

2008

## What is Truth?: True Suspects and False Defamation

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### Recommended Citation

Peter B. Kutner, *What is Truth?: True Suspects and False Defamation*, 19 Fordham Intell. Prop. Media & Ent. L.J. 1 (2008).  
Available at: <https://ir.lawnet.fordham.edu/iplj/vol19/iss1/1>

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## **Cover Page Footnote**

This article was written while the author was a visiting researcher at the Max Planck Institute for Comparative and International Private Law, Hamburg, Germany. The author expresses much appreciation for the facilities and assistance offered by the directors—in particular, Professor Reinhard Zimmermann—the staff, and researchers of the Institute.

# What is Truth?: True Suspects and False Defamation

Peter B Kutner\*

“[T]ruth is generally the best vindication against slander.”

—Abraham Lincoln<sup>1</sup>

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\* Hugh Roff Professor of Law, The University of Oklahoma. This article was written while the author was a visiting researcher at the Max Planck Institute for Comparative and International Private Law, Hamburg, Germany. The author expresses much appreciation for the facilities and assistance offered by the directors—in particular, Professor Reinhard Zimmermann—the staff, and researchers of the Institute.

<sup>1</sup> Letter from President Abraham Lincoln to Secretary of War Edwin M. Stanton (July 14, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN, at 440 (Roy P. Basler, ed., 1953).

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#### ABSTRACT

A television station reports that an individual is a suspect in a murder case. A newspaper reports that a business or charity is under investigation to determine whether it has provided funding to terrorists or terrorist organizations. It is true that the individual is a suspect in the police investigation of the murder, and that the government is investigating the business or charity for possible financial links to terrorists. However, the suspicion is wrong, or at least unprovable. As far as can be determined from the available evidence, the individual did not commit a murder, and the business or charity did not provide funds to terrorists. If the party identified as a suspect or investigation target brings a defamation action, the defendant will assert that the report it made to the public was true and truth is a complete defense to a defamation claim. The plaintiff, however, will assert that the report damaged the plaintiff's reputation by causing the public to suspect the plaintiff of criminal or improper acts and the suspicion was false, so the defense of truth should not succeed. Which version of "truth" will prevail in these circumstances? What must be true for the defendant to avoid liability?

This is the question that this article examines and attempts to answer. The answer will determine whether an innocent person can obtain some remedy for harm to reputation or whether the media will enjoy what amounts to an absolute immunity from liability when the published report is literally accurate in identifying a person as a suspect or under investigation. American courts have not developed a satisfactory or authoritative answer to the question of what is "truth" in this situation. This article will put forward an-

swers that are well-grounded in defamation common law and constitutional law and strike a reasonable balance between allowing the media freedom to report on criminal investigations and providing a remedy to innocent parties whose reputation has been damaged.

#### INTRODUCTION

Reportage on investigations of crime is staple fare for the mainstream news media. Publication or broadcast of a report that a person is a suspect in, or being investigated for, criminal activity is an everyday occurrence. In the United States, this seems to be accepted as a legitimate part of media publication on matters of public concern.

People identified in news reports as suspects or investigation targets are understandably much aggrieved by these reports. Persons who are correctly suspected of unlawful conduct may legitimately complain that publication of such reports is premature and can cause prejudice in legal proceedings taken against them. However, the concern of this article is with those who are identified in the media as suspects, or as under investigation for unlawful activity, but are in fact innocent—or at least cannot be proved guilty. Such persons may suffer great loss because of the resulting damage to their reputations and unwillingness of others to be associated with them, even if it is soon reported that they are no longer a suspect.

If there is any legal remedy for the damage to reputation caused by these reports, it is to be found in a cause of action for defamation (libel or slander). It is defamatory to make a statement that puts a person under suspicion of having committed a crime, or having helped another person commit a crime, even if the statement falls far short of asserting that the person is guilty.<sup>2</sup> Corporations and other entities may be defamed by reports that they or their officers are under investigation or suspects.<sup>3</sup>

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<sup>2</sup> See JOHN CLEMENT CARPENTER GATLEY ET AL., GATLEY ON LIBEL AND SLANDER 105–07 (Patrick Milmo & W.V.H. Rogers eds., Sweet & Maxwell 10th ed. 2004) [hereinafter GATLEY]; cases discussed *infra* text accompanying notes 59–88, 222–52.

<sup>3</sup> See cases discussed *infra* text accompanying notes 89–107, 253–91.

It is fundamental to the common law of defamation that truth is a complete defense to liability. There is no liability for publication of matter that is found to be true in its defamatory meaning or meanings.<sup>4</sup> A news report that a person is being investigated for, or is a suspect in, a crime may well be true in the sense that a public law enforcement authority, or possibly a private entity, is in fact investigating the person for possible criminal activity or has identified the person as a suspect. However, to the extent the report creates public suspicion that the person engaged in criminal activity, the suspicion is false when the person has committed no crime. An element of falsity may also be found when a person is reported to be a suspect but did not engage in conduct that would reasonably create suspicion of criminal activity. Furthermore, it has long been accepted that the defense of truth does not protect a person who correctly states that another has made a particular statement about the plaintiff, when the statement has a defamatory meaning that is false.<sup>5</sup> For this reason, accurate reportage of a statement by a law enforcement officer that a person is a suspect, or under investigation, is not by definition a true publication for purposes of a defamation case. An additional complication is that the common law privilege to accurately report governmental proceedings might apply to reports of investigations or conclusions reached in investigations.

The critical question for liability in these circumstances is “What is truth?”—in what sense must the report be true for its publisher to be protected from defamation liability? This article focuses on the question “What is truth?” when a person has been identified in news reportage or commentary as a suspect in, or under investigation for, a serious crime. It will describe the reported

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<sup>4</sup> LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* 327–29 (1978); 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *HARPER, JAMES AND GRAY ON TORTS* § 5.20 (3d ed. 2006) [hereinafter *HARPER, JAMES & GRAY*]; W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 839–42 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; RESTATEMENT (SECOND) OF TORTS § 581A (1977). In defamation litigation, pleading truth as a defense is known as a plea of “justification.” *HARPER, JAMES & GRAY, supra*.

<sup>5</sup> DAN B. DOBBS, *THE LAW OF TORTS* 1150 (2000); GATLEY, *supra* note 2, at 270–71; *HARPER, JAMES & GRAY, supra* note 4, § 5.20, at 197–98; RESTATEMENT (SECOND) OF TORTS § 581A cmt. e (1977).

cases in which the question has been addressed and critically examine the decisions in those cases. The article will also consider whether truth for purposes of First Amendment protection from liability is different from the concept of truth in the common law of defamation.

Courts in the United States have not developed a satisfactory or authoritative answer to the “What is truth?” question. When the question has arisen, American courts, unlike their counterparts in England and elsewhere, have failed to appreciate how much its resolution depends upon identification of the particular defamatory meaning conveyed by the report and upon the distinction between the literal truth of the report, the truth of the defamatory meaning, and truth as a basis for protection from liability under the First Amendment. This has influenced decisions in prominent defamation cases brought by parties identified as suspects in the commission of terrorist acts or within an investigation into funding of terrorist groups, as well as cases involving more traditional crimes.

While no single answer to the question “What is truth?” can be propounded as the correct one, this article will suggest answers that are well-grounded in defamation common law and constitutional law, and strike a reasonable balance between allowing the media freedom to report on criminal investigations and providing a remedy to innocent parties for damage to reputation.

## I. FACTUAL CONTEXT: U.S. CASES

It is important to understand the factual context in which the “What is truth?” issue has appeared in defamation case law. Of the many reported defamation cases of recent years, only a small number explicitly or impliedly address the question “What is truth?” when a plaintiff complains of being identified as a suspect in a crime or under investigation. Within that small number, there is considerable variety in the crime involved, the content of what was published concerning the crime and the plaintiff, the impact of the material on public perceptions of the plaintiff, and the harm that the plaintiff suffered or was likely to suffer. The actual or suspected crimes in these cases have ranged from not unusual instances of homicide, theft, fraud, corruption or other unlawful con-

duct to crimes notable for their unusual or lurid elements, the prominence of the people involved in the crime or investigation, or the public fear generated by the crime. The reportage has ranged from straightforward communication to the public of the statements or actions of law enforcement personnel to revelation of the details of non-public investigations and the investigators' suspicions, to media commentary asserting that the plaintiff ought to be the principal focus of investigations into the crime. The leading American cases of the past decade all involve purported acts of terrorism or funding of terrorism.<sup>6</sup> Recent major cases in England and South Africa also involve reports that the plaintiff was a suspect or under investigation for acts of terrorism or providing financial support for terrorism.<sup>7</sup>

Some of the American cases take the very simplistic approach that reporting that a person is under investigation for criminal activity is true and non-actionable when the person was in fact being investigated. In *Hirschfeld v. Daily News, L.P.*,<sup>8</sup> a newspaper had published an article stating that "the Manhattan district attorney's office is investigating millionaire developer Abe Hirschfeld for allegedly plotting to kill a long-time business partner."<sup>9</sup> In a brief opinion, the New York Supreme Court's Appellate Division held that Hirschfeld's defamation action against the newspaper had

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<sup>6</sup> See *infra* text accompanying notes 68–180. For discussions of other instances in which individuals were pervasively portrayed by the American news media as suspects in major crimes but were never charged, and eventually cleared, see Clay Calvert & Robert D. Richards, *Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney*, L. Lin Wood, 35 MCGEORGE L. REV. 1 (2004) [hereinafter Calvert & Richards, *Journalism*], and Robert D. Richards & Clay Calvert, *Suing the News Media in the Age of Tabloid Journalism: L. Lin Wood and the Battle for Accountability*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 467 (2006) [hereinafter Richards & Calvert, *Suing*]. These include the parents of Jon Benét Ramsey, the child beauty-pageant participant murdered in the Ramseys' home; Richard Ricci, portrayed as a suspect in the widely-publicized kidnapping of a girl in Utah until she was found alive; and Wen Ho Lee, the Los Alamos laboratory scientist who was put under suspicion of stealing sensitive nuclear secrets for China.

<sup>7</sup> See *infra* text accompanying notes 273–329.

<sup>8</sup> *Hirschfeld v. Daily News, L.P.*, 703 N.Y.S.2d 123 (App. Div. 2000), *appeal denied*, 713 N.Y.S.2d 463 (App. Div. 2000).

<sup>9</sup> *Id.* at 124; Mark Kriegel, *DA Probing Hirschfeld Allegedly Plotted to Kill Biz Partner*, DAILY NEWS (N.Y.), Nov. 8, 1997, at 3.



been properly dismissed because “the central premise of the article was factually true”: a grand jury was receiving evidence “in connection with allegations that Abraham Hirschfeld may have been involved in a plot to kill [the business partner].”<sup>10</sup> The opinion did not identify the defamatory meanings conveyed by the article or consider whether the defamatory meanings were shown to be true.<sup>11</sup>

In *Gravitt v. Brown*,<sup>12</sup> the plaintiff had been an employee of the California Bureau of Narcotic Enforcement responsible for managing an evidence vault.<sup>13</sup> After three hundred kilograms of cocaine were stolen from the vault, an assistant chief of the Bureau stated that the plaintiff was the “prime suspect” in the theft.<sup>14</sup> Rejecting the plaintiff’s action for slander, the court reasoned that the assistant chief’s statement “was not the same as saying that [the plaintiff] actually committed the theft, so it was not a false statement of fact,” and the plaintiff had not produced any evidence that what the assistant chief said was untrue.<sup>15</sup>

In *Jackson v. Paramount Pictures Corp.*,<sup>16</sup> the entertainer Michael Jackson sued over statements in radio and television programs that police and district attorney’s office investigators were looking for a video tape showing Jackson engaged in sexual activity with a young boy.<sup>17</sup> Two district attorneys’ offices had in fact received reports that there was such a tape and around the time of the broadcasts there was some investigation into the tape’s existence and whether it could be procured. No such tape was ever found. Investigators concluded, after the broadcasts, that its exist-

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<sup>10</sup> *Hirschfeld*, 703 N.Y.S.2d at 124.

<sup>11</sup> One passage in the opinion states that the article’s statements about the plaintiff “were true and non-defamatory.” *Id.* As it is implausible to interpret as non-defamatory a report that the plaintiff was being investigated for allegedly plotting to kill a business partner, presumably the court meant that the article was not actionable as defamation because it was true. Hirschfeld was indicted on the charges before the Appellate Division’s decision and convicted afterwards. See Edward Wong, *Hirschfeld is Convicted by Jury*, N.Y. TIMES, June 17, 2000, at B2.

<sup>12</sup> *Gravitt v. Brown*, 74 F. App’x 700 (9th Cir. 2003).

<sup>13</sup> *Id.* at 702.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 705.

<sup>16</sup> *Jackson v. Paramount Pictures Corp.*, 80 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998).

<sup>17</sup> *Id.* at 2.

tence could not be established.<sup>18</sup> The trial court and appellate court were of the view that the broadcasts were truthful reports that did not give rise to a defamation action.<sup>19</sup> In addition, to the extent the broadcasts conveyed the impression that an incriminating video tape existed, the defendants were protected from liability because Jackson could not show that the defendants had “actual malice,” i.e., knowledge of or reckless disregard for falsity,<sup>20</sup> as is necessary when a public figure sues for defamation.<sup>21</sup>

A. *Jacobs v. McIlvain*

In *Jacobs v. McIlvain*,<sup>22</sup> the Texas Court of Appeals adopted a different approach that resulted in reversal of summary judgment for the defendants, but its decision was reversed by the state supreme court.<sup>23</sup> Employees of a municipal water facility in Houston were the subject of a news report broadcast by a local television station.<sup>24</sup> Viewers were told that:

The city’s public integrity section is investigating the use of city employees for private work in the home of the city water maintenance manager. The employees of the city water maintenance division say four payroll employees were used, on city time, to care for the elderly father of Emerick Jacobs, the manager of water department maintenance division. The employees say they were sent by a supervisor each day to the manager’s home to care for his father and do other tasks around the house. On top of this, these same employees are putting in for overtime so they could get their city jobs done later on. Police investigators who are conducting the investi-

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<sup>18</sup> See *id.* at 8.

<sup>19</sup> *Id.* at 8–9, 12.

<sup>20</sup> *Id.* at 9, 12–16.

<sup>21</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), established this as a requirement based on the First Amendment.

<sup>22</sup> *Jacobs v. McIlvain (Jacobs I)*, 759 S.W.2d 467 (Tex. App. 1988), *rev’d*, 794 S.W.2d 14 (Tex. 1990).

<sup>23</sup> *McIlvain v. Jacobs (Jacobs II)*, 794 S.W.2d 14, 16 (Tex. 1990).

<sup>24</sup> *Jacobs I*, 759 S.W.2d at 468.

gation were looking for a gun, but they didn't find the gun at the Dalton Street Water Facility. They found liquor bottles. One city employee says drinking on the job there is not so unusual. The information about the alleged theft of City time may be turned over to a grand jury.<sup>25</sup>

Emerick Jacobs and another employee of the water facility sued the owners of the television station and the reporter who broadcast the story.<sup>26</sup> The trial court granted summary judgment for the defendants without specifying the basis of its decision.<sup>27</sup> On appeal, the defendants sought to sustain the summary judgment on the grounds that (a) Emerick Jacobs was a public official who could not recover for defamation without proof that the defendants had "actual malice";<sup>28</sup> (b) the broadcast was privileged under Texas law as a true and fair account of an executive proceeding;<sup>29</sup> (c) the broadcast was truthful in all respects; and (d) the plaintiffs could not meet their burden of proof that the broadcast was false.<sup>30</sup>

In a 2-1 decision, the court of appeals reversed the trial court and ordered the case remanded for trial.<sup>31</sup> Summary judgment was not upheld on the ground of Jacobs being a public official because the record did not show, as a matter of law, that Jacobs had the status of public official and the record did allow the possibility that there was reckless disregard for the truth.<sup>32</sup> The privilege to publish an account of government proceedings did not entitle the defendants to summary judgment because the privilege was not absolute. It was lost upon a showing of malice, and the record "admit[ted] the possibility" of reckless disregard for truth.<sup>33</sup>

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<sup>25</sup> *Jacobs II*, 794 S.W.2d at 15 (paraphrasing in opinion omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Jacobs I*, 759 S.W.2d at 469.

<sup>28</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), requires that a public official seeking damages for defamation prove that the defendant had "actual malice," defined as knowledge of the falsity of the statement or reckless disregard for falsity. *Id.* at 279-80.

<sup>29</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 (2008).

<sup>30</sup> *Jacobs I*, 759 S.W.2d at 468.

<sup>31</sup> *Id.* at 470.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 469-70.

Fact issues regarding the truth of the statements also precluded summary judgment for the defendants on that ground. The summary judgment could not be upheld on the basis of truth, or the plaintiffs' inability to prove falsity.<sup>34</sup> The defendants' argument was said to be, "Appellees stand by their story, maintaining that the essence of the broadcast was that the charges had been made. In other words, journalists should be able to report the very fact of governmental self-scrutiny. And presumably under this umbrella they can publish potentially defamatory statements as a matter of law."<sup>35</sup> But,

[m]erely alleging that an investigation was in progress does not entitle a journalist to publish free-standing allegations which are . . . legally immune from examination under the law of libel. . . . [T]he law does not generally immunize the propagation of defamatory statements. It is no defense to say, "It is alleged that . . ."

. . . .

"The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own, and is liable in equal measure to the original defamer."<sup>36</sup>

The evidence did not show that the "underlying charges were true as a matter of law."<sup>37</sup>

Justice Ellis delivered a brief dissenting opinion.<sup>38</sup> He would have affirmed the summary judgment. His principal disagreement with the majority was "with the notion that defamation occurred in the first place. The broadcast said there was an investigation, and there was indeed an investigation."<sup>39</sup>

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<sup>34</sup> *Id.* at 469.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting *Belo v. Fuller*, 19 S.W. 616 (Tex. 1892), and *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 470 (Ellis, J., dissenting).

