporters are entitled to engage in legal and ordinary newsgathering activities without fear of tort liability as these actions are at the very core of protected First Amendment activity**. Plaintiff's claims also fall [because he cannot prove any of them]. . .Finally, the newly amended anti-SLAPP law mandates that plaintiff pay defendants' attorneys' fees and costs because plaintiff's claims plainly constitute a strategic lawsuit against public participation, and, contrary to plaintiff's argument, New York's anti-SLAPP law is directed to more than just defamation-based lawsuits.

**BACKGROUND**

***Factual Background***

Shortly after the death of Frederick C. Trump, plaintiff's father and Mary Trump's grandfather, disputes arose among various members of the Trump family regarding the estate. . .[Various family members sued the other members. Among the documents produced by the parties in the litigation were]. . .tax and financial records concerning plaintiff. . . [I]n. . . 2001, the parties executed a settlement agreement to "fully, finally, and globally" resolve [all] the. . .proceedings ("the settlement agreement"). . .

. . .[T]he agreement contain[s]. . .confidentiality provisions. . .:

> [The parties] "shall not disclose any of the terms of [the Settlement Agreement], and in addition shall not directly or indirectly publish or cause to be published, any. . .description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation . . .involving the Estate of Fred C. Trump. . .or assist or provide information to others. . ."

Defendants contend that, while the confidentiality provisions state that the agreement itself is confidential and that the parties may not discuss their relationship in the context of the estate disputes, the provisions do not extend confidentiality to documents exchanged during discovery in the estate proceedings.

Years later, as the public's interest in plaintiff began to grow, eventually culminating with his entry into national politics, The Times began scrutinizing some of plaintiff's public statements regarding his personal finances. . .While running for President, plaintiff promised to disclose his tax returns. . .[He never did.] Then, in 2016, The Times obtained portions of plaintiff's tax returns and published an article revealing that he may have avoided taxes for nearly two decades. The publication of the article further sparked public debate, and since then, plaintiff's taxes have become a frequent subject of media attention.

At The Times, Craig, Barstow, and Buettner were specifically tasked with covering plaintiffs financial affairs. As part of their ongoing efforts to report on the topic, in 2017, Craig approached Mary Trump. . .[who] initially declined to speak with Craig, but Craig continued reaching out to Mary Trump, assuring her that her cooperation could help "rewrite the history of the President of the United States".

. . .Mary Trump [later] changed her mind and. . .call[ed] Craig. She and Craig discussed documents from the estate disputes that had remained in Mary Trump's client file at the offices of her attorneys. . .To communicate, Mary Trump and Craig used anonymous cell phones, also known as burners. Mary Trump initially considered the possibility that she might have to "smuggle" these documents out of her attorney's office, but instead she received permission from her attorneys to take an extra copy from them. Mary Trump then shared those documents with The Times. . .[without] authorization from any of the. . .[other parties to the estate disputes].

Plaintiff contends that these actions constitute a blatant breach of paragraph 2 of the confidentiality provision of the settlement agreement. Plaintiff also contends that The Times was aware that Mary Trump's actions would constitute a violation of the settlement agreement. In fact, the complaint alleges, Craig made such acknowledgments publicly. According to plaintiff, Mary Trump would not have breached the confidentiality provision were it not for The Times' persistent efforts. Therefore, plaintiff contends, The Times has [unlawfully] interfered with the contract [the

settlement agreement] between Mary Trump and plaintiff. . .

On October 2, 2018, The Times published an article, credited to Barstow, Craig, and Buettner, entitled *"Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father"* (the "2018 article"). The article's subject matter was described immediately below the headline: "The president has long sold himself as a self-made billionaire, but a Times investigation found that he received at least $413 million in today's dollars from his father's real estate empire, much of it through tax dodges in the 1990s". The 13,000-word article explained in detail the various methods plaintiff allegedly used to "dodge taxes," including "set[ting] up a sham corporation to disguise millions of dollars in gifts"; "tak[ing] improper tax deductions worth millions more"; and "formulat[ing] a strategy to undervalue his parents' real estate holdings by hundreds of millions of dollars on tax returns.". . .