<sup>39</sup> *Id.*

The basis of the dissent's disagreement "with the notion that defamation occurred in the first place" is not clear. It ought to have been obvious that defamation did occur in this case. A report with city employees' statements that a manager sent them to care for his elderly father and do tasks around the house on city time conveys a defamatory meaning about the manager. What Justice Ellis may actually have meant was that there was no actionable defamation because the report was true. "The broadcast said there was an investigation, and there was indeed an investigation."<sup>40</sup>

If so, the dissenting justice was vindicated when the defendants appealed to the Supreme Court of Texas. The court affirmed the trial court's grant of summary judgment for the defendants on the ground that the "substantial truth" of the broadcast had been established.<sup>41</sup> The broadcast was correct in its report that an investigation into the use of city employees for private work was underway. It was also factually consistent with the findings of the investigation. Reporting the employees' statements about being used to care for Jacobs' father on city time was shown to be correct because

[a]ccording to the City of Houston's legal department report, employees of the water maintenance division had gone on separate occasions with Joyce Moore to St. Joseph's Hospital or to the home of Jacobs' father and sat with him while he was ill. Sworn statements by a division employee indicate that on three occasions, Moore and other water division employees would visit Jacobs' father in the hospital during work hours, staying there for a half day or longer. While on these visits, the employees were paid their regular city wages. . . . The [Public Integrity Review Group] found from the payroll division office records that on several occasions, when these employees were absent from the office

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<sup>40</sup> *Id.*

<sup>41</sup> *McIlvain v. Jacobs (Jacobs II)*, 794 S.W.2d 14, 16 (Tex. 1990). Two justices dissented without specifying reasons.

for as long as four hours caring for the elder Mr. Jacobs, they requested and received overtime.<sup>42</sup>

The Public Integrity Review Group report also showed that the broadcast was correct in stating that police investigators found liquor bottles at the Dalton Street Water Facility and that there was drinking on the job. Finally, evidence that this information was being gathered for possible prosecution demonstrated the substantial truth of the broadcast's statement that information about the alleged theft of city time may be turned over to a grand jury.<sup>43</sup> The court noted the U.S. Supreme Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*<sup>44</sup> that a plaintiff suing a media defendant for a statement on a matter of public concern must bear "the burden of showing that the speech at issue is false,"<sup>45</sup> but it was the showing of the "substantial truth of the broadcast as a matter of law"<sup>46</sup> that led the Texas Supreme Court to hold that the defendants were entitled to summary judgment. In substance, the broadcast was regarded as true, and therefore not actionable as defamation, because it was correct concerning the investigation and consistent with what was found in the investigation, including findings based on statements by city employees.

The state supreme court's decision in the *Jacobs* case appears to have established in Texas law that news reports about investigations are to be regarded as true, and therefore protected from defamation liability, when they accurately report the nature of the investigation and allegations made against the plaintiff.<sup>47</sup> A recent example is *Grotti v. Belo Corp.*,<sup>48</sup> in which the plaintiff was a doctor under investigation, and eventually prosecuted, for causing the deaths of patients. The court reasoned that the "gist" of the defen-

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<sup>42</sup> *Id.* at 16.

<sup>43</sup> *Id.*

<sup>44</sup> *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

<sup>45</sup> *Id.* at 777; *see infra* text accompanying notes 347–48.

<sup>46</sup> *Jacobs II*, 794 S.W.2d at 16.

<sup>47</sup> David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 748–50 (2007), interprets the decision more narrowly, on the basis that the Public Integrity Review Group report showed the truth of the allegations.

<sup>48</sup> *Grotti v. Belo Corp.*, 188 S.W.3d 768 (Tex. App. 2006).

dants' broadcasts was reporting on investigations and allegations concerning the plaintiff and the "gist" was true in substance.<sup>49</sup>

*B. Lawrence v. Bauer Publishing & Printing Ltd.*

In a New Jersey case, *Lawrence v. Bauer Publishing & Printing Ltd.*,<sup>50</sup> an intermediate appellate court's decision sustaining the plaintiffs' defamation action was reversed by the state supreme court, as in *Jacobs*, but on grounds leaving open the possibility that a plaintiff who was not a public figure could prevail.<sup>51</sup> The plaintiffs in *Lawrence* were the president and secretary-treasurer of the Rahway Taxpayers Association. The Association circulated petitions among Rahway's registered voters to force a public referendum on a municipal appropriation for a new firehouse, which the Association opposed.<sup>52</sup> The plaintiffs submitted to the Rahway City Clerk petitions containing over 5000 signatures. A local newspaper published an article stating that an attorney<sup>53</sup> had been "empowered to handle a case" against the plaintiffs "based on charges that forgery was involved" in the gathering of the signatures.<sup>54</sup> The article also related that the plaintiffs would be charged with false swearing of oaths and affidavits. The article's headline was "forgery charges may loom for Lawrence, Simpson."<sup>55</sup> In response to plaintiffs' request for a retraction, the newspaper published a second article asserting that the first article did not make any accusations of guilt, but rather reported that "city officials were turning the petitions over to the local prosecutor, which in fact they did, to investigate allegations of forgery and

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<sup>49</sup> *Id.* at 775, 788–89; *see also* Dolcefino v. Randolph, 19 S.W.3d 906, 918 (Tex. App. 2000); KRTK Television v. Felder, 950 S.W.2d 100, 105–06 (Tex. App. 1997).

<sup>50</sup> *Lawrence v. Bauer Publ'g & Printing Ltd. (Lawrence I)*, 423 A.2d 655 (N.J. Super. Ct. App. Div. 1980), *rev'd*, 446 A.2d 469 (N.J. 1982), *cert. denied*, 459 U.S. 999 (1982).

<sup>51</sup> *Lawrence v. Bauer Publ'g & Printing Ltd. (Lawrence II)*, 446 A.2d 469, 476, 478–79 (N.J. 1982).

<sup>52</sup> *Lawrence II*, 446 A.2d at 471.

<sup>53</sup> Identified in the courts' opinions as the city prosecutor. *Id.*; *Lawrence I*, 423 A.2d at 659–60.

<sup>54</sup> *Lawrence II*, 446 A.2d at 471; *Lawrence I*, 423 A.2d at 659.

<sup>55</sup> *Lawrence II*, 446 A.2d at 471; *Lawrence I*, 423 A.2d at 659 (quoting Patsy Bon-tempo, *City Attorney Rules Association Petitions Improper; Forgery Charges May Loom for Lawrence, Simpson*, RAHWAY NEWS-RECORD, Jan. 9, 1975, at A1).

false swearing of oaths.”<sup>56</sup> The Rahway City Business Administrator had informed the newspaper’s reporters and editor that the city prosecutor was investigating whether there were incidents of forgery or false swearing in the petitions, including petitions with signatures personally witnessed by the plaintiffs.<sup>57</sup> However, the plaintiffs were never accused by any municipal or other official of having committed forgery or false swearing.<sup>58</sup>

The plaintiffs commenced libel actions for publication of the two articles. The trial court ruled that the articles imputed to the plaintiffs commission of the crimes of forgery and false swearing.<sup>59</sup> Consequently, the defendants could only assert “the justification of truth” if they were prepared to prove that the plaintiffs did commit these crimes.<sup>60</sup> Proof that the reported investigation was conducted or that “forgery charges loomed” would not suffice.<sup>61</sup> When defense counsel conceded that he would not prove that the plaintiffs committed the crimes, the trial court ordered that the defendants’ truth defense be stricken from the case.<sup>62</sup>

The Appellate Division of the Superior Court affirmed the trial court’s decision, saying:

It is not significant that defendants used the qualified “charges may loom” rather than the unconditional “charges have been made” or “will be made.” The capacity to destroy reputations is equally great. The sting of an accusation may be more pervasive when made by insinuation. . . .

. . . .

Surrounding the defamatory sting of their words with terms such as “reportedly,” “may be,” or “could possibly be” will not protect a publisher.

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<sup>56</sup> *Lawrence II*, 446 A.2d at 471 (quoting Patsy Bontempo, *News-Record Asked to Retract Article on Firehouse Battle*, RAHWAY NEWS-RECORD, Apr. 17, 1975, at A1).

<sup>57</sup> *Lawrence II*, 446 A.2d at 471.

<sup>58</sup> *Lawrence I*, 423 A.2d at 659.

<sup>59</sup> *Lawrence II*, 446 A.2d at 472–73.

<sup>60</sup> *Id.* at 473.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



Any other interpretation of the defense of “truth” would provide publishers with a cloak of immunity in the publication of rumor, gossip and malicious insinuations without responsibility for the consequent damages inflicted by the mere repetition in headlines of undocumented accusations.

We are, therefore, entirely satisfied that a publisher of a statement which is defamatory by suggestion or insinuation, must, in order to present an adequate defense, prove more than that the article was literally true. That the information was received from another source is not enough. To sufficiently develop the defense of truth under the facts of this case, defendants must show that plaintiffs had in fact committed the offenses or that they had been formally charged with criminal conduct or that police or county prosecuting authorities had announced an official investigation of plaintiffs for the offenses described in the articles [a privileged report under New Jersey law].<sup>63</sup>

The Appellate Division also sustained the trial court’s decision that the newspaper articles were defamatory per se, in the sense that they were not susceptible of a non-defamatory meaning.<sup>64</sup>

When the case reached the New Jersey Supreme Court, the court referred to the Appellate Division’s determination of the truth issue without criticism, but without explicit endorsement. The court’s opinion stated:

There is considerable authority for the proposition that the fact that defendants accurately reported information obtained from another source will not relieve them of liability. Under that analysis the defense of truth does not refer to the truthful republication of a defamatory statement but to the truth of the statement’s contents. Thus, if defendant published that a third person stated that plaintiff has

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<sup>63</sup> *Lawrence I*, 423 A.2d at 660–61 (citations omitted).

<sup>64</sup> *Id.* at 662–63.

committed a crime, it is no justification that the third party did in fact make that statement. Defendant must prove that in fact plaintiff committed the crime. Similarly, a statement that criminal charges were imminent would be truthful only if such charges were demonstrably impending.

The trial court viewed the statement in this case as imputing to plaintiffs the crimes of forgery and false swearing and therefore imposed on defendants the burden of proving that plaintiffs had actually committed those crimes. A more literal reading of the headline indicates that the correct interpretation may have been that charges of forgery and false swearing were forthcoming. Whether the “truth” defense should be framed in terms of proof that defendants committed the crimes referred to in the article or simply that charges concerning those charges might “loom” is a provocative question we need not decide today . . . .<sup>65</sup>

The court did endorse the lower courts’ conclusion that the articles were defamatory *per se*.

[I]t was not necessary for plaintiffs to prove that defendants had accused them of the commission of a crime. Words that clearly “sound to the disreputation” of an individual are defamatory on their face. The unambiguous import of the two articles is to cast doubt on the reputations of plaintiffs, Lawrence and Simpson. The statement that plaintiffs “may be” charged with criminal conduct diminishes their standing in the community and is little different from an assertion that plaintiffs have actually been charged with certain crimes. Hence the court correctly ruled that the articles were libelous *per se*,

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<sup>65</sup> *Lawrence II*, 446 A.2d at 474 (citations omitted).

*i.e.*, not susceptible of a nondefamatory interpretation.<sup>66</sup>

Ultimately, the defendants prevailed in the case on the grounds that the plaintiffs were public figures and their evidence was insufficient to establish the “actual malice,” *i.e.*, knowing falsehood or reckless disregard for truth, needed for defamation liability to a public figure.<sup>67</sup>

### C. *Richard Jewell*

*Jewell v. NYP Holdings, Inc.*<sup>68</sup> is the first of the cases in which the plaintiff was reported to be a suspect in a major act of terrorism. In July 1996, during the Olympic Games held in Atlanta, Georgia, a bomb concealed within a package exploded in the Centennial Olympic Park.<sup>69</sup> One person was killed and 110 people were injured.<sup>70</sup> There was very extensive media coverage of the bombing not only because of its connection to the Olympic Games, but also because of what the court described as the nation’s “rapidly eroding” “sense of domestic security” in the wake of the bombings of the World Trade Center in 1993 and the Murrah Federal Building in Oklahoma City in 1995.<sup>71</sup>

Approximately twenty minutes before the bomb exploded, a security guard named Richard Jewell reported the existence of an unattended package to a member of the Georgia Bureau of Investigation, who requested the dispatch of a bomb inspection team. In the interval before the explosion, Jewell evacuated people from the vicinity of the package, thus protecting them from death or injury when the bomb exploded.<sup>72</sup> For several days, Jewell’s actions were described by the national and international media as heroic.<sup>73</sup> The tone of the media coverage dramatically changed when an article in the *Atlanta Journal-Constitution* identified Jewell as “the

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<sup>66</sup> *Id.* at 473 (citation omitted).

<sup>67</sup> *Id.* at 474–78.

<sup>68</sup> *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998).

<sup>69</sup> *Id.* at 355.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 356.

<sup>73</sup> *Id.* at 355.

focus of the federal investigation” into who had planted the bomb.<sup>74</sup> He was then portrayed as the principal suspect and as a person who fitted the “profile” of a bomber.<sup>75</sup> Jewell was never arrested or charged, and three months later he was notified by the U.S. Department of Justice that he was not a target of the bombing investigation.<sup>76</sup> In 2005, another man pleaded guilty to the bombing.<sup>77</sup>

After settling defamation claims against NBC, CNN and others,<sup>78</sup> Jewell pursued his claims against the publishers of the *Atlanta Journal-Constitution*<sup>79</sup> and the *New York Post*.<sup>80</sup> It is the federal district court’s opinion in the case involving the *Post* that addresses the issue of whether the media statements concerning Jewell were “true.”<sup>81</sup> The court had previously determined that the primary “sting” of the publications complained of was that Jewell

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<sup>74</sup> *Id.* at 356; Kathy Scruggs & Ron Martz, *FBI Suspects ‘Hero’ Guard May Have Planted Bomb*, ATLANTA J. CONST., July 30, 1996, at 01X.

<sup>75</sup> Jewell v. NYP Holdings, 23 F. Supp. 2d at 356. For further details of the media portrayals of Richard Jewell, see the presentation by his attorney, L. Lin Wood, in Symposium, *Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401 (1997). A published interview with both Richard Jewell and his attorney contains much additional detail on Jewell, his actions immediately before the bombing, his contacts with the media after the bombing, what the media published about him, and how it affected his life. Calvert & Richards, *Journalism*, *supra* note 6.

<sup>76</sup> See L. Lin Wood, *The Case of David v. Goliath: Jewell v. NBC and the Basics of Defamacast in Georgia*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 691 (1997). This was followed some time later by a statement from the director of the FBI that Jewell was innocent, and by an apology from the Attorney General. Richards & Calvert, *Suing*, *supra* note 6, at 495.

<sup>77</sup> Richards & Calvert, *Suing*, *supra* note 6, at 494.

<sup>78</sup> See *id.* at 496. Jewell reportedly received \$500,000 from NBC. Jessica E. Jackson, Note, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J. L. ETHICS & PUB. POL’Y 789, 804 (2005). The *NBC Nightly News* broadcast, viewed by more than twenty million households, had reported that the FBI probably had enough to prosecute Jewell and he might be arrested imminently. Wood, *supra* note 76, at 691–93.

<sup>79</sup> See *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), *cert. denied*, 537 U.S. 814 (2002); Brenda Goodman, *Falsely Accused Suspect Pursues Libel Case*, N.Y. TIMES, May 27, 2006, at A11.

<sup>80</sup> See Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348 (S.D.N.Y. 1998).

<sup>81</sup> The issue of truth in *Atlanta Journal-Constitution v. Jewell* was explored, prior to the district court’s decision, in Brendan W. Williams, *Defamation as a Remedy for Criminal Suspects Tried Only in the Media*, 19 COMM. & L. 61, 72–75 (1997).

was guilty or likely guilty of criminal involvement in the Centennial Olympic Park bombing.<sup>82</sup> This, of course, could be found to be defamatory.<sup>83</sup> The court also decided that to state that Jewell fit the “profile” of the perpetrator could be found defamatory.<sup>84</sup> Identification as someone who fits the profile of the perpetrator of a major act of terrorism

certainly “expose[s] a person to hatred, contempt or aversion, or . . . induce[s] an evil or unsavory opinion [of that person] in the community.” Although the net cast by a criminal profile may well capture a number of innocent people, that fact does not change the damaging impact on the innocents snared. As in this case, a person who fits the profile is identified as someone who may have been involved in a criminal act. Such a false accusation is not without its sting or pain.<sup>85</sup>

When, however, the court addressed the question of whether the *Post* could prevail on grounds of truth, the opinion focused on whether portrayal of Jewell as the prime or main suspect in the bombing was true.<sup>86</sup> This was found to be substantially true because Jewell was “a” suspect when the *Post* articles were published and accurately reporting that would not have produced a different meaning in readers’ minds than “prime” or “main” suspect.<sup>87</sup> Either way, the meaning was that Jewell was suspected of planting the bomb and was being actively investigated by the authorities, and that was true. The *Post* was granted summary judgment for this reason.<sup>88</sup> The court did not address whether the defamatory meanings it had identified earlier were true.

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<sup>82</sup> Jewell v. NYP Holdings, 23 F. Supp. 2d at 359.

<sup>83</sup> *Id.* at 360.

<sup>84</sup> *Id.* at 363–64.

<sup>85</sup> *Id.* at 364 (quoting Levin v. McPhee, 119 F.3d 189, 195 (2d Cir. 1997)).

<sup>86</sup> *Id.* at 367.

<sup>87</sup> *Id.* at 369.

<sup>88</sup> *Id.* at 367.

#### D. *Global Relief Foundation*

The major U.S. cases on the subject subsequent to *Jewell* are related to what could be described as the nation's even more "rapidly eroding" "sense of domestic security" after the events of September 11, 2001. These are *Global Relief Foundation, Inc. v. New York Times Co.*<sup>89</sup> and *Hatfill v. New York Times Co.*<sup>90</sup>

In the days following the September 11th acts of terrorism, the federal government investigated non-government organizations that might be fronts for or sources of funding for terrorist groups.<sup>91</sup> President Bush issued an executive order authorizing the government to freeze the assets of organizations that supported or were otherwise associated with terrorism.<sup>92</sup> Reports in major newspapers and broadcast media identified organizations that had their assets frozen, or were under investigation for or suspected of providing funds to terrorist groups—both groups thought responsible for the September 11th attacks and groups whose targets were outside the United States.<sup>93</sup> *Global Relief Foundation, Inc.*, an Islamic charitable organization based in Illinois, brought suit on account of statements in newspaper reports, a television broadcast and an Associated Press report identifying *Global Relief* as one of the organizations being investigated or as an organization suspected or accused of being a source of financial support for terrorism.<sup>94</sup> About a month after the suit was filed, the federal government is-

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<sup>89</sup> *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief I)*, 31 Media L. Rep. 1468 (N.D. Ill. 2003), *aff'd*, 390 F.3d 973 (7th Cir. 2004).