*The instant action*

On September 21, 2021, plaintiff filed this lawsuit. He brings four claims against The Times and the three reporter defendants [all related to the interference with contract claim]. Although plaintiff does not specify an identifiable harm, he demands an award of. . .damages in an amount . . .alleged to be no less than $100,000,000.

. . .The New York Times and its reporters move. . .to dismiss each of the claims. . .and for an order, based on New York's. . .anti-SLAPP law, directing plaintiff to pay the moving defendants the attorneys' fees and costs spent defending against plaintiff s claims.

DISCUSSION

*1. Does New York 's anti-SLAPP law apply to plaintiff's claims?*

New York's. . .anti-SLAPP statute applies to the claims. . .because plaintiff's [claims]. . . against The Times and its reporters, constitute a strategic lawsuit against public participation. Moreover, and contrary to what plaintiff argues, the anti-SLAPP statute is not limited only to defamation claims.

**SLAPP suits-or strategic lawsuits against public participation-are characterized as having little legal merit but "filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future"**. **The law. . .applies to suits that target. . .any "lawful conduct in furtherance of the exercise. of the constitutional right of free speech in connection with an issue of public interest."** [When the law is invoked by a defendant] [p]laintiffs can avoid dismissal only if they establish that they have a "substantial basis in law" for their claims. . .If a defendant prevails in securing dismissal of the case, it is entitled to seek reimbursement of its costs and attorneys' fees from the plaintiff, along with compensatory and punitive damages

The law was originally enacted in 1992 as a response to "rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development. . ." In 2020. . .[the law was amended] to also include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest". . .[and] that "public interest" "shall be construed broadly. . ." **The. . .anti-SLAPP law was specifically designed to apply to lawsuits like this one.**

In fact. . .plaintiff's history. . .[involving 3,500 lawsuits] that some. . .have described as abusive and frivolous, inspired the expansion of the law.. . .[O]ne of its authors issued a press release stating: "For decades, Donald Trump, his billionaire friends, large corporations and other powerful forces have abused our legal system by attempting to harass, intimidate and impoverish their critics with strategic lawsuits against public participation, or 'SLAPP' suits. This broken system has led to journalists. . .and others being dragged through the courts on retaliatory legal challenges solely . intended to silence them."

Nonetheless, plaintiff argues that his claims do not fall within the purview of the anti- SLAPP law since the claims asserted against The Times do not relate to communication in a public forum in connection with an issue of public interest. **Plaintiff argues that he is not suing The Times for its publication of the 2018 article, but for its actions in inducing its co-defendant Mary Trump to breach her confidentiality agreement and turn over the confidential records. These actions [he claims]. . .must be viewed separate[] and apart from the. . .publication of The Times article.**

**Moreover, plaintiff argues that the anti-SLAPP law is not applicable to claims other than for defamation** - a cause of action which plaintiff did not assert against The Times. . .**Plaintiff's arguments fail on all counts**. First, even if the complaint. . .did not target the 2018 article's publication, the claims. . .are still subject to **New York's anti-SLAPP law. The law was specifically amended to protect, not just the communication in the public forum. . ., but also the "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest". [T]here can be no dispute that newsgathering certainly qualifies as conduct in furtherance of the exercise of one's right to free speech**. **Moreover. . .New York's anti-SLAPP law is not limited to defamation claims**. . .[T]he legislature's expansive changes to the law were, in part, specifically designed to prevent plaintiff himself from filing lawsuits like this one to retaliate against journalists for their reporting. Therefore, **it would be unreasonable to conclude that plaintiff could evade the application of a law specifically designed to stop frivolous lawsuits aimed at chilling free speech simply by pleading non-defamation claims.**

Accordingly, because, in this court's assessment, the anti-SLAPP law applies to the claims at hand, plaintiff can avoid dismissal of those claims only if he can establish a "substantial basis in law" for his claims. . .Additionally. . .if. . .The Times defendants prevail [and]. . .dismiss the case, they would be entitled to seek reimbursement of their costs and attorneys' fees from plaintiff.