<sup>90</sup> *Hatfill v. N.Y. Times Co. (Hatfill I)*, 33 Media L. Rep. 1129 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006), *on remand*, 488 F. Supp. 2d 522 (E.D. Va. 2007), *aff'd*, 532 F.3d 314 (4th Cir. 2008).

<sup>91</sup> *Global Relief I*, 31 Media L. Rep. at 1469; *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief II)*, 390 F.3d 973, 975 (7th Cir. 2004).

<sup>92</sup> *Global Relief I*, 31 Media L. Rep. at 1469.

<sup>93</sup> *Global Relief I*, 31 Media L. Rep. at 1470–71; *Global Relief II*, 390 F.3d at 975–79; *see, e.g.*, Mac Daniel, *Charity Probe: Muslim Relief Agency Eyed in Terror Link*, BOSTON GLOBE, Oct. 11, 2001, at A7; Judith Miller & Kurt Eichenwald, *A Nation Challenged: The Investigation; U.S. Set to Widen Assault*, N.Y. TIMES, Oct. 1, 2001, at A1.

<sup>94</sup> *Global Relief II*, 390 F.3d at 979.

sued an order blocking Global Relief's assets pending investigation.<sup>95</sup>

Global Relief, asserting that it had never provided funding to terrorists and did not have links to terrorists, contended that it had been falsely defamed.<sup>96</sup> Suing in federal court, it alleged damage had resulted from publication of the reports because the level of donations to Global Relief had declined.<sup>97</sup> The defendants produced affidavits showing that the government suspected Global Relief of providing financial support to terrorist organizations, it was investigating links between Global Relief and terrorist groups, and it was contemplating a freeze on Global Relief's assets. The defendants contended that this showed the news reports were true and that the defendants were entitled to summary judgment on the defamation claims for this reason.<sup>98</sup> Global Relief's contention was that the defendants could establish truth only by proving that Global Relief was guilty of providing financial support to terrorist groups.<sup>99</sup>

Proceeding from the premise that the truth defense required proof that the "gist" or "sting" of the defamatory material was true,<sup>100</sup> the district court concluded that the gist or sting of defendants' reports was that the federal government was investigating Global Relief for possible links to terrorism, that Global Relief was suspected of financial support for terrorism, and the government was considering freezing the organization's assets.<sup>101</sup> The "gist" or "sting" was shown to be substantially true by the affidavits submitted by the defendants.<sup>102</sup> Consequently, the defendants were entitled to summary judgment.<sup>103</sup> The reports did not impute guilt.<sup>104</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 980.

<sup>97</sup> *Id.* at 981. Contributions were said to have "evaporated" following the news reports. *Id.* at 974.

<sup>98</sup> *Id.* at 980.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief I)*, 31 Media L. Rep. 1468, 1473 (N.D. Ill. 2003), *aff'd*, 390 F.3d 973 (7th Cir. 2004).

<sup>101</sup> *Global Relief I*, 31 Media L. Rep. at 1473.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Therefore, truth did not require proof that Global Relief was guilty.<sup>105</sup>

Global Relief appealed to the U.S. Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court's decision, essentially for the same reasons.<sup>106</sup> The "gist" or "sting" was that Global Relief was one of the organizations the government was investigating and whose assets might be blocked. It was not that Global Relief was guilty of what it was being investigated for. The defendants had shown that their reports were true in this respect and were therefore entitled to summary judgment. It was not necessary for the defendants to prove the truth of charges against Global Relief.<sup>107</sup>

#### *E. Steven Hatfill*

*Hatfill v. New York Times Co.*<sup>108</sup> and the related case of *Hatfill v. Foster*<sup>109</sup> present the strongest conflict between a plaintiff's claim to a remedy for defamation and defendants' claims of freedom to publish "factual" reports identifying the plaintiff as a suspect.

In the fall of 2001, shortly after the September 11th airplane hijackings and attacks, letters laced with anthrax were mailed to several news organizations and members of Congress.<sup>110</sup> At least five people died as a result of contact with the letters, and the postal

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<sup>105</sup> *Id.* at 1472–75.

<sup>106</sup> *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief II)*, 390 F.3d 973 (7th Cir. 2004).

<sup>107</sup> *Id.* at 987. Under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), Global Relief was required to bear the burden of proving falsity. 475 U.S. at 776–77; see also *Global Relief II*, 390 F.3d at 982. The Court of Appeals had accepted Global Relief's contention that the reports tended to harm its reputation and therefore could be considered defamatory. 390 F.3d at 981–82.

<sup>108</sup> *Hatfill v. N.Y. Times Co. (Hatfill I)*, 33 Media L. Rep. 1129 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006), *on remand*, 488 F. Supp. 2d 522 (E.D. Va. 2007), *aff'd*, 532 F.3d 314 (4th Cir. 2008).

<sup>109</sup> *Hatfill v. Foster (Foster I)*, 401 F. Supp. 2d 320 (S.D.N.Y. 2005), *on reh'g*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006).

<sup>110</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill v. N.Y. Times Co. (Hatfill II)*, 416 F.3d 320 (4th Cir. 2005).



service was disrupted.<sup>111</sup> There was much speculation about a possible connection between the anthrax letters and the September 11th attacks.<sup>112</sup> The federal government promptly launched a major investigation to find those responsible.<sup>113</sup>

More than half a year later, with no one yet arrested for the anthrax mailings, a regular *New York Times* columnist, Nicholas Kristof, wrote five columns for the *Times* “Op-Ed” pages that criticized the FBI for being slow and incompetent in its investigation and criticized the administration for its failure to pay sufficient attention to the dangers of “bio-terrorism.”<sup>114</sup> In the first column, Kristof asserted that the FBI had been “painstakingly slow” in investigating the “handful of individuals who had the ability, access and motive to send the anthrax.”<sup>115</sup> One of these individuals was identified as a “middle-aged American who has worked for the United States military biodefense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack.”<sup>116</sup>

The second column said, “Some in the biodefense community think they know a likely culprit, whom I’ll call Mr. Z.”<sup>117</sup> This and subsequent columns gave specific identifying details concerning “Mr. Z,” although not his name, and reasons why he should be thoroughly investigated as a suspect in the anthrax attacks. These included his knowledge of biological warfare agents, his position as a “biodefense insider” and involvement in “the shadowy world

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<sup>111</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill II*, 416 F.3d at 324.

<sup>112</sup> *Hatfill I*, 33 Media L. Rep. at 1130.

<sup>113</sup> *Id.* at 1130; *Hatfill II*, 416 F.3d at 324.

<sup>114</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill II*, 416 F.3d at 325; see Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, Aug. 13, 2002, at 19; Nicholas D. Kristof, *Case of the Missing Anthrax*, N.Y. TIMES, July 19, 2002, at 17; Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, July 12, 2002, at 19; Nicholas D. Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. TIMES, July 2, 2002, at 21; Nicholas D. Kristof, *Connecting Deadly Dots*, N.Y. TIMES, May 24, 2002, at 25.

<sup>115</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill II*, 416 F.3d at 325.

<sup>116</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill II*, 416 F.3d at 325; Nicholas D. Kristof, *Connecting Deadly Dots*, N.Y. TIMES, May 24, 2002, at 25.

<sup>117</sup> *Hatfill I*, 33 Media L. Rep. at 1130; *Hatfill II*, 416 F.3d at 325; Nicholas D. Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. TIMES, July 2, 2002, at 21.

of counterterror”; his infuriation at suspension of the top security clearance he held; his use of aliases in international travel; his work with the army in Rhodesia fighting a guerrilla war, at a time when more than ten thousand black farmers were sickened in an anthrax outbreak; and his possible responsibility for earlier anthrax hoaxes, with the design of demonstrating the importance of his field of expertise.<sup>118</sup> The second column opined that the FBI should either “go over him more aggressively . . . [or] exculpate him and remove this cloud of suspicion.”<sup>119</sup> It mentioned that Mr. Z denied any wrongdoing and “his friends are heartsick at suspicions directed against a man they regard as a patriot.”<sup>120</sup> The fourth Kristof column, published about two months after the first, mentioned that the FBI had interviewed Mr. Z four times and his house had been searched twice.<sup>121</sup>

In August 2002, Dr. Steven Hatfill, a research scientist employed by the Department of Defense, held a press conference at which he acknowledged that he was a “person of interest” to the FBI but strenuously denied any involvement with the anthrax mailings.<sup>122</sup> He described himself as a “loyal American” and as a “fall guy” in the anthrax investigation.<sup>123</sup> He decried those trying to connect him to the mailings.<sup>124</sup> Two days later, Kristof wrote a column identifying the “Mr. Z” in the previous columns as Hatfill.<sup>125</sup> Mr. Z had “named himself.”<sup>126</sup> The column said, “It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of physical evidence linking him to the attacks.” However, Hatfill was wrong to suggest that the FBI had casually designated him as the anthrax “fall guy.” The investigating authorities were interested in him on account of a number of factors, including not only what had been mentioned in pre-

<sup>118</sup> *Hatfill I*, 33 Media L. Rep. at 1130–31; *Hatfill II*, 416 F.3d at 325–27.

<sup>119</sup> *Hatfill II*, 416 F.3d at 325.

<sup>120</sup> *Id.*; *Hatfill I*, 33 Media L. Rep. at 1131.

<sup>121</sup> *Hatfill II*, 416 F.3d at 327; Nicholas D. Kristof, *Case of the Missing Anthrax*, N.Y. TIMES, July 19, 2002, at 17.

<sup>122</sup> *Hatfill I*, 33 Media L. Rep. at 1131; *Hatfill II*, 416 F.3d at 327.

<sup>123</sup> *Hatfill I*, 33 Media L. Rep. at 1131; *Hatfill II*, 416 F.3d at 327.

<sup>124</sup> *Hatfill I*, 33 Media L. Rep. at 1131.

<sup>125</sup> *Id.*; *Hatfill II*, 416 F.3d at 327.

<sup>126</sup> *Hatfill II*, 416 F.3d at 327.

vious columns but also Hatfill's failing three polygraph examinations and positive responses to him by bloodhounds given scents from the anthrax letters. One of the earlier anthrax hoax letters had been sent from England while Hatfill was there. Kristof's column found "reason to hope that the [FBI] may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."<sup>127</sup> This hope was not yet realized when Hatfill sued Kristof and the *New York Times* for publication of the columns. Neither Hatfill nor anyone else had been conclusively identified as the culprit or charged with any crime related to the anthrax mailings.<sup>128</sup>

*Hatfill v. Foster*<sup>129</sup> arose from two magazine articles published more than a year after Hatfill "named himself" at the press conference. The author of the two articles, Donald Foster, was a professor of literature who specialized in "literary forensics," deducing the authors of writings.<sup>130</sup> In addition to analysis of literary works, Foster had sought to apply his skills to the solution of crimes where written evidence, such as letters from criminals, was available.<sup>131</sup> He gave seminars in literary forensics and served as a consultant to law enforcement agencies.<sup>132</sup>

Foster analyzed the anthrax-laden letters sent through the mail and other written evidence.<sup>133</sup> He concluded that the FBI ought to be focusing its investigation on Hatfill.<sup>134</sup> When the FBI did not respond with what Foster thought was appropriate action, he wrote an article entitled *The Message in the Anthrax*. The article was published in the October 2003 issue of *Vanity Fair*.<sup>135</sup> A revised

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<sup>127</sup> *Hatfill*, 33 Media L. Rep. at 1131–32; *Hatfill*, 416 F.3d at 327–28.

<sup>128</sup> *Hatfill v. Foster (Foster II)*, 415 F. Supp. 2d 353, 357 (S.D.N.Y. 2006); see Ben Battles, Note, *Terror, Tort, and the First Amendment: Hatfill v. New York Times and Media Liability for Intentional Infliction of Emotional Distress*, 72 BROOK. L. REV. 237, 239–58 (2006), for additional details on the anthrax attacks, the investigation, Nicholas Kristof's columns, and Hatfill's action against Kristof and the *New York Times*.

<sup>129</sup> *Hatfill v. Foster (Foster I)*, 401 F. Supp. 2d 320 (S.D.N.Y. 2005), *on reh'g*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006).

<sup>130</sup> *Hatfill v. Foster (Foster III)*, 372 F. Supp. 2d 725, 727 (S.D.N.Y. 2005).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; *Foster I*, 401 F. Supp. 2d at 323.

<sup>134</sup> *Foster III*, 372 F. Supp. 2d at 727–28; *Foster I*, 401 F. Supp. 2d at 323.

<sup>135</sup> *Foster III*, 372 F. Supp. 2d at 728; *Foster I*, 401 F. Supp. 2d at 323; Don Foster, *The Message in the Anthrax*, VANITY FAIR, Oct. 2003, at 180.

version of the article appeared in the December 2003 issue of *Reader's Digest*, under the title *Tracking the Anthrax Killer*.<sup>136</sup>

*The Message in the Anthrax* detailed at length Foster's analysis of the deadly anthrax letters and previous hoaxes, his theory about why the deadly letters were sent,<sup>137</sup> and facts concerning Hatfill that pointed to him as the person responsible. The article initially referred to the person who sent the letters as "John Doe," but most of the article was a demonstration of why John Doe was Steven Hatfill.<sup>138</sup> Having set forth the "evidence" and "hypotheses" that made Hatfill Foster's "suspect" in the anthrax murders, the article concluded by saying that Hatfill had been compared with Richard Jewell, who was wrongly and very publicly suspected of planting the bomb in Atlanta's Centennial Olympic Park,<sup>139</sup> but "it is my opinion, based on the documents I have examined, that Hatfill is no Richard Jewell."<sup>140</sup> The subsequent *Reader's Digest* article omitted the reference to Richard Jewell and some of the allegations in the *Vanity Fair* article, but it maintained what the court identified as the central theme of the *Vanity Fair* article—that Hatfill was the author's prime, and indeed sole, suspect in the 2001 anthrax case.<sup>141</sup>

There is only a brief reference in *Hatfill v. Foster* to the "truth" of Foster's articles. The case leaves open what a showing of truth would require.<sup>142</sup> Truth is much more prominent as an issue in the case arising from the Kristof columns in the *New York Times*.<sup>143</sup>

<sup>136</sup> *Foster III*, 372 F. Supp. 2d at 728; *Foster I*, 401 F. Supp. 2d at 323; see Don Foster, *Tracking the Anthrax Killer*, READER'S DIGEST, Dec. 2003, at 152.

<sup>137</sup> They were sent by a scientist who was frustrated by governmental and public indifference to prior warnings about the vulnerability of the United States to biological or chemical attacks and who believed that in the aftermath of September 11th, the American people were now ready to hear and heed the warnings. As a by-product, "America's leading biowarriors" would receive the recognition and respect they deserved. The scientist intended to warn people, not kill them. *Foster I*, 401 F. Supp. 2d at 330–31.

<sup>138</sup> *Foster I*, 401 F. Supp. 2d at 330–34.

<sup>139</sup> See *supra* text accompanying notes 68–88.

<sup>140</sup> *Foster I*, 401 F. Supp. 2d at 334. This was followed by the disclaimer that "even if the FBI should find hard evidence linking Hatfill to a crime, he will remain innocent until proved guilty." *Id.*

<sup>141</sup> *Id.* at 341.

<sup>142</sup> The court noted that in ruling on defendants' motions to dismiss the action, Hatfill's pleadings of the falsity of the statements written about him had to be accepted as correct.

Hatfill contended that the columns collectively stated or implied that he was the mailer of the anthrax and that this allegation was factually false as well as defamatory.<sup>144</sup> The district court believed that the columns did not impute to Hatfill guilt in the mailing of the anthrax letters.<sup>145</sup> They could not reasonably be so understood. The reasonable reader would not think that the columns were intended to impute guilt.<sup>146</sup> The columns only identified Hatfill as deserving scrutiny by the FBI and, in the last column, as the focus of the FBI investigation, while cautioning that he might actually have no connection with the anthrax letters and could be exculpated by the investigation.<sup>147</sup> The court believed that the columns were accurate in their descriptions of Hatfill, his becoming the focus of the FBI investigation into the anthrax attacks,<sup>148</sup> and “report[ing] questions being raised in the context of an ongoing public controversy.”<sup>149</sup> It ordered dismissal of Hatfill’s complaint.<sup>150</sup>

Hatfill appealed the dismissal to the U.S. Court of Appeals for the Fourth Circuit. In a 2-1 decision, a panel of the Fourth Circuit reversed the district court’s order and remanded the case.<sup>151</sup> The majority’s interpretation of the Kristof columns was that the reasonable reader was likely to conclude that Hatfill was responsible for the anthrax mailings.<sup>152</sup> Notwithstanding the statements that

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The *Global Relief* case was distinguished because it involved a motion for summary judgment, not dismissal, and because Foster’s articles went well beyond reporting on an official investigation or offering an opinion about that investigation. The articles implied that Hatfill was guilty of the anthrax murders. *Id.* at 338.

<sup>143</sup> *Hatfill v. N.Y. Times Co. (Hatfill I)*, 33 Media L. Rep. 1129 (E.D. Va. 2004), *rev’d*, 416 F.3d 320 (4th Cir. 2005), *reh’g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006), *on remand*, 488 F. Supp. 2d 522 (E.D. Va. 2007), *aff’d*, 532 F.3d 314 (4th Cir. 2008).

<sup>144</sup> *Hatfill I*, 33 Media L. Rep. at 1132–33.

<sup>145</sup> *Id.* at 1133–34.

<sup>146</sup> *Id.* at 1134–35.

<sup>147</sup> *Id.* at 1133–34.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1134.

<sup>150</sup> *Id.* at 1138. The opinion implies that Hatfill conceded that he had to establish that the columns imputed guilt to him, on a reasonable interpretation. *Id.* at 1134.

<sup>151</sup> *Hatfill v. N.Y. Times Co. (Hatfill II)*, 416 F.3d 320, 337 (4th Cir. 2005), *reh’g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006).

<sup>152</sup> *Id.* at 333.

the FBI should “end this unseemly limbo by either exculpating Dr. Hatfill or arresting him” and that readers should entertain a presumption of Hatfill’s innocence, “the unmistakable theme of Kristof’s columns is that the FBI should investigate Hatfill more vigorously because all the evidence (known to Kristof) pointed to him.”<sup>153</sup> For the majority, the dispositive question was whether the columns were “capable of defamatory meaning.”<sup>154</sup> As the columns under the majority’s interpretation imputed commission of a crime to Hatfill, they were capable of defamatory meaning and it was error to dismiss Hatfill’s defamation action.<sup>155</sup> The majority did not explicitly address what “truth” would establish a defense to liability.<sup>156</sup> But in identifying the relevant defamatory meaning as Hatfill was responsible for the anthrax mailings, and characterizing it as provably false,<sup>157</sup> the majority opinion clearly implied that “truth” would be proof of Hatfill’s guilt, not merely proof that the available evidence pointed strongly to him or that he had become the principal suspect.<sup>158</sup>

Judge Niemeyer delivered a short dissenting opinion.<sup>159</sup> In his view, Kristof’s columns could not be read as accusing Hatfill of the anthrax crimes. “Reporting suspicion of criminal conduct—even elaborately and sometimes inaccurately—does not amount to an accusation of criminal conduct.”<sup>160</sup> For this reason, he would affirm the order of dismissal.

The more important dissent in the *Hatfill* case is that of Judge Wilkinson, delivered when rehearing en banc was denied on a 6–6

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 334.

<sup>155</sup> *Id.*

<sup>156</sup> *But see id.* at 329 (noting that the court “must accept as true all well-pleaded allegations and view the complaint in the light most favorable to Hatfill” because this is necessary when determining whether a complaint should be dismissed under FED. R. CIV. P. 12(b)(6)), 330 n.4 (taking Hatfill’s allegations as true).

<sup>157</sup> *Id.* at 333 n.6.

<sup>158</sup> A footnote to the opinion noted that at this stage of the litigation, there was no evidence to show whether or to what extent Kristof’s columns were accurate reports of an ongoing investigation. *Id.* at 333 n.5.

<sup>159</sup> *Id.* at 337–38 (Niemeyer, J., dissenting).

<sup>160</sup> *Id.* at 338 (Niemeyer, J., dissenting).

vote.<sup>161</sup> For Judge Wilkinson, the case was one of “constitutional importance” even at the stage of the motion to dismiss.<sup>162</sup> “The consequences of this decision for the First Amendment run deep.”<sup>163</sup> The anthrax mailings and the government’s response to them “lie at the heart of legitimate public inquiry.”<sup>164</sup> It was open to a columnist to comment vigorously on whether law enforcement is properly carrying out its responsibilities.<sup>165</sup> It was often difficult, if not impossible, “to cover the long continuum of justice in Joe Doe fashion without the use of a suspect’s identity or name, as daily media reports on criminal activity make clear.”<sup>166</sup> The news media had an obligation not to deprive the public of a meaningful report. “In short, . . . defendant was simply doing its job . . . a job that the Constitution protects.”<sup>167</sup>

Judge Wilkinson did not contend that there was a specific First Amendment doctrine protecting the *New York Times* from liability in this case. His argument was essentially that First Amendment considerations should have led the court to construe and apply state defamation law in a restrained way that would support dismissal of Hatfill’s action against the *Times*.<sup>168</sup> He criticized the panel’s decision for “push[ing] state law in a direction that . . . aggravates . . . the constitutional tensions inherent in the defamation field”<sup>169</sup> and restricts speech on a matter of vital public concern.<sup>170</sup> He agreed with Judge Niemeyer and the district court that the Kristof columns did not accuse Hatfill of criminal activity.<sup>171</sup> The columns were therefore not “defamatory per se.”<sup>172</sup>

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<sup>161</sup> Hatfill v. N.Y. Times Co. (*Hatfill III*), 427 F.3d 253, 253–59 (4th Cir. 2005) (Wilkinson, J., dissenting). Two other judges joined in this dissent. *Id.*

<sup>162</sup> *Id.* at 254.

<sup>163</sup> *Id.* at 258.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 259.

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 255.

<sup>169</sup> *Id.* at 254.

<sup>170</sup> *Id.* at 253.

<sup>171</sup> *Id.* at 256.

<sup>172</sup> *Id.* at 256–57. Identifying a person as the principal suspect or most likely perpetrator of a very serious crime can, of course, be found to be defamatory even if it does not fit into the “per se” category of imputation of crime. But the panel had reversed the district

Rehearing en banc having been denied, the *New York Times* petitioned for a writ of certiorari in the U.S. Supreme Court. The Supreme Court denied the petition, without recorded dissent,<sup>173</sup> and the case went back to the district court for further proceedings. The *Times* moved for summary judgment. The district court granted the motion on the ground that Hatfill was a “public official” and “public figure” for purposes of the defamation action and he had failed to make the necessary showing that the defamation was published with knowledge or reckless disregard of its falsity.<sup>174</sup> There was no evidence to establish that Kristof knew that his statements were false or that he had a high awareness of the probable falsity of his statements. He did not believe that any of his statements were false. Based on all the information he had gathered, Kristof had no reason to doubt seriously that Hatfill could have been the anthrax mailer.<sup>175</sup> The evidence revealed that Kristof did not know whether Hatfill was the sender of the anthrax and therefore was not certain about the truth of the implication that Hatfill was guilty, but this would not support a finding that Kristof had high awareness of probable falsity.<sup>176</sup> The Court of Appeals affirmed the district court’s judgment for essentially the same reasons,<sup>177</sup> but with more emphasis on Kristof’s actual belief that Hatfill was the prime suspect in the anthrax mailings. Kristof did not have a “high degree of awareness” that Hatfill was not the anthrax mailer.<sup>178</sup>

For these reasons, Hatfill’s attempt to establish defamation liability in the case against the *Times* ultimately failed, irrespective of whether he could establish that statements in the Kristof columns about him or the defamatory meanings of the statements were false. Ironically, within a few weeks of the court of appeals’

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court’s dismissal of the action on the premise that the columns could be read to mean that Hatfill was the guilty party. *Id.*

<sup>173</sup> *N.Y. Times Co. v. Hatfill*, 547 U.S. 1040 (2006).

<sup>174</sup> *Hatfill v. N.Y. Times Co. (Hatfill IV)*, 488 F. Supp. 2d 522, 530–31 (E.D. Va. 2007).

<sup>175</sup> *Id.* at 531.

<sup>176</sup> *Id.*

<sup>177</sup> *Hatfill v. N.Y. Times Co. (Hatfill V)*, 532 F.3d 312, 315 (4th Cir. 2008). It did not endorse the district court’s conclusion that Hatfill was a “public official,” but this did not affect the result because Hatfill was a “limited-purpose public figure.” *Id.* at 319 n.4.

<sup>178</sup> *Id.* at 324–25.



decision, the *Times* reported the FBI's conclusion that the anthrax was mailed by another scientist<sup>179</sup> and the Justice Department's formal exoneration of Hatfill.<sup>180</sup>

*F. Summary and Critique of U.S. Cases*

The American defamation cases bearing on “what is truth?” when the plaintiff has been identified as a suspect or under investigation for criminal activity exhibit several different tendencies. One, exemplified by the *Hirschfeld*, *Gravitt* and *Jackson* cases, is to treat the defendant's publication as true, and therefore protected from defamation liability, when the publication was accurate in reporting that the plaintiff was a suspect or under investigation, without regard to what defamatory meanings were conveyed by the publication and whether the defamatory meanings were true.<sup>181</sup> Going beyond this approach, the Texas Supreme Court in *Jacobs* treated the defendants' broadcast as “substantially true” not only because it was accurate in reporting the nature of the investigation involving the plaintiffs and the possibility of referring the matter to a grand jury, but also because the allegations of improper conduct were substantiated by the investigators' findings and statements made by city employees.<sup>182</sup>

Other cases do give some attention to the defamatory connotations of what the defendant published but ultimately reach the conclusion that there is no liability because the publication was essentially true in reporting the investigation or plaintiff's being a suspect. This approach is exemplified by *Jewell*.<sup>183</sup> Having found that newspaper articles conveyed the defamatory meanings that Richard Jewell was guilty or likely guilty of causing the Centennial

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<sup>179</sup> *F.B.I. Presents Anthrax Case, Saying Scientist Acted Alone*, N.Y. TIMES, Aug. 7, 2008, at A1.

<sup>180</sup> *Letter Officially Exonerates Scientist in Anthrax Case*, N.Y. TIMES, Aug. 9, 2008, at A13. The Justice Department had earlier agreed to pay Hatfill over four million dollars to settle his lawsuit against the government for leaking information about him to the media. *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1.

<sup>181</sup> See also *Jacobs v. McIlvain (Jacobs I)*, 759 S.W.2d 467, 470 (Tex. App. 1988) (Ellis, J., dissenting), *rev'd*, 794 S.W.2d 14 (Tex. 1990); *supra* text accompanying notes 22–49 (discussing *Jacobs v. McIlvain*).

<sup>182</sup> *McIlvain v. Jacobs (Jacobs II)*, 794 S.W.2d 14, 16 (Tex. 1990).

<sup>183</sup> *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998).

Olympic Park bombing and that he fit the profile of the perpetrator, the court granted summary judgment for the defendant because Jewell was portrayed as a suspect in the bombing and that was true.<sup>184</sup> The court failed to require proof that the defamatory meanings it had identified were true.

In still other cases, there is an examination of the publication that focuses on whether or not it conveyed, or could be found to convey, the meaning that the plaintiff was guilty of criminal activity. If the meaning was that the plaintiff was guilty, the defendant would not prevail on grounds of truth unless it were proved that the plaintiff was guilty. But if the publication did not convey that meaning, on a reasonable interpretation, the defendant would prevail on a showing that the publication was true in its meaning that the plaintiff was a suspect or under investigation. The defendants in the *Global Relief*<sup>185</sup> case prevailed for this reason. The district court judge who dismissed Steven Hatfill's defamation action against the *New York Times*, and the judges of the U.S. Court of Appeals who would have affirmed the dismissal, were of the view that the Kristof columns did not accuse Hatfill of guilt.<sup>186</sup> However, the majority in the Court of Appeals concluded that the columns did impute responsibility for the anthrax mailings to Hatfill, and the dismissal was reversed.<sup>187</sup> Similarly, in *Hatfill v. Foster*, *The Message in the Anthrax* was interpreted to "unmistakably impl[y] that Hatfill is guilty of the anthrax murders."<sup>188</sup>

In *Jacobs*, *Jewell* and *Global Relief*, the courts held the defendants not liable because what the defendants published was "substantially" true. The proposition that "substantial truth" rather than

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<sup>184</sup> *Id.* at 367.

<sup>185</sup> *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief I)*, 31 Media L. Rep. 1468 (N.D. Ill. 2003), *aff'd*, 390 F.3d 973 (7th Cir. 2004).

<sup>186</sup> *Hatfill v. N.Y. Times Co. (Hatfill I)*, 33 Media L. Rep. 1129 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006), *on remand*, 488 F. Supp. 2d 522 (E.D. Va. 2007), *aff'd*, 532 F.3d 314 (4th Cir. 2008); *Hatfill v. N.Y. Times Co. (Hatfill II)*, 416 F.3d 320, 337 (4th Cir. 2005), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006).

<sup>187</sup> *See Hatfill II*, 416 F.3d at 333.

<sup>188</sup> *Hatfill v. Foster (Foster I)*, 401 F. Supp. 2d 320, 338 (S.D.N.Y. 2005).

complete truth is sufficient to avoid defamation liability does not support the decisions made in these cases. The substantial truth of the defamatory meaning will suffice as a defense to liability even if some of the details of the publication were false or not provably true. However, as the courts in all three cases acknowledged,<sup>189</sup> there is “substantial truth” that protects defendants from defamation liability only when the defamatory “sting” of the publication is essentially true.<sup>190</sup> When it is reported that a person is suspected of responsibility for a crime, or being investigated to ascertain whether he has committed a crime, the defamatory “sting” that damages the person’s reputation is to cause readers or viewers of the report to suspect that the person committed or may have committed the crime. If the person did not commit the crime, the “sting” is not substantially true, even if the report of the investigation or the person’s being a suspect is correct.<sup>191</sup> *A fortiori*, the defamatory “sting” is not shown to be substantially true by production of inculpatory evidence or accusatory statements made during the investigation.<sup>192</sup> As the Texas Court of Appeals recognized in *Jacobs*,<sup>193</sup> it is inconsistent with long-established common law to treat as true an accurate report of a third party’s statement that is not itself proved to be true in its defamatory meaning.<sup>194</sup> The Texas cases treating news reports as true, and therefore protected from defamation liability, when they accurately report the nature of

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<sup>189</sup> *McIlvain v. Jacobs (Jacobs II)*, 794 S.W.2d 14, 16 (Tex. 1990); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 366–68 (S.D.N.Y. 1998); *Global Relief Found., Inc. v. N.Y. Times Co. (Global Relief II)*, 390 F.3d 973, 982 (7th Cir. 2004).

<sup>190</sup> See *DOBBS*, *supra* note 5, at 1147–50; *ELDREDGE*, *supra* note 4, at 336–38; *GATLEY*, *supra* note 2, at 274–77; *RODNEY A. SMOLLA, LAW OF DEFAMATION* § 5:17 (2d ed. 1999).

<sup>191</sup> The traditional view of the truth defense is that the entire imputation must be true. “A plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made.” *Crane v. N.Y. World Telegram Corp.*, 126 N.E.2d 753, 757 (N.Y. 1955); see *ELDREDGE*, *supra* note 4, at 332–38; *PROSSER & KEETON*, *supra* note 4, at 841–42; *ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS* § 3.9 (3d ed. 1999).

<sup>192</sup> *Cf. Turnbull v. Herald Co.*, 459 S.W.2d 516, 519–20 (Mo. Ct. App. 1970) (deciding that where a newspaper article reported that a quantity of jewelry was found in plaintiff’s home, police believed some were items taken in a burglary of a jewelry store, and plaintiff was arrested on suspicion of burglary and receiving stolen property, the accuracy of these facts did not show truth because the article conveyed the inference that plaintiff had burglarized the jewelry store or received jewelry stolen from the store, which was false).

<sup>193</sup> See *supra* text accompanying notes 31–37.

<sup>194</sup> See *supra* text accompanying note 5.

an investigation and allegations made against the plaintiff,<sup>195</sup> have not been followed in other jurisdictions and should not be followed.<sup>196</sup>

The better reasoned decisions are those which connect the issue of truth to recognition of the harm to reputation and defamatory character of meanings other than the plaintiff's being guilty. The principal examples of this are the opinions of the Appellate Division and New Jersey Supreme Court in *Lawrence*. The Appellate Division recognized that publishing statements about the possibility of a person's being prosecuted had the capacity to destroy that person's reputation.<sup>197</sup> So did the reporting of unproven accusations.<sup>198</sup> The court held that the literal truth of the article did not suffice for the defense of truth.<sup>199</sup> It was necessary to show that the plaintiffs had in fact committed the offenses. The state supreme court did not decide what had to be proved true, but it did uphold the lower courts' conclusion that the articles published by the defendants were defamatory per se. The statement that the plaintiffs may be charged with criminal conduct diminished their standing in the community. It was not necessary for the plaintiffs to show that the articles accused the plaintiffs of commission of a crime. The decision of the Court of Appeals in *Hatfill* to uphold the defamation action because the Kristof columns were "capable of defamatory meaning" might well have been influenced by recognition of how damaging the columns were to the plaintiff, even if they could not be read to mean that he was guilty of the anthrax mailings, and by the belief that more than accurate reportage of relevant facts was required to justify reputational harm.<sup>200</sup> When a

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<sup>195</sup> See *supra* text accompanying notes 41–49.

<sup>196</sup> See Elder, *supra* note 47, at 728–55 (criticizing opinions in the Texas cases, *Global Relief*, and other cases which found truth in the accurate reportage of allegations about the plaintiff).

<sup>197</sup> *Lawrence v. Bauer Publ'g & Printing Ltd. (Lawrence I)*, 423 A.2d 655, 660 (N.J. App. Div. 1980), *rev'd*, 446 A.2d 469 (N.J. 1982), *cert. denied*, 459 U.S. 999 (1982).

<sup>198</sup> *Id.* at 661.

<sup>199</sup> *Id.*

<sup>200</sup> See *Hatfill v. N.Y. Times Co. (Hatfill II)*, 416 F.3d 320, 331–32 (4th Cir. 2005) ("While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo, operating within the scope of its legitimate functions, it does impute conduct tending to injure him in his pro-

publication could be interpreted to mean that there is a likelihood that the plaintiff committed a major crime, the substance of that meaning is not proved true by evidence of facts warranting suspicion or investigation.<sup>201</sup>

The common law and statutory privileges to publish accurate reports of governmental proceedings could protect defendants from liability when an accurate account of an investigation by law enforcement officials is published,<sup>202</sup> but these privileges were not significant factors in any of the cases.<sup>203</sup> In contrast, the First Amendment “privilege” to defame public officials and public figures has been of considerable importance in a number of cases. This “privilege,” more accurately described as a constitutional law rule limiting liability to cases in which the plaintiff proves the defamation was published with knowledge of or reckless disregard for its falsity,<sup>204</sup> was the basis on which the defendants ultimately prevailed in *Jackson*, *Lawrence* and *Hatfill v. New York Times Co.*<sup>205</sup>

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fession.” (quoting *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 589–90 (Va. 1954)).

<sup>201</sup> See *infra* text accompanying notes 221–85. The court in *Jewell* recognized that stating that a person fits the “profile” of the perpetrator of a major crime damages the person’s reputation and conveys a defamatory meaning, even though it is known that innocent people are caught in “the net cast by a criminal profile.” See *supra* notes 84–85 and accompanying text.

<sup>202</sup> See *infra* note 390 and accompanying text.

<sup>203</sup> They were mentioned only in the intermediate appellate court opinions in *Jacobs* and *Lawrence*. In *Jacobs*, the court held that the defendants were not entitled to summary judgment on grounds of privilege because the record admitted the possibility of reckless disregard for truth, which would defeat the claim of privilege. *Jacobs v. McIlvain (Jacobs I)*, 759 S.W.2d 467, 469 (Tex. App. 1988). In *Lawrence*, the court observed that under New Jersey law, privilege applied to true reports of formal charges of criminal conduct and statements about investigations issued by police department heads and county prosecutors. *Lawrence v. Bauer Publ’g & Printing Ltd. (Lawrence I)*, 423 A.2d 655, 661 (N.J. App. Div. 1980).

<sup>204</sup> See *supra* notes 20–21, 28 and accompanying text.

<sup>205</sup> The Texas Court of Appeals in *Jacobs* decided not to uphold summary judgment for the defendants on this ground because the record did not show that Jacobs had the status of public official or exclude the possibility of reckless disregard for truth. *Jacobs I*, 759 S.W.2d at 470. The decision in *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), *cert. denied*, 537 U.S. 814 (2002), to classify Richard Jewell as a public figure was a large, if not insurmountable, barrier in his attempts to obtain redress for defamation. See *Richards & Calvert, Suing, supra* note 6, at 3–4; *Goodman, supra* note 79, at A11.