*2. Does the New York Constitution protect The Times' right to solicit in/Ormation from its source, even when its strategy of obtaining information involves encouraging its source to breach her contractual*

*confidentiality obligations?*

**The Times defendants' conduct is protected by New York law, which is exceedingly protective of free speech rights. . .New York courts have consistently rejected efforts to impose tort liability on the press based on allegations that a reporter induced a source to breach a non-disclosure agreement.**

The New York State Constitution. . .provides strong protections for free speech. "Every citizen may freely speak, write and publish his or her sentiments on all subjects". This principle has been reaffirmed by New York courts. . .The New York Court of Appeals [Ed: in other states this would be known as the "Supreme Court"]. . . has boasted of New York's "own exceptional history and rich tradition" of protecting the freedom of the press. . ."in safeguarding the free press against undue interference" *(id.)*. This tradition extends to "the sensitive role of gathering and disseminating news of public events," which receives "the broadest possible protection" under state law. [And] "[t]he protection. . .of free press and speech in the New York Constitution is often broader than the. . .First Amendment," including where a case could impact "[t]he ability of the press freely to collect and edit news".

That stated, the New York tradition of protecting the freedom of the press to collect news is also consistent with how the First Amendment has been interpreted. For example, in *Smith v. Daily Mail Publishing Co.,* the Supreme Court of the United States declared that "[If] a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order". . .[T]he Supreme Court has. . .rejected tort lawsuits premised on the publication of information that was obtained through ordinary newsgathering activities *(see Fla Star v BJF*. . .[and] *Barnicki v. Vopper* [Ed: two cases we will be studying in a few weeks]) Plaintiff argues that The Times' conduct is not constitutionally protected because its actions were tortious in nature and it is well established that "[c]rimes and torts committed in news gathering are not protected by the First Amendment" *(Le Mistral, Inc. v. Columbia Broadcasting System* [Ed: another case we will study later])

According to plaintiff, The Times. . .activities, even if. . .covered by the New York Constitution, were nonetheless coercive, harassing. . .and in blatant disregard of the plaintiff's contractual rights, and, as such, deserve no protection.

**Plaintiff is mistaken. His characterization of The Times' actions as [unlawful] does not, on its own, remove the constitutional protections that are extended to the press during the process of ordinary newsgathering. . .This protection is based on the longstanding recognition that "without some protection for seeking out the news, freedom of the press could be eviscerated" *(Branzburg v. Hayes).***

Thus, **the question before this court is not whether the [Plaintiff] characterizes The Times' conduct as [unlawful], but whether the conduct it alleges – persuading Mary Trump to provide documents from her client file for a story about plaintiff – constitutes an illegal act or tort. . .**

Plaintiff principally relies on two cases to support his argument that The Times' c0nduct qualifies as a tort. Plaintiff argues that The Times' conduct is not constitutionally protected under *Le Mistral, Inc. v. Columbia Broadcasting System,* a case that established that "[c]rimes and torts committed in news gathering are not protected by the First Amendment". [That case involved trespass in order to gather news and is irrelevant here]. . .

**Plaintiff does not cite a single case where any court. . .has held that a reporter is liable for inducing his or her source to breach a confidentiality provision. In fact, New York courts have consistently rejected [that argument]. . .**

Given the binding precedent. . .and the New York Constitution's strong protection of newsgathering, plaintiff's attempt to impose civil liability on The Times and its reporters lacks "a substantial basis in law" and is contrary to the core principles that underlie the First Amendment and the New York State Constitution. Accordingly, the tort claims asserted against The Times and its reporters are dismissed in their entirety.

* * *

*4. Are The Times defendants entitled to costs and attorneys' fees?*

As explained above, New York's anti-SLAPP law applies to this lawsuit. . .Therefore, due to dismissal of the claims asserted against The Times and its reporters, The Times defendants are entitled to recover their costs and attorneys' fees. . .