It is predictable that a court would rule that a public figure plaintiff has failed to present the necessary “clear and convincing evidence”<sup>206</sup> of reckless disregard for truth when the defendant shows that what was reported was an accurate account of a governmental investigation or evidence obtained or conclusions reached in the course of an investigation. As reckless disregard for truth can be found when the defendant “in fact entertained serious doubts as to the truth of his publication,”<sup>207</sup> plaintiffs can contend that it is reckless disregard for truth to publish material that will cause the public to believe that the plaintiff is guilty of a crime when the defendant had serious doubts about the plaintiff’s guilt. This view was rejected by the district court and court of appeals in *Hatfill*.<sup>208</sup> It was also rejected in substance, although not explicitly, in *Jackson*.<sup>209</sup> The courts were, it is submitted, correct to find no reckless disregard in the defendants’ uncertainty about the plaintiff’s guilt. Publishing with doubt on this question, but with genuine belief in the facts published, falls far short of the level of culpability intended by the Supreme Court when it adopted the “actual malice” requirement in *New York Times Co. v. Sullivan*<sup>210</sup> and when it equated reckless disregard with “high degree of awareness of [a statement’s] probable falsity.”<sup>211</sup> The court in *Jackson* was correct to conclude that the *New York Times* standard was consistent with a healthy skepticism that is “a normal part of a reputable journalist’s makeup and leads him or her to obtain corroborating evidence to back up a source’s story.”<sup>212</sup> The standard

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<sup>206</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (public figures and public officials must present clear and convincing evidence that the defendant acted with knowledge of or reckless disregard for falsity).

<sup>207</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>208</sup> *Hatfill v. N.Y. Times Co. (Hatfill IV)*, 488 F. Supp. 2d 522, 531 (E.D. Va. 2007); *Hatfill v. N.Y. Times Co. (Hatfill V)*, 532 F.3d 312, 325 (4th Cir. 2008).

<sup>209</sup> *See Jackson v. Paramount Pictures Corp.*, 80 Cal. Rptr. 2d 1, 14–15 (Cal. Ct. App. 1998).

<sup>210</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

<sup>211</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *cf. Post v. Oregonian Publ’g Co.*, 519 P.2d 1258 (Or. 1974) (no reckless disregard for truth in reporting that plaintiff was suspected in the smuggling of narcotics by aircraft without an attempt to determine whether plaintiff was involved in smuggling).

<sup>212</sup> *Jackson*, 80 Cal. Rptr. 2d at 15.

did not require that the reporter hold a “devout belief in the truth of the story being reported.”<sup>213</sup>

Whether reckless disregard is excluded by showing that the defendant lacked serious doubt that the defendant *could* be guilty—the standard applied in *Hatfill*<sup>214</sup>—might still be questioned. There does seem to be an element of reckless disregard for damage to reputation by defamatory falsehood when the defendant is aware that reporting that the plaintiff is a suspect or under investigation will cause the public to think the plaintiff is responsible for a crime and the defendant greatly doubts that the plaintiff is guilty. But the lack of serious doubt about what is reported concerning the investigation or the plaintiff’s being a suspect does warrant the conclusion that the plaintiff cannot establish the reckless disregard for truth, or knowing falsity, that is required in a public figure defamation action.

*Hatfill v. New York Times Co.* is the only case in which any judge found the defendants’ publication to be protected from defamation liability by the First Amendment for reasons other than the requirement that public figures and public officials prove knowledge of or reckless disregard for falsity.<sup>215</sup> The district court judge asserted, “The principle that an accurate report of ongoing investigation or an allegation of wrongdoing does not carry the implication of guilt has long been recognized at the common law, and it is mandated by the First Amendment.”<sup>216</sup> While the cases cited in support of this assertion<sup>217</sup> do support the proposition that a re-

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<sup>213</sup> *Id.*

<sup>214</sup> *Hatfill v. N.Y. Times Co. (Hatfill IV)*, 488 F. Supp. 2d 522, 531 (E.D. Va. 2007); *Hatfill v. N.Y. Times Co. (Hatfill V)*, 532 F.3d 312, 325 (4th Cir. 2008).

<sup>215</sup> Opinions in other cases referred to the requirement of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that the plaintiff bear the burden of proving the defamatory statement’s falsity, which displaced the common law requirement that the defendant prove truth, but none of the decisions on defamation liability in these cases was based on *Hepps*.

<sup>216</sup> *Hatfill v. N.Y. Times Co. (Hatfill I)*, 33 Media L. Rep. 1129, 1133 (E.D. Va. 2004).

<sup>217</sup> *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), *reh’g en banc*, 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *Green v. CBS Inc.*, 286 F.3d 281 (5th Cir. 2002), *cert. denied*, 537 U.S. 887 (2002); *Basilus v. Honolulu Publ’g Co.*, 711 F. Supp. 548 (D. Haw. 1989), *aff’d sub nom. Polycarp Basilus v. Honolulu Publ’g Co.*, 888 F.2d 1394 (9th Cir. 1989); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998); *Foley v. Lowell Sun Publ’g Co.*, 533 N.E.2d 196 (Mass. 1989).

port of an investigation or allegation of wrongdoing does not convey a meaning of guilt, none of those cases posits this as a First Amendment requirement rather than an application of the common law. Judge Wilkinson's dissent in the Fourth Circuit also invoked the First Amendment. But his conclusion that the Kristof columns were not to be interpreted to convey the defamatory meaning of guilt in the anthrax mailings was based on the premise that First Amendment considerations warranted a restrained interpretation and application of state defamation law, not any supposed First Amendment rule requiring that no meaning of guilt be found.<sup>218</sup> There is no such rule in the First Amendment doctrine applicable to defamation.<sup>219</sup>

Judge Wilkinson's dissent made a wider argument that the Constitution protects a news publisher when "doing its job" in providing a "meaningful report" to the public on the workings of the criminal justice system—one which might require the use of a suspect's name—and the action or inaction of law enforcement.<sup>220</sup> However, the dissent did not suggest any limitation of defamation liability beyond affording a greater opportunity for the defendant to prevail on a motion to dismiss and refraining from an interpretation of state defamation law that would restrict the type of speech at issue in *Hatfill*. No specific constitutional limitation on liability for characterizing a person as a suspect was advocated or identified. The opinions in *Hatfill* that would protect the *New York Times* from liability provide no basis for constitutional protection of reports identifying a person as a suspect or as under investigation, beyond the requirement that public figures and public officials prove knowing or reckless falsehood.

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<sup>218</sup> See *supra* text accompanying notes 162–72.

<sup>219</sup> The *Janklow* case, cited by the district court, does support the proposition that "a materially accurate report of historical fact" is protected from defamation liability because the publication of true facts is constitutionally protected. *Janklow*, 759 F.2d at 649. But the possible application of this to media identification of a person as a suspect in a crime was not discussed in *Hatfill*.

<sup>220</sup> *Hatfill v. N.Y. Times Co. (Hatfill III)*, 427 F.3d 253, 258–59 (4th Cir. 2005) (Wilkinson, J., dissenting).



## II. DECISIONS IN ENGLAND AND OTHER COMMON LAW JURISDICTIONS

The weaknesses of the opinions discussed above become more readily apparent when the opinions are compared with what can be found in analogous defamation cases from England and other countries that apply the common law of defamation. The opinions in those cases reflect careful attention to the range of defamatory meanings that can be found in a statement that someone is a suspect or under investigation, and to what must be pleaded and proved to “justify” a statement on grounds of truth. They also maintain and apply the rules that the truth of a defamatory meaning must be established and that accuracy in repeating and attributing a third party’s defamatory statement does not show truth.<sup>221</sup>

### A. *Chase v. News Group Newspapers Ltd.*

*Chase v. News Group Newspapers Ltd.*<sup>222</sup> is an important example. Britain’s *Sun* newspaper published an issue with the front page headline “Nurse is probed over 18 deaths.”<sup>223</sup> Articles in that issue said that a nurse was suspected of overdosing terminally ill children with painkillers. The deaths of the children had not been seen as suspicious at first. “But now it is suspected that they might have been given huge overdoses of morphine or other painkillers.”<sup>224</sup> The *Sun* reported that after an internal inquiry in which the nurse’s colleagues and some parents of child patients were interviewed, senior health service officials went to the police and told them that the nurse was suspected of accelerating the deaths of eighteen children. A “health source close to the inquiry” was quoted as saying that the nurse “was suspended so that her capacity for doing harm would be eliminated.”<sup>225</sup> The *Sun* said, “The case already has echoes of the crimes of killer GP Harold Shipman,”<sup>226</sup>

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<sup>221</sup> This article will address only a few of the relevant English cases and one case from South Africa. A future article will present a more extensive examination of the British and Commonwealth cases on the subject.

<sup>222</sup> *Chase v. News Group Newspapers Ltd.*, [2002] EWCA (Civ) 1772, [2003] E.M.L.R. 11, 218 (C.A.).

<sup>223</sup> *Id.* at [4], [2003] E.M.L.R. at 221.

<sup>224</sup> *Id.* at [6], [2003] E.M.L.R. at 221.

<sup>225</sup> *Id.* at [10], [2003] E.M.L.R. at 222.

<sup>226</sup> *Id.* at [6], [2003] E.M.L.R. at 221.

the doctor who murdered patients with doses of morphine or diamorphine. References were also made to Beverley Allitt, a nurse convicted of murdering children in her care.<sup>227</sup>

The next day's issue of the *Sun* also featured this story. A photograph of the nurse, with her face obscured, was captioned "Woman at centre of 18-death probe" and described as "the first picture of the nurse being investigated over the deaths of 18 children."<sup>228</sup> An article said, "Cops are probing claims . . . that terminally ill youngsters aged eight weeks to 17 years were given overdoses of painkillers."<sup>229</sup> The nurse was "suspected by NHS [National Health Service] bosses last year."<sup>230</sup> Twenty detectives were working on the case and the police had visited every family that had lost a child.<sup>231</sup>

Eight months after the articles were published, Essex police announced their conclusion that the nurse did not hasten the deaths of any children.<sup>232</sup> The nurse then commenced libel proceedings against the publishers of the *Sun*. She contended that the material in the *Sun* conveyed the defamatory meaning "that there were very strong grounds to suspect [her] of having serially murdered at least 18 terminally ill children entrusted to her care and of having behaved in an evil manner comparable to the behaviour of Beverley Allitt and Harold Shipman."<sup>233</sup> She had not been named in the *Sun*, but allegedly a significant number of readers identified her as the subject of the articles.<sup>234</sup>

While conceding that the material could be found to have the meaning the plaintiff claimed,<sup>235</sup> the defendants asserted that the articles meant that "there were reasonable grounds to suspect the claimant of involvement in hastening the deaths of child pa-

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<sup>227</sup> *Id.* at [8]–[9], [2003] E.M.L.R. at 221.

<sup>228</sup> *Id.* at [14], [2003] E.M.L.R. at 222.

<sup>229</sup> *Id.*; Lisa Reynolds & John Troup, *Check Every Kid*, *SUN*, June 24, 2000.

<sup>230</sup> *Chase*, [2002] EWCA (Civ) 1772, [14], [2003] E.M.L.R. 11, 218, 222 (C.A.); Reynolds & Troup, *supra* note 229.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at [18], [2003] E.M.L.R. at 223.

<sup>233</sup> *Id.* at [13], [2003] E.M.L.R. at 222.

<sup>234</sup> *Id.* at [5], [2003] E.M.L.R. at 221.

<sup>235</sup> *Id.* at [13], [2003] E.M.L.R. at 222.

tients.”<sup>236</sup> The defendants also claimed that the articles could have conveyed the even milder meaning that there were serious grounds to investigate the plaintiff.<sup>237</sup> The defendants made a plea of justification addressed to the first of these two meanings. The plea alleged facts that, in the defendants’ view, would show that there were reasonable grounds to suspect the plaintiff of involvement in hastening the deaths of child patients. These included the conduct of investigations by the health service and police, allegations made by some nurses during the investigation about the plaintiff’s behavior and her irregular administration of drugs, police suspicion that the plaintiff might have been stockpiling controlled drugs resulting in a warrant to search her home and discovery of a small quantity of controlled drugs there, and the plaintiff’s subsequent arrest on suspicion of possession and theft of Class C drugs and supply of Class A drugs.<sup>238</sup> The search of the plaintiff’s home, discovery of drugs and arrest of the plaintiff occurred several months after the articles were published in the *Sun*.<sup>239</sup> Just before the articles were published, the police had concluded that there were no grounds whatsoever for arresting the nurse. The police ultimately notified the plaintiff that following an in-depth investigation and review of all available information, the police had concluded that there were no grounds to suspect that the plaintiff had played any part in hastening the deaths of any children.<sup>240</sup>

Note that the defendants never denied that the possible meanings were defamatory, and they did not assert that the articles’ account of an investigation of the plaintiff would be justified by proof that there was such an investigation. Also note that the plaintiff never asserted that the articles conveyed the meaning that she hastened the deaths of terminally ill children and that justification must be proof of her guilt. As will be seen, English precedent made it advisable for the parties to concede these points.<sup>241</sup>

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<sup>236</sup> *Id.* at [18], [2003] E.M.L.R. at 223.

<sup>237</sup> *Id.* at [49], [2003] E.M.L.R. at 230.

<sup>238</sup> *Id.* at [18], [2003] E.M.L.R. at 224.

<sup>239</sup> *Id.* at [18], [2003] E.M.L.R. at 224.

<sup>240</sup> *Id.* at [28], [2003] E.M.L.R. at 226.

<sup>241</sup> *See infra* text accompanying notes 253–71.

The trial court struck out the defendants' plea of justification on the ground that the facts pleaded by the defendants were incapable of justifying the defamatory meaning pleaded.<sup>242</sup> The facts on which the defendants relied would not show the truth of the meaning that "there were reasonable grounds to suspect the claimant of involvement in hastening the deaths of child patients."<sup>243</sup> Justification of a "reasonable grounds for suspicion" meaning had to be based upon some conduct of the plaintiff that gave rise to a reasonable suspicion.<sup>244</sup> It could not be based on "hearsay" statements.<sup>245</sup> Matters occurring after publication, such as the discovery of drugs at the plaintiff's home, could not show that there were grounds for suspicion at the time of publication, so they could not be used.<sup>246</sup> To the extent the defendants sought to justify a milder meaning that there were serious grounds to investigate the plaintiff, the plea was rejected because what the *Sun* published did not have this meaning—the *Sun* clearly went further and conveyed that there were reasonable grounds to suspect the plaintiff.<sup>247</sup>

The Court of Appeal affirmed the trial court's decision to strike out the defendants' justification defense.<sup>248</sup> It endorsed the trial judge's conclusions, subject to a couple of qualifications that did not affect the result. First, "[t]here may be cases, of which this is unquestionably not one, in which . . . a defendant may rely on matters which do not directly focus on some conduct on the plaintiff's part giving rise to a relevant [reasonable] suspicion."<sup>249</sup> The defendant might rely on strong circumstantial evidence implicating the plaintiff.<sup>250</sup> Second, hearsay was admissible to the extent permissible under the Civil Evidence Act.<sup>251</sup> However,

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<sup>242</sup> *Chase*, [2002] EWCA (Civ) 1772, [31], [2003] E.M.L.R. 11, 218, 227 (C.A.).

<sup>243</sup> *Id.* at [18], [2003] E.M.L.R. at 223.

<sup>244</sup> *Id.* at [30], [2003] E.M.L.R. at 227.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at [49], [2003] E.M.L.R. at 231.

<sup>248</sup> *Id.* at [66], [2003] E.M.L.R. at 235.

<sup>249</sup> *Id.* at [50], [2003] E.M.L.R. at 231.

<sup>250</sup> *Id.* at [51], [2003] E.M.L.R. at 231.

<sup>251</sup> Civil Evidence Act, 1995, c. 38 (U.K.).

[i]t remains the law . . . that if a defendant repeats a libel he/she has heard from others, a plea of justification will only succeed if he/she can prove by admissible evidence that what they said was substantially true . . . . “[Y]ou cannot escape liability for defamation by putting the libel behind a prefix such as ‘I have been told that’ . . . and then asserting that it was true that you had been told . . . .”<sup>252</sup>

*B. Lewis v. Daily Telegraph Ltd.*

The liability and defense theories of the parties in *Chase*, and the judgments of both the trial court and the Court of Appeal, can be explained largely by reference to a line of cases going back to *Lewis v. Daily Telegraph Ltd.*<sup>253</sup> In *Lewis*, two national newspapers had published on their front pages reports that the City of London Fraud Squad were “inquiring into the affairs of Rubber Improvement Ltd.”<sup>254</sup> The reports stated that “Mr. John Lewis, former Socialist M.P.,” was the company’s chairman.<sup>255</sup> Rubber Improvement Ltd. and Lewis immediately commenced libel actions against the owners of the two newspapers.<sup>256</sup>

The plaintiffs’ pleadings stated, “It is generally known that the City Fraud Squad investigate serious cases of company fraud.”<sup>257</sup> Rubber Improvement Ltd. alleged, “By the said words the defendants meant and were understood to mean that the affairs of the plaintiffs . . . were conducted fraudulently or dishonestly or in such a way that the police suspected that their affairs were so conducted.”<sup>258</sup> Lewis alleged,

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<sup>252</sup> *Chase*, [2002] EWCA (Civ) 1772 [39], [2003] E.M.L.R. 11, 218, 228 (C.A.) (quoting *Lewis v. Daily Tel. Ltd.*, [1964] A.C. 234, 283 (H.L.) (Lord Devlin)).

<sup>253</sup> *Lewis v. Daily Tel. Ltd.*, [1964] A.C. 234 (H.L.). Also, liability and defense theories can be explained by the development of requirements for specific pleadings on alleged defamatory meanings and justification of defamatory meanings. See *Chase*, [2002] EWCA (Civ) 1772, [37], [2003] E.M.L.R. 11, 218, 228 (C.A.). *Shah v. Standard Chartered Bank*, [1999] Q.B. 241 (C.A.), and *Bennett v. News Group Newspapers Ltd.*, [2002] E.M.L.R. 860 (C.A.), were the most significant cases after *Lewis*.

<sup>254</sup> *Lewis*, [1964] A.C. at 237.

<sup>255</sup> *Id.* at 238.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 239.

<sup>258</sup> *Id.*

By the said words the defendants meant and were understood to mean that the plaintiff had been guilty or was suspected by the police of having been guilty of fraud or dishonesty in connection with the affairs of the said company . . . and/or that he had caused or permitted the affairs of the said company . . . to be conducted fraudulently or dishonestly or in such a way that the police suspected that the affairs of the said company . . . had been so conducted and/or that the plaintiff was unfit to hold either of his said offices [chairman and managing director].<sup>259</sup>

The defendants denied that the words published bore these meanings. The defendants also asserted justification on the basis that it was true that officers of the City of London Fraud Squad inquired into the affairs of Rubber Improvement Ltd.<sup>260</sup> They admitted that what the newspapers published was libelous.<sup>261</sup>

There were separate trials for the libel actions against each newspaper's owner. In each, the trial judge left it to the jury to decide what meaning was conveyed by the newspaper reports. Concerning justification, the judge told the jury that if they thought the meaning conveyed was no more than that the police were making an inquiry, they had to consider whether the defendants had proved that an inquiry had been made.<sup>262</sup> Evidently accepting the plaintiffs' claim that the newspaper reports conveyed the meaning that the plaintiffs were guilty of fraud,<sup>263</sup> the juries delivered verdicts for the plaintiffs with large awards of damages.

The essence of the decision of the House of Lords in *Lewis* is that the newspaper reports, as a matter of law, were incapable of bearing the meaning that the plaintiffs were guilty of fraud. The ordinary reader would not infer guilt of fraud from the newspapers' reports of an inquiry by the Fraud Squad. At most, the reader would infer that the plaintiffs had conducted their affairs in such a

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<sup>259</sup> *Id.* at 239 (references to the company's subsidiaries omitted).

<sup>260</sup> *Id.* at 239–40.

<sup>261</sup> *Id.* at 258, 265, 270, 283.

<sup>262</sup> *Id.* at 241–43.

<sup>263</sup> *See id.* at 257–58 (Lord Reid), 270 (Lord Hodson).

way as to create suspicion of fraud. Therefore, the trial judge erred in allowing the jury to decide whether the newspaper articles imputed guilt of fraud.<sup>264</sup> Presumably, it was due to *Lewis* that the plaintiff in *Chase* never asserted that the *Sun* articles conveyed the meaning that the plaintiff was guilty of hastening the deaths of ill children.

*Lewis* is particularly important in its recognition of different levels of defamatory meaning. One meaning is that the plaintiff is guilty of wrongdoing. A second meaning is that the plaintiff is suspected of being guilty. A third possibility is that there are grounds for investigating the plaintiff.<sup>265</sup> Lord Reid differentiated imputations that the plaintiffs were guilty of fraud, that the plaintiffs conducted their affairs so as to give rise to suspicion of fraud, and that the plaintiffs conducted their affairs in a way that justified an inquiry into whether there had been fraud.<sup>266</sup> From this evolved the three categories of meaning found in *Chase*: that the plaintiff “has in fact committed some serious act”; “there are reasonable grounds to suspect that he/she has committed such an act”; and “there are grounds for investigating whether he/she has been responsible for such an act.”<sup>267</sup>

In *Lewis* and *Chase* there is also recognition that “justification” of a defamatory meaning is based upon proof that that particular defamatory meaning is true. If a statement cannot be found to convey the meaning that the plaintiff is guilty of a crime, as in *Lewis*, or the plaintiff never claims that what the defendant pub-

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<sup>264</sup> *Id.* at 258–60 (Lord Reid), 274–76 (Lord Hodson), 283–87 (Lord Devlin). Lord Morris disagreed on this point. *Id.* at 266–69 (Lord Morris of Borth-y-Gest).

<sup>265</sup> *See id.* at 260 (Lord Reid), 267–68 (Lord Morris of Borth-y-Gest), 274–75 (Lord Hodson), 283–86 (Lord Devlin).

<sup>266</sup> *Id.* at 260 (Lord Reid). The parties and all the judges accepted that the articles could bear the meaning that the police suspected that the affairs of Rubber Improvement were conducted fraudulently or dishonestly. *See id.* at 267 (Lord Morris of Borth-y-Gest).

<sup>267</sup> *Chase v. News Group Newspapers Ltd.*, [2002] EWCA (Civ) 1772, [45], [2003] E.M.L.R. 11, 218, 230 (C.A.). The second meaning requires “reasonable” grounds for suspicion on the premise that a report that a third party suspects a person of a crime is defamatory only to the extent that the report conveyed the imputation that there were reasonable grounds for the suspicion. *See Musa King v. Tel. Group Ltd.*, [2004] EWCA (Civ) 613, [25], [2004] E.M.L.R. 23, 429, 439 (C.A.). But this premise may be wrong. See the treatment of “is suspected” and “is suspected on reasonable or strong grounds” in the *King* case, discussed *infra* text accompanying notes 294–308.

lished conveyed such a meaning, as in *Chase*, the defendant does not have to prove that the plaintiff was guilty even though what was published led readers to think that the plaintiff might be guilty. But if a statement conveys the meaning that there are grounds to suspect the plaintiff of guilt, the truth of that must be proved. If the statement conveys the meaning that there are grounds for investigation, that must be proved true.<sup>268</sup> It follows from this that if any of these meanings is found in a report that the plaintiff is under investigation or a suspect, the defendant cannot establish justification by showing that the plaintiff was in fact being investigated or regarded as a suspect.<sup>269</sup> *Chase* does accept that what a defendant must establish is the “substantial” truth of the libel, but that means showing that the “sting of the libel” is true.<sup>270</sup> Showing the truth of a lesser defamatory meaning does not suffice.<sup>271</sup>

### C. Reports on Investigation of Terrorism and Terrorism Funding

In striking similarity to the *Global Relief* and *Hatfill* cases,<sup>272</sup> the most recent cases in England and South Africa bearing on what is the “truth” for reports that a person is a suspect or under investigation also concern funding of terrorism or involvement in acts of terrorism.

In *Al Rajhi Banking & Investment Corp. v. Wall Street Journal Europe Sprl.*,<sup>273</sup> a Saudi Arabian banking company brought libel proceedings over an article published in the *Wall Street Journal Europe*. The article reported that at the request of U.S. law en-

<sup>268</sup> See *Lewis*, [1964] A.C. at 260 (Lord Reid), 274–75 (Lord Hodson), 282, 284 (Lord Devlin); *Chase*, [2002] EWCA (Civ) 1772, [48], [2003] E.M.L.R. 11 at 230; see also *Shah v. Standard Chartered Bank*, [1999] Q.B. 241 (C.A.).

<sup>269</sup> See GATLEY, *supra* note 2, at 850–51 (with “*quaere*” as to “grounds for investigation”). The judges of the Court of Appeal in *Lewis*, whose decision the House of Lords affirmed, were clearly of the view that proof that there was a Fraud Squad inquiry into the plaintiffs would not justify the newspapers’ reports of an inquiry if the reports conveyed an additional meaning. See *Lewis v. Daily Tel. Ltd.*, [1963] 1 Q.B. 340, 363 (Hollroyd Pearce, L.J.), 395 (Davies, L.J.), 408 (Havers, J.).

<sup>270</sup> *Chase*, [2002] EWCA (Civ) 1772, [34], [2003] E.M.L.R. 11 at 227.

<sup>271</sup> *Id.* at [34], [2003] E.M.L.R. at 227.

<sup>272</sup> See *supra* text accompanying notes 89–180.

<sup>273</sup> *Al Rajhi Banking & Inv. Corp. v. Wall Street Journal Europe Sprl. (Al Rajhi Banking I)*, [2003] EWHC (QB) 1358, *subsequent proceedings*, [2003] EWHC (QB) 1776.



forcement agencies, the central bank of Saudi Arabia was monitoring 150 bank accounts “associated with some of the country’s most prominent businessmen in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organisations.”<sup>274</sup> Accounts belonging to the plaintiff were among the 150 being monitored.<sup>275</sup> The article quoted American officials saying that “[m]any of the Saudi accounts on the U.S. list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism.”<sup>276</sup> The publisher of the *Journal* attempted to plead justification on the grounds that the plaintiff had associations with institutions or persons suspected of links to terrorism and that the plaintiff was the subject of “US law enforcement interest”<sup>277</sup>—no knowing or “witting” involvement in terrorism or financing of terrorism was alleged.<sup>278</sup> The court rejected this. Justification could not be established on the basis of some association, as distinct from guilty association, or on the basis that the plaintiff was the subject of American law enforcement “interest” or suspicion. Reasonable grounds to suspect the plaintiff of involvement in terrorism had to be identified.<sup>279</sup>

The defendant then sought to plead as justification that “there were reasonable grounds to suspect that the [plaintiff] had been knowingly or negligently involved in the funding of terrorist-related activity” and that “there were sufficient grounds for investigating whether the [plaintiff] had been and/or was still knowingly or negligently involved in the funding of terrorist-related activity.”<sup>280</sup> Unlike the earlier pleadings, this version fit into two of the three levels of defamatory meaning identified in *Chase v. News Group Newspapers Ltd.*:<sup>281</sup> reasonable grounds for suspicion and

<sup>274</sup> *Id.* at [4]; James M. Dorsey, *Saudi Officials Monitor Certain Bank Accounts—Focus Is on Those with Potential Terrorist Ties*, WALL STREET J. EUR., Feb. 6, 2002, at 1.

<sup>275</sup> *Al Rajhi Banking I*, [2003] EWHC (QB) 1358, [4].

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at [21].

<sup>278</sup> *Id.* at [16]–[19].

<sup>279</sup> *Id.* at [28]–[33].

<sup>280</sup> *Al Rajhi Banking & Inv. Corp. v. Wall Street Journal Europe Sprl. (Al Rajhi Banking II)*, [2003] EWHC (QB) 1776, [7].

<sup>281</sup> *Chase v. News Group Newspapers Ltd.*, [2002] EWCA (Civ) 1772, [45], [2003] E.M.L.R. 11, 218, 230 (C.A.); *see supra* text accompanying note 267.

grounds for investigation. The plaintiff did not claim that the article imputed direct involvement in funding of terrorism, so it was not necessary for the defendant to plead justification of that meaning.<sup>282</sup> The court held that the article could not be reasonably construed to mean no more than that there were reasonable grounds to investigate. Consequently, justification could not be established by showing grounds to investigate whether the plaintiff was involved in funding of terrorism.<sup>283</sup> As in *Chase*, the article implied that there were grounds to suspect the plaintiff of wrongdoing. Therefore, justification could be established only by showing that there were reasonable grounds to suspect the plaintiff.<sup>284</sup> The court allowed the defendant to plead justification in terms of “reasonable grounds to suspect” to the limited extent that the defendant’s particulars set forth a basis for proving that there were objectively reasonable grounds to suspect the plaintiff of knowing or negligent involvement in funding of terrorism.<sup>285</sup>

A second case arose from the same article: *Jameel v. Wall Street Journal Europe Sprl.*<sup>286</sup> The plaintiffs in *Jameel* were the president of one of the Saudi companies named in the article as having its bank accounts monitored and the company itself.<sup>287</sup> As in *Al Rajhi Banking*, one of the major issues was whether the article necessarily conveyed the defamatory meaning that there were reasonable grounds for suspecting the plaintiffs of involvement with terrorism or could be found to have some lesser meaning, such as the existence of grounds for investigation. In the Queen’s Bench Division, the court<sup>288</sup> ruled that the article did mean at least that the plaintiffs were under a reasonable suspicion of knowing or negligent involvement with terrorism. It could not be found to have a lesser meaning.<sup>289</sup> However, this decision was reversed on

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<sup>282</sup> *Al Rajhi Banking II*, [2003] EWHC 1776, [3].

<sup>283</sup> *Id.* at [12].

<sup>284</sup> *Id.* at [19].

<sup>285</sup> *Id.* at [80].

<sup>286</sup> *Jameel v. Wall Street Journal Europe Sprl. (Jameel I)*, [2003] EWCA (Civ) 1694, [2004] E.M.L.R. 6, 89 (C.A.); Dorsey, *supra* note 274.

<sup>287</sup> *Jameel I*, [2003] EWCA (Civ) 1694, [2], [2004] E.M.L.R. at 92.

<sup>288</sup> Eady, J., the same judge as in *Al Rajhi Banking (I & II)*.

<sup>289</sup> *Jameel I*, [2003] EWCA (Civ) 1694, [4], [2004] E.M.L.R. at 95.

appeal. The court of appeal concluded that while a jury might well find that the article had the more serious meaning, the meaning of the article was not so plain as to exclude a finding of some lesser defamatory meaning.<sup>290</sup> The defendants in this case did not plead justification. For this reason, the court of appeal was not specific on what lesser defamatory meaning a jury could find and on what would be required to justify the meaning. Presumably, the lesser defamatory meaning that could be found is that grounds existed to investigate whether the plaintiff company and company president were involved in the provision of funds to terrorist organizations.<sup>291</sup>

In *King v. Telegraph Group Ltd.*,<sup>292</sup> the plaintiff's libel action concerned two articles in the *Sunday Telegraph*. The first article reported that two unnamed white men were being investigated by Scotland Yard "to establish whether they have committed terrorist offences."<sup>293</sup> It was "the first time since September 11 that white non-Muslims have been accused of involvement in Islamic extremism."<sup>294</sup> One of the two men was identified as a computer expert "linked" to a named individual who had been charged under the Prevention of Terrorism Act.<sup>295</sup> The plaintiff claimed that readers of the article would have understood this man was the plaintiff.<sup>296</sup> The second article, headlined, "British Muslim targeted by FBI for

<sup>290</sup> *Id.* at [22]–[23], [2004] E.M.L.R. at 103–04.

<sup>291</sup> See also *Jameel v. Times Newspapers Ltd. (Jameel II)*, [2004] EWCA (Civ) 983, [2004] E.M.L.R. 31, 665 (C.A.). Yousef Jameel claimed that an article in the *Sunday Times* said or implied that there were reasonable grounds for suspecting that he had directly or indirectly funded terrorism, or at least that there was good reason for investigating whether he had done so. As in the earlier *Jameel I* case discussed in the text (involving different plaintiffs), the Court of Appeal held that a jury could find the article to bear either of these meanings. It could also find there was no defamatory meaning. *Id.* at [20], [2004] E.M.L.R. at 676. The court discussed whether the "good reason for investigating" meaning could be justified (i.e., considered true) on the basis of allegations others had made about the plaintiff's conduct that were not proved to be correct, but no conclusion was reached on this issue. *Id.* at [22]–[30], [2004] E.M.L.R. at 676–81.

<sup>292</sup> *King v. Tel. Group Ltd.*, [2004] EWCA (Civ) 613, [2005] 1 W.L.R. 2282, *sub nom.* *Musa King v. Tel. Group Ltd.*, [2004] E.M.L.R. 429 (C.A.). The report of the case in E.M.L.R. is more complete than the report in the usually authoritative W.L.R.

<sup>293</sup> [2004] EWCA (Civ) 613, [11], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 433–34.

<sup>294</sup> *Id.* at [11], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 433–34.

<sup>295</sup> *Id.* at [11], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 433–34.

<sup>296</sup> *Id.* at [13], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 433–34.

terror link,” referred to the plaintiff by name and address.<sup>297</sup> It said, “The FBI wants to question a white British Muslim computer expert . . . about his alleged links to Osama bin Laden’s terror network.”<sup>298</sup> Police in Britain had seized his computers.<sup>299</sup> The *Telegraph*’s defense included a plea of justification: “In so far as the words complained of . . . bore or were understood to bear the meaning that the police suspected the claimant of involvement in terror-related activities on reasonable and/or strong grounds, they are true in substance and in fact.”<sup>300</sup>

The trial judge rejected the plea of justification to the extent it was founded on it being true that the police suspected the plaintiff of involvement in terror-related activities.<sup>301</sup> He required that the plea be amended to read: “In so far as the words complained of . . . bore or were understood to bear the meaning that there were reasonable and/or strong grounds for suspecting the claimant of involvement in terror-related activities, they are true in substance and in fact.”<sup>302</sup> In the court of appeal, defense counsel submitted that there were two different meanings that the articles could be found to have—“(a) that the police suspected the claimant of involvements in terror-related activities” and “(b) that the claimant was suspected of such activities on grounds that were reasonable and/or strong”<sup>303</sup>—and that the first meaning could be justified by evidence that Scotland Yard did regard the plaintiff as a suspect and had seized his computer and other property. With the plaintiff’s counsel conceding that “the two meanings could be split in this way,”<sup>304</sup> the court of appeal held that the defendants could restate their justification defense as counsel had proposed, provided the defense made a clear distinction between the two meanings and clearly showed which of the meanings the facts alleged in the de-

<sup>297</sup> *Id.* at [13], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 433–34.

<sup>298</sup> *Id.* at [13], [2005] 1 W.L.R. at 2285, [2004] E.M.L.R. at 434.

<sup>299</sup> *Id.* at [13], [2005] 1 W.L.R. at 2285; [2004] E.M.L.R. at 435. The plaintiff was a convert to Islam. *Id.* at [2], [2005] 1 W.L.R. at 2284, [2004] E.M.L.R. at 432.

<sup>300</sup> *Id.* at [20], [2005] 1 W.L.R. at 2286, [2004] E.M.L.R. at 436.

<sup>301</sup> *Id.* at [16]–[27], [2005] 1 W.L.R. at 2286–87 (part of judgment omitted), [2004] E.M.L.R. at 436–39.

<sup>302</sup> *Id.* at [16], [2005] 1 W.L.R. at 2286–87, [2004] E.M.L.R. at 436.

<sup>303</sup> *Id.* at [29], [2004] E.M.L.R. at 439 (omitted in W.L.R.).

<sup>304</sup> *Id.* at [32], [2004] E.M.L.R. at 440 (omitted in W.L.R.).

fense (“particulars of justification”) applied to.<sup>305</sup> This decision implies that if it is found that a publication carried the meaning that the police regarded the plaintiff as a suspect without also carrying the meaning that there were reasonable grounds for this, it could be justified by showing that the police regarded the plaintiff as a suspect. Reasonable grounds for the suspicion would not have to be proved.<sup>306</sup>

The South African case, *Independent Newspapers Holdings Ltd. v. Suliman*,<sup>307</sup> involved a front page article in the *Cape Times* newspaper published a few days after a bomb exploded at Cape Town’s Victoria and Alfred Waterfront complex. Two people had been killed and many more were seriously injured.<sup>308</sup> The article stated that after receiving an anonymous “tip-off,” “[d]etectives probing Tuesday’s horrific Waterfront blast . . . arrested three Capetonians about to board an Egypt-bound flight at Cape Town International Airport.”<sup>309</sup> The three (a married couple and their female cousin) were identified by name, age and place of residence.<sup>310</sup> The article reported a statement by the chief of operations of the South African Police: “There is the possibility that they could be involved in the blast, but at this stage there is no evidence pointing to this.”<sup>311</sup> The article also reported that the two women would be charged with passport offenses and the “male suspect” was being held for further questioning.<sup>312</sup> The article was illustrated by a photograph of this man being led away by police with his hands cuffed behind his back.<sup>313</sup>

The “male suspect” named in the article sued the proprietor, publisher, distributor and editor of the *Cape Times*.<sup>314</sup> He con-

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<sup>305</sup> *Id.* at [33], [2005] 1 W.L.R. at 2287, [2004] E.M.L.R. at 440.

<sup>306</sup> In *Miller v. Associated Newspapers Ltd.*, [2005] EWHC 21 (Q.B.D.), *King* was interpreted to allow the fact of suspicion to be used to justify the meaning that there were grounds for investigation. *Id.* at [7]–[9].

<sup>307</sup> *Indep. Newspapers Holdings Ltd. v. Suliman*, [2004] 3 All SA 137 (S.C.A.).

<sup>308</sup> *Id.* at 139.

<sup>309</sup> *Id.* at 140.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 143. A later edition of the newspaper contained a similar but not identical article. Both are reprinted in the case.

<sup>314</sup> *Id.* at 140.

tended that the article conveyed a number of defamatory meanings about him that were not true, including that he was responsible for a terrorist attack and was about to flee the country because of this.<sup>315</sup> The trial judge accepted the plaintiff's assertion that he and the two others had been arrested for passport violations, not in connection with the explosion, and they had been taken into custody by the border police, not detectives probing the bombing.<sup>316</sup> The plaintiff admitted that the police had received an anonymous report that he might be linked to the explosion and he was leaving the country.<sup>317</sup>

The judges in this case were in substantial agreement about the meaning of the *Cape Times* article.<sup>318</sup> To the reasonable reader, the article did not mean that the plaintiff was in fact responsible for the Waterfront bombing; it conveyed the defamatory meaning that he was arrested and taken into custody because, as a result of a "tip-off," the police suspected him of involvement in the bombing and he was about to leave the country.<sup>319</sup> But the judges were divided on whether this meaning was true.<sup>320</sup> A 3–2 majority concluded that the evidence showed the meaning to be true.<sup>321</sup> The border police had stopped the plaintiff and arrested him for passport irregularities, but this was done because, on the strength of the "tip-off," the police investigating the bombing regarded him as a suspect and wanted to prevent him from leaving South Africa for Egypt.<sup>322</sup> He was taken to a police station for the purpose of questioning him as a suspect. The border police had assisted the investigation police in achieving their objectives.<sup>323</sup> The minority concluded that the meaning was false. The article's implication that the plaintiff was arrested in connection with the bombing was

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<sup>315</sup> *Id.* at 144.

<sup>316</sup> *Id.* at 147.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 166 (Nugent, J.A., with whom Ponnann, A.J.A., concurred).

<sup>319</sup> *Id.* at 153 (Marais, J.A., with whom Scott, J.A., and Mthiyane, J.A., concurred).

<sup>320</sup> *See id.* at 155 (Marais, J.A., with whom Scott, J.A., and Mthiyane, J.A., concurred),

165 (Nugent, J.A., with whom Ponnann, A.J.A., concurred).

<sup>321</sup> *Id.* at 155 (Marais, J.A., with whom Scott, J.A., and Mthiyane, J.A., concurred).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

false—he had been arrested for a passport irregularity.<sup>324</sup> Furthermore, the minority interpreted the article to carry the inference that the police had reasonable grounds to suspect the plaintiff of involvement in the bombing.<sup>325</sup> They did not. The police arrested the plaintiff for the passport infraction because they lacked grounds to arrest him for the bombing.<sup>326</sup>

Under South African law, the defendants were liable for defaming the plaintiff, despite the truth of the defamation, unless publication was for the public benefit or in the public interest.<sup>327</sup> The majority held that the “premature disclosure of the identity of a suspect” when there was no evidence connecting him to the explosion, he was not at large, and he had not appeared in court, was not for the public benefit or in the public interest, despite the legitimate public interest in knowing the progress of the investigation of the bombing and whether any arrests had been made.<sup>328</sup> The defendants were, therefore, liable for the defamation.<sup>329</sup>

The approach to identification of defamatory meanings in *Independent Newspapers Holdings Ltd. v. Suliman* is consistent with the approach adopted in the English cases. However, the case adds a new dimension to the issue of truth. The judges focused not on whether the defendants proved there were reasonable grounds to suspect the plaintiff of involvement in the Waterfront bombing, but on whether the *Cape Times* article was accurate in conveying the meaning that the plaintiff was arrested and taken into custody because the police suspected him of involvement. The decision that publication was not for the public benefit, while not applicable to defamation law in either England or the United States, supports the

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<sup>324</sup> *Id.* at 167–68 (Nugent, J.A., with whom Ponnann, A.J.A., concurred).

<sup>325</sup> *Id.* at 166.

<sup>326</sup> *Id.* at 168. The trial judge had reached the same conclusions.

<sup>327</sup> *Id.* at 163.

<sup>328</sup> *Id.* at 158 (Marais, J.A., with whom Scott, J.A., and Mthiyane, J.A., concurred).

<sup>329</sup> *Id.* at 159. The minority disagreed with the majority of the court on this point also. The minority was of the opinion that the arrest of a person, particularly on a serious charge, is always a matter of public concern and that this included the identity of the person arrested. Publication of a report that identified the person arrested was therefore in the public interest. This was not a circumstance in which suppression of truthful information was justified. *Id.* at 163–64 (Nugent, J.A., with whom Ponnann, A.J.A., concurred). The minority did not take a position on whether it would be in the public interest to identify a person as a suspect or under investigation when the person was not arrested.

view that, at least in some circumstances, the truth of a report that a person is a suspect in a serious crime is not in itself sufficient justification for the harm to the person caused by the report's publication.

#### *D. Possible Criticisms of the English Approach*

English case law now identifies three different potential defamatory meanings or levels of defamation in statements that a person or entity is under investigation for wrongdoing or a suspect: the meaning that the plaintiff has committed a wrongful act, the meaning that there are reasonable grounds to suspect that the plaintiff committed a wrongful act (with the implication of conduct by the plaintiff that gave rise to a reasonable suspicion), and the meaning that there are grounds to investigate whether the plaintiff was responsible for such an act.<sup>330</sup> Arguably the meaning that the plaintiff is a suspect is a fourth distinct category of defamatory meaning.<sup>331</sup>

This differentiation of defamatory meanings can be criticized on the grounds that the categories are artificial constructs that vary only in the degree of suspicion created and do not conform to what the ordinary reader or viewer of news reports thinks about a person identified as a suspect or under investigation. The court of appeal has acknowledged the difficulty of separating the "level two" (reasonable grounds to suspect) and "level three" (grounds for investigation) meanings,<sup>332</sup> and some judges have said the difference between the two is "a matter of degree."<sup>333</sup> It could well be contended that the essence of all meanings other than the first (guilt) is that there is suspicion that the plaintiff committed a wrongful act, and the fact that the damage to the plaintiff's reputation is greater if it is thought there are reasonable grounds for the

<sup>330</sup> See *supra* text accompanying notes 265–67.

<sup>331</sup> See *supra* text accompanying notes 303–06.

<sup>332</sup> *Jameel v. Times Newspapers Ltd. (Jameel II)*, [2004] EWCA (Civ) 983, [18] [2004] E.M.L.R. 31, 665, 675–76 (C.A.); *Jameel v. Wall St. Journal Europe Sprl. (Jameel I)*, [2004] EWCA (Civ) 1694, [19]–[21], 2004 E.M.L.R. 6, 89, 103.

<sup>333</sup> *Jameel II*, [2004] EWCA (Civ) 983, [39], [2004] E.M.L.R. 31, 682 (Longmore, L.J.); *Al Rajhi Banking & Inv. Corp. v. Wall St. Journal Europe Sprl. (Al Rajhi Banking II)*, [2003] EWHC (QB) 1776, [9].



suspicion does not warrant a separate “reasonable grounds to suspect” category of defamation. Even the “guilt” meaning could be seen as a variation of a defamation whose essence is to convey to the public that there is a probability that the plaintiff committed a crime or other wrongful act. All of the meanings imply that the plaintiff acted, or may have acted, in a way that created suspicion of wrongdoing. Furthermore, the reported fact that law enforcement authorities have investigated the plaintiff or regard the plaintiff as a suspect carries the implication that there are reasonable grounds for suspicion because of the assumption that law enforcement officials act on reasonable grounds. There is also the common assumption that “where there is smoke there is fire.”

It is standard law that when the defendant published a third party’s statement that the plaintiff committed a crime, or published a rumor that the plaintiff committed a crime, justification requires proof that the plaintiff did commit the crime.<sup>334</sup> The effect of publishing the accusation or rumor would probably be to place the plaintiff under suspicion of having committed the crime, not to cause most of the public to believe that the plaintiff was guilty, but proof of guilt is required to defend on grounds of truth. Arguably, the same should apply to other types of defamation that harm reputation by creating or intensifying the belief that the plaintiff may have committed serious wrongdoing.<sup>335</sup>

If these criticisms are sound, the breakdown or differentiation of defamatory meanings found in the English cases should not be adopted elsewhere. If it is rejected entirely, there would be at most two types of meaning to be drawn from a report that the plaintiff is a suspect or under investigation—(1) the plaintiff is guilty and (2) there is a probability or possibility that the plaintiff is guilty—and justification could only be proof of the plaintiff’s guilt. Alternatively, the English approach could be eschewed to the extent it differentiates the meanings of grounds for investigation, being a sus-

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<sup>334</sup> See *supra* text accompanying notes 4–5.

<sup>335</sup> In *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234 (H.L.), publication of a report meaning that the plaintiff is suspected of guilt is distinguished from publication of rumors and third party statements that the plaintiff is guilty on the ground that these repeat a statement that the plaintiff is guilty. When that statement is communicated, justification requires proof of guilt. *Id.* at 260 (Lord Reid), 274–75 (Lord Hodson), 283–84 (Lord Devlin).

pect and reasonable grounds for suspicion on account of the plaintiff's conduct, while accepting that a distinction is to be drawn between these meanings and the meaning that the plaintiff is guilty. If so, a publication that did not (on a reasonable interpretation) convey the meaning that the plaintiff was guilty could be justified without proving the plaintiff's guilt. However, it could not be justified simply by showing that the plaintiff was a suspect or under investigation. The relevant truth would be the existence of grounds for the investigation or identification of the plaintiff as a suspect. Those grounds would normally be found in conduct by the plaintiff that warranted the investigation or designation as a suspect.

The adoption by the English courts of different categories of defamatory meanings seems to have been calculated to relieve media defendants of the burden of proving the plaintiff's guilt when what was published did not mean that the plaintiff was guilty. It also potentially relieves defendants of the burden of proving conduct warranting suspicion by the plaintiff when what was published did not imply that the plaintiff engaged in such conduct, but only that there were circumstances causing or warranting an investigation.<sup>336</sup> While this could be criticized as overly protective of publishers at the expense of individuals and companies whose reputations are damaged, it can be defended as a development in defamation law that strikes a reasonable balance between affording a remedy for damage to the reputation of parties who committed no wrongdoing and protecting the media from liability for publishing "true" reports. It is consistent with defamation law's long-held understanding that it is the truth of the substance of the defamatory meanings, not the literal truth of the defendant's statement, that warrants protection from liability,<sup>337</sup> and it is precise in identifying the defamatory meanings whose truth must be pleaded and proved.

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<sup>336</sup> See *Jameel v. Times Newspapers Ltd. (Jameel II)*, [2004] EWCA (Civ) 983, [19], [2004] E.M.L.R. 31, 676.

<sup>337</sup> DOBBS, *supra* note 5, at 1150–53; GATLEY, *supra* note 2, at 274; SACK, *supra* note 190, § 3.8.

### III. IS TRUTH DIFFERENT UNDER THE FIRST AMENDMENT?

Under the common law, it is the defamatory meaning of the matter published by the defendant, not literal accuracy, which determines whether the defense of truth can prevail. Consequently, the literal truth of a report that the plaintiff is a suspect in a crime or under investigation for possible criminal activity is not the truth that excludes liability for defamation, as far as the common law is concerned. Could application of the First Amendment require a different result? Could truth for First Amendment purposes be the literal truth, or something other than the complete truth of the defamatory meanings conveyed by the report? If so, the First Amendment would protect against liability when the common law does not.

Supreme Court decisions on the application of the First Amendment to defamation liability clearly imply that the First Amendment's guarantees of freedom of speech and freedom of the press protect publication of truthful statements.<sup>338</sup> If the First Amendment requires substantial limitation of defamation liability for the publication of false statements, as held in *New York Times*,<sup>339</sup> *Curtis*,<sup>340</sup> *Gertz*,<sup>341</sup> and other cases, it must also limit liability for publication of true statements. *Garrison v. Louisiana*<sup>342</sup> foreclosed liability for true statements critical of public officials. A public official could have a defamation action only if the official established that the "utterance" was false.<sup>343</sup> Dictum in *Cox Broadcasting Corp. v. Cohn*<sup>344</sup> stated that the defense of truth is constitutionally required when the subject of the publication is a public official or public figure,<sup>345</sup> and a concurring opinion as-

<sup>338</sup> SMOLLA, *supra* note 190, §§ 5:5–5:10.

<sup>339</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964).

<sup>340</sup> *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 155 (1967).

<sup>341</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>342</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

<sup>343</sup> *Id.* *Garrison* involved the constitutionality of liability for criminal defamation, but the opinion of the Court clearly excludes civil liability for true statements also. *Id.* at 74. Under *New York Times Co. v. Sullivan*, a public official bringing a defamation action would also have to prove that the "utterance" was made with knowledge of or reckless disregard for its falsity. 376 U.S. at 279–83 (1964).

<sup>344</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>345</sup> *Id.* at 490.

serted that the First Amendment required the defense of truth in private figure cases also.<sup>346</sup> In *Philadelphia Newspapers, Inc. v. Hepps*,<sup>347</sup> the Supreme Court held that the First Amendment required the plaintiff in a defamation action to prove the falsity of the statement when the “speech” was on a matter of public concern. “To ensure that true speech on matters of public concern is not deterred,” the common law rule that the defendant bears the burden of proving a statement’s truth could no longer be applied when a plaintiff sought damages against a media defendant for “speech of public concern.”<sup>348</sup> For the Court, the legitimate interest allowing defamation liability under state law is “the compensation of individuals for the harm inflicted on them by defamatory falsehood.”<sup>349</sup> The First Amendment also excludes tort liability for publishing true statements on the basis of invasion of privacy, at least when the information was lawfully obtained and liability is not needed “to further a state interest of the highest order.”<sup>350</sup>

Supreme Court decisions thus provide a strong basis for a claim that the Constitution does not permit defamation liability for a true statement. The Court, however, has never decided whether there can be liability for publishing an accurate statement whose meanings or implications are not true. The decisions do not establish that the accuracy of a statement excludes liability for harm to reputation caused by false meanings reasonably found in the statement.<sup>351</sup> In *Milkovich v. Lorain Journal Co.*,<sup>352</sup> the Court ac-

<sup>346</sup> *Id.* at 499 (Powell, J., concurring).

<sup>347</sup> *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

<sup>348</sup> *Id.* at 776–77.

<sup>349</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

<sup>350</sup> *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

<sup>351</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513–18 (1991), can be interpreted to adopt “substantial truth” as a criterion of constitutional protection. See C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 269–73 (1993); Neil J. Kinkopf, Note, *Malice in Wonderland: Fictionalized Quotations and the Constitutionally Compelled Substantial Truth Doctrine*, 41 CASE W. RES. L. REV. 1271, 1280 (1991). This would exclude liability when there were minor inaccuracies but the substance, gist or “sting” of the defamatory charge was true. As discussed earlier, *supra* text accompanying notes 190–92, the “sting” in a report that a someone is a suspect or under investigation to ascertain whether he committed a crime is to induce in the report’s readers or viewers a suspicion that the person committed or may have committed the crime. It is

cepted that there could be defamation liability for false implications as well as explicit statements.<sup>353</sup>

There are a number of lower court decisions addressing aspects of this issue. Some of the cases involve the question of whether a public official or public figure can have a defamation action premised on false implications found in a publication whose individual statements of fact were accurate. Several courts, drawing on *Garrison v. Louisiana* and other Supreme Court decisions limiting liability to public officials and public figures, have held that there can be no liability in this situation.<sup>354</sup> Other courts have decided that an action can be maintained, provided the plaintiff proves the defendant's knowledge of or reckless disregard for the false defamatory meaning.<sup>355</sup> In a defamation action by a plaintiff who is not a public official or public figure, the *Gertz* requirement of fault<sup>356</sup> would require proof that the defendant was negligent in publishing material that the defendant knew or should have known carried a false implication.<sup>357</sup>

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therefore erroneous to consider a report to be "substantially true" just because it is correct that the person was a suspect or being investigated.

<sup>352</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

<sup>353</sup> *See Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 394 (8th Cir. 1996) (opinion by Justice Byron White after retirement from Supreme Court). *See generally* Dienes & Levine, *supra* note 351; Elizabeth Blanks Hindman, *When is the Truth not the Truth? Truth Telling and Libel by Implication*, 12 COMM. L. & POL'Y 341 (2007).

<sup>354</sup> *See Pietrafesa v. D.P.I., Inc.*, 757 P.2d 1113 (Colo. App. 1988) (public figures); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981) (public officials); *Mihalik v. Duprey*, 417 N.E.2d 1238 (Mass. App. Ct. 1981) (public officials); *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) (plurality opinion), *cert. denied*, 489 U.S. 1119 (1991) (public officials); *cf. Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985), *reh'g granted*, 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986) (report of girl's accusation of rape by public official not actionable because it was a "materially accurate report of historical fact").

<sup>355</sup> *See Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830 (Iowa 2007); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) (recognizing a claim of "defamation by implication" caused by juxtaposition of facts or omission of particular facts); *see also Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1317 (7th Cir. 1988) (holding that a public official could maintain an action for "defamation by innuendo"; liability was not limited to publication of explicit charges against the official).

<sup>356</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-48 (1964) (holding that the First Amendment prohibits liability without fault in private figure defamation cases).

<sup>357</sup> *See Johnson v. Columbia Broad. Sys., Inc.*, 10 F. Supp. 2d 1071, 1075 (D. Minn. 1998).

Perhaps the most relevant cases are those involving the purported privilege of “neutral reportage,” first recognized in *Edwards v. National Audubon Society, Inc.*<sup>358</sup> In *Edwards*, the Second Circuit held that “when 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.”<sup>359</sup> The rationale of the privilege is that

[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them. . . . What is newsworthy about such accusations is that they were made. . . . [T]he press may [not] be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.<sup>360</sup>

Cases subsequent to *Edwards* have extended the privilege to reports of charges made by prominent individuals, even some not considered “responsible,”<sup>361</sup> and by public officials,<sup>362</sup> when made by a party to an existing public controversy.

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<sup>358</sup> *Edwards v. Nat. Audubon Soc’y, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977). Decisions on the existence and extent of the neutral reportage privilege are collected in Jennifer J. Ho, Annotation, *Libel and Slander: Construction and Application of the Neutral Reportage Privilege*, 13 A.L.R.6th 111 (2006), DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE §§ 3:27–:33 (1993), and SACK, *supra* note 191, at § 7.3.2.4. See also Elder, *supra* note 47, at 655–723; Joseph A. Russomanno & Kyu Ho Youm, “Neutral Reportage” and Its Second Decade, *A Marketplace Perspective*, 3 COMM. L. & POL’Y 439 (1998); Kyu Ho Youm, *Ten Years of ‘Neutral Reportage’ Doctrine: US Approach to Defamatory Republication*, 9 J. MEDIA L. & PRAC. 23 (1988); Rodney A. Nelson, Comment, *Neutral Reportage: Making Sense of Edwards v. National Audubon Society, Inc.*, 20 CAP. U. L. REV. 471 (1991).

<sup>359</sup> *Edwards*, 556 F.2d at 120.

<sup>360</sup> *Id.*

<sup>361</sup> *Ward v. News Group Int’l, Ltd.*, 733 F. Supp. 83 (C.D. Cal. 1990) (accusations about actor); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1510 (D.S.C. 1989) (statements about plaintiff’s deceptive merchandising practices made by competitor and president of regional Better Business Bureau); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122–28 (N.D. Cal. 1984) (accusations by star basketball player against head coach of his team). The court in *In re United Press Int’l*, 106 B.R. 323

When the doctrine of neutral reportage is adopted and applied, the “truth” that excludes defamation liability is the fact that the charge against the plaintiff was made and accurately reported, not the truth of the charge. But the case law on neutral reportage does not establish this as a general First Amendment rule. Accurate reports of newsworthy accusations have been excluded from the privilege when not made by a prominent, responsible party to a current public controversy.<sup>363</sup> The protection of the neutral reportage privilege has also been denied when the accused party was not a public figure or public official.<sup>364</sup> Arguably, there is a general public interest in being informed about accusations pertaining to significant public issues and the press should have the freedom to accurately and neutrally report such accusations—regardless of whether the accuser or accused is a public figure or responsible, and even when there was not yet any substantial public controversy.<sup>365</sup> Courts, however, have not accepted this. The Second

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(D.D.C. 1989), went even further, extending neutral reportage privilege to a wire service report about a non-prominent individual’s accusation that the plaintiff was the “godfather” of underworld crime in Hawaii. *Id.* at 328–31; *see also* *Orr v. Lynch*, 401 N.Y.S.2d 897, 899 (App. Div. 1978), *aff’d*, 383 N.E.2d 562 (N.Y. 1978) (accusations against police officer by man wounded in exchange of gunfire). *Contra* *Fogus v. Capital Cities Media, Inc.*, 444 N.E.2d 1100, 1101 (Ill. App. Ct. 1982) (privilege inapplicable to accusations by arrested youths of abusive conduct by police); *DiSalle v. P.G. Publ’g Co.*, 544 A.2d 1345, 1354–63 (Pa. Super. Ct. 1988) (reported charge must be made by public figure or official); *cf.* *Martin v. Wilson Publ’g Co.*, 497 A.2d 322, 330 (R.I. 1985) (privilege did not extend to reports of rumors in community).

<sup>362</sup> *See* *April v. Reflector-Herald, Inc.*, 546 N.E. 2d 466, 470 (Ohio Ct. App. 1988) (report of sheriff’s statement that plaintiff was fired for stealing).

<sup>363</sup> *See* *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 67–70 (2d Cir. 1980); *Crane v. Ariz. Republic*, 729 F. Supp. 698, 710–11 (C.D. Cal. 1989), *vacated*, 972 F.2d 1511 (9th Cir. 1992) (privilege inapplicable when no public controversy prior to publication); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1390–91 (S.D.N.Y. 1981) (privilege inapplicable to report of statement elicited by investigative reporter without prior public controversy); *see also* cases cited *supra* note 361.

<sup>364</sup> *See* *Crane*, 729 F. Supp. at 710; *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696, 706–08 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999); *Owens v. CBS Inc.*, 527 N.E.2d 1296, 1308 (Ill. App. Ct. 1988). *Contra* *Reflector-Herald*, 546 N.E.2d at 469.

<sup>365</sup> *See* DOBBS, *supra* note 5, at 1165; James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 481–87 (1991); Keith C. Buell, Note, “Start Spreading the News”: *Why Republishing Material from “Disreputable” News Reports Must Be Constitutionally Protected*, 75 N.Y.U. L. REV. 966, 992–1003 (2000).

Circuit, after adopting the neutral reportage privilege in *Edwards*, declared:

The need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even for publishing statements believed to be untrue. Absent the qualifications set forth . . . in *Edwards*, all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past and made by persons known to be of scant reliability. And this, although without any such immunity, the media already enjoy the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact or opinion . . . . “A member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community.”<sup>366</sup>

In deciding that the neutral reportage privilege had no application to accusations against a private figure, regardless of the prominence of the party making the accusation, the Supreme Court of California reasoned that

although 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’s insistence on the need for balancing the First Amendment interest in promoting the broad dissemination of information relevant to public controversies against the reputation interests of private figures: “If the

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<sup>366</sup> *Cianci*, 639 F.2d at 69–70 (quoting THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 69 (1967)).



scope of the privilege were to include defamations of private figures, a neutral reportage route out of liability could emasculate the *Gertz* distinction between private and public figure plaintiffs.”

. . . .

Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public 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 . . . . “[A] reasonable degree of protection for a private individual’s reputation is essential to our system of ordered liberty.” The availability of a defamation action against the source of the falsehood may be an inadequate remedy if the source is insolvent or otherwise unable to respond in damages.<sup>367</sup>

A number of courts have rejected entirely the proposition that there is a First Amendment privilege of neutral reportage.<sup>368</sup> Most have done so in the belief that an absolute privilege to report newsworthy accusations would be inconsistent with the Supreme Court’s decisions on liability for defamation. The Court has permitted liability for defamation of a public official or public figure when the defendant’s knowledge of falsity or reckless disregard for

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<sup>367</sup> *Khawar*, 965 P.2d at 707 (1998) (quoting Ray Worthy Campbell, Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 871 (1983); *Brown v. Kelly Broad. Co.*, 771 P.2d 406, 426 (Cal. 1989)).

<sup>368</sup> See *Dickey v. CBS Inc.*, 583 F.2d 1221, 1225–26 (3d Cir. 1978); *Newell v. Field Enters., Inc.*, 415 N.E.2d 434, 451–52 (Ill. App. Ct. 1980); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886–87 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 517–18 (Mich. Ct. App. 1982), *appeal denied*, 417 Mich. 1050 (1983); *Hogan v. Herald Co.*, 446 N.Y.S.2d 836, 841–42 (N.Y. App. Div. 1982), *aff’d*, 444 N.E.2d 1002 (N.Y. 1982); *Norton v. Glenn*, 860 A.2d 48, 56–57 (Pa. 2004), *cert. denied*, 544 U.S. 956 (2005); *Janklow v. Viking Press*, 378 N.W.2d 875, 879–81 (S.D. 1985).

truth is proved.<sup>369</sup> Under *St. Amant v. Thompson*,<sup>370</sup> reckless disregard includes publication when the defendant has serious doubts about the truth of what is published.<sup>371</sup> While the defendant in a neutral reportage case might have accurately reported the accusation against the plaintiff, the defendant might have had serious doubts about the truth of the accusation or a belief that it was false. *Gertz v. Robert Welch, Inc.*,<sup>372</sup> the principal decision on liability when the plaintiff is not a public official or a public figure, is interpreted to allow considerable protection to the reputational interests of private figures and to require that First Amendment limitation of liability depend upon the plaintiff's status as a public or private person, not the newsworthiness of the defamatory statement.<sup>373</sup>

The view that recognition of a neutral reportage privilege is inconsistent with Supreme Court decisions may be wrong.<sup>374</sup> Cases subsequent to *Gertz*, especially *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>375</sup> and *Philadelphia Newspapers, Inc. v. Hepps*,<sup>376</sup> have made clear that First Amendment protection from defamation liability does depend on the public interest in the statement as well as the status of the defamed party. Accurate neutral reportage of a newsworthy but doubtful accusation does not involve the serious culpability the Supreme Court had in mind when it required proof of what it labelled "actual malice"<sup>377</sup> for li-

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<sup>369</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151–53 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>370</sup> *St. Amant v. Thompson*, 390 U.S. 727 (1968).

<sup>371</sup> *Id.* at 731.

<sup>372</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>373</sup> Several cases have so interpreted *St. Amant*, *Gertz* and other Supreme Court decisions. See, e.g., *Dickey*, 583 F.2d at 1225–26 (noting that the neutral reportage privilege stems from the newsworthiness of the statement published rather than the plaintiff's status as a public or private figure); *Newell*, 415 N.E.2d at 451–52; *Hogan*, 446 N.Y.S.2d at 842; *Norton*, 860 A.2d at 53–57.

<sup>374</sup> See Boasberg, *supra* note 365, at 470–74; Comm. on Commc'ns & Media Law, Assoc. of the Bar of the City of N.Y., *The Neutral Report Privilege*, 53 REC. 686, 715–19 (1998); Note, *Libel and the Reporting of Rumor*, 92 YALE L.J. 85, 98–104 (1982).

<sup>375</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>376</sup> *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

<sup>377</sup> In substance, publication with knowledge of falsity or reckless disregard for falsity. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–82 (1964).

ability to a public official or public figure.<sup>378</sup> However, the prediction of the Supreme Court of Pennsylvania<sup>379</sup> that the U.S. Supreme Court would not adopt the neutral reportage doctrine may well be correct.

Neutral reportage of a person's being a suspect in a crime or under investigation for wrongdoing is not entirely analogous to neutral reportage of accusations. There is a very substantial public interest in protection from crime and in effective investigation and prosecution of illegal activity, and the investigation in most cases is conducted by a law enforcement agency of the government, so a claim to First Amendment protection against defamation actions might have more weight than when accusations are reported. However, the two situations are sufficiently similar for the law on neutral reportage of accusations to be applied to reports identifying a person as a suspect or object of investigation. In both, the plaintiff seeks a remedy for harm to reputation caused by the false suspicion of wrongdoing that results from the media report, and the defendant's claim to First Amendment protection rests upon the truth of the report and the public interest in being informed.

If the analogy is accepted, under the current state of the case law the First Amendment does not protect media reports that a person is a suspect or under investigation on the basis of the truth of the report. Liability may arise from such reports on account of the false defamatory implications they convey. Possibly there is a special area of First Amendment protection when there is already a public controversy about the investigation or responsibility for the crime, as in the *Hatfill* case,<sup>380</sup> or when the plaintiff is a public official or (less persuasively) a public figure, as with Michael Jackson.<sup>381</sup> Otherwise, liability is limited only by the requirements that fault<sup>382</sup> and the falsity of the defamatory meaning be proved.

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<sup>378</sup> See Dienes & Levine, *supra* note 351, at 252–54, 303–04, 320 (liability only for “calculated falsehood”).

<sup>379</sup> Norton v. Glenn, 860 A.2d 48, 57 (Pa. 2004).

<sup>380</sup> See *supra* text accompanying notes 108–80.

<sup>381</sup> See *supra* text accompanying notes 16–21.

<sup>382</sup> See *supra* text accompanying notes 356–57. Knowing falsehood or reckless disregard for truth is required when the plaintiff is a public figure or public official. See Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

The Supreme Court may eventually be persuaded that the First Amendment does protect an accurate report that a person is a suspect or under investigation, even when the reporter or publisher did not believe the person was guilty of anything. That may well be the correct resolution of the issue. However, until the Supreme Court does so decide, the operating assumption should be that the First Amendment does not categorically protect such reports and that the truth that excludes defamation liability continues to be the truth of the defamatory meaning conveyed by the report.<sup>383</sup>

#### REVIEW AND CONCLUSIONS

If a media report conveys the meaning that a person is suspected of committing a serious crime, or is being investigated to determine whether criminal acts were committed, the report is defamatory. The report is defamatory because of its natural tendency to cause its recipients to believe that the subject of the report may have committed a crime, and thus to damage the person's reputation. A report is usually defamatory also when its meaning is that a person is suspected of or under investigation for assisting the commission of serious criminal acts by others—for example, assisting the commission of fraud or providing financial support to persons involved in terrorism. The damage to personal or business reputation caused by such reports may have serious consequences. An individual may lose employment, or an opportunity for employment or appointment to office, even if the individual is cleared of all wrongdoing. A company or charitable organization may incur a large financial loss that cannot be recouped.

As reports of this nature are defamatory, the person or entity who is the subject of the report may bring a defamation action against the report's publisher and author. However, a defamation action cannot succeed if the report's publication was protected by common law privilege or First Amendment rules on defamation liability, and it cannot succeed if liability is excluded by the truth of

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<sup>383</sup> See Elder, *supra* note 47 (arguing at length that under the Supreme Court's decisions, determinations of falsity and fault are to be based on whether there is "underlying falsity," not accuracy or inaccuracy in the reportage of defamatory statements).

the report. Truth is a complete defense (“justification”) to any action for libel or slander.

The central concern of this article is: in what sense must the report be true for its publisher to be protected from defamation liability? A defendant would contend that if the report was accurate in its meaning that the person was a suspect or under investigation, the report is true and therefore there is no liability. A plaintiff would contend that the truth that excludes liability is the truth of the defamatory meaning, and that requires proof that the plaintiff was guilty of what the plaintiff was reportedly being investigated for or suspected of. A court might reject both contentions and instead link truth to proof of certain meanings the report could be found to convey, including the meaning that the plaintiff had engaged in conduct warranting the suspicion or investigation. The First Amendment might be interpreted to protect true reports from liability in a way that the common law does not. The issue of “What is truth?” is closely connected to the question of what defamatory meaning or meanings the report conveyed to its readers or viewers.<sup>384</sup>

The defense of truth did not gain acceptance in the common law because of a policy of encouraging the exposure of wrongful conduct or solicitude for freedom of speech. The modern rationale for the defense is that the plaintiff does not deserve to recover damages when the matter published by the defendant was correct about the plaintiff’s conduct or character.<sup>385</sup> “[T]he truth is an answer to the action . . . because it shews that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.”<sup>386</sup> This rationale sup-

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<sup>384</sup> See GATLEY, *supra* note 2, at 274–75.

<sup>385</sup> See HARPER, JAMES & GRAY, *supra* note 4, § 5.20 at 189; FREDERICK POLLOCK, THE LAW OF TORTS 266–67 (13th ed. 1929).

<sup>386</sup> *M’Pherson v. Daniels*, 10 B. & C. 263, 272, 109 Eng. Rep. 448, 451 (K.B. 1829) (Littledale, J.). This was endorsed in *Watkin v. Hall*, L.R. 3 Q.B. 396, 400–01 (Q.B. 1868) (Blackburn, J.), and has been quoted with approval in the House of Lords and American courts. See *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127, 192 (Lord Nicholls of Birkenhead); *Plato Films Ltd. v. Speidel*, [1961] A.C. 1090, 1146 (H.L.) (Lord Morris of Borth-y-Gest); *Savannah News-Press, Inc. v. Hartridge*, 138 S.E.2d 173, 176 (Ga. Ct. App. 1964); *Oles v. Pittsburg Times*, 2 Pa. Super. 130, 143 (1896); *see also*

ports the contention that the plaintiff's guilt must be proved to justify a publication whose meaning is that the plaintiff is or should be suspected of wrongdoing. An innocent plaintiff would not be attempting to "recover damages in respect of an injury to a character [reputation] which he either does not, or ought not, to possess."<sup>387</sup> An innocent plaintiff is not undeserving of recovery for harm to reputation caused by the defendant, except perhaps when the plaintiff engaged in improper conduct that warranted a suspicion that the plaintiff was guilty of a wrongful act.

The policies of the First Amendment, which influence decisions on tort liability even when it is not decided that liability would violate the Amendment, are of course very different. It is clear from *New York Times Co. v. Sullivan*, *Philadelphia Newspapers, Inc. v. Hepps* and other defamation cases that the First Amendment is interpreted to encourage truthful and even only arguably truthful media publication on matters of public interest and to restrain deterrents to the publication of information thought to be true. This is achieved by applying the First Amendment so as to give substantial protection against risks of liability. Media reporting portraying individuals and organizations as suspects in the commission of terrorist acts or giving financial support to terrorists presents the most acute conflict between defamation law's object of providing a remedy for undeserved harm to reputation and the interests of the public and media in contemporary news reportage on matters of great public concern.

In the United States and elsewhere, courts appear to be very reluctant to have the media risk defamation liability for publishing a report that a person is a suspect or under investigation whenever the person is not actually guilty. In the reported cases, most of the

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Curtis Publ'g Co. v. Butts, 388 U.S. 130, 151 (1967); *Castle v. Houston*, 19 Kan. 417, 424–25 (1877). For other possible rationales, see ELDREDGE, *supra* note 4, at 329–31; Bertram Harnett & John V. Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425, 432–37 (1949); Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 54–58 (1931).

<sup>387</sup> Cf. *Oles v. Pittsburg Times*, 2 Pa. Super. 130 (1896) (newspaper was held liable for accurately reporting that the plaintiff's neighbors believed she practiced witchcraft and caused a boy to be "possessed of devils.").

courts have found some way to avoid the conclusion that the defendant is liable when the plaintiff was not guilty of wrongdoing.

In some American cases, courts have ruled that the defendant was not liable for reporting that the plaintiff was being investigated or suspected because it was true that the plaintiff was being investigated or suspected. These decisions are simplistic and erroneous. They fail to recognize that it is the truth of the defamatory meanings of a statement, not literal truth, that excludes liability. They are also inconsistent with the well-established rule that when a third party's statement is repeated, accuracy in communicating the statement does not show truth. The truth of the statement's substance must be shown. In other U.S. cases, courts have examined the meaning of what the defendant published to the extent of determining whether it meant that the plaintiff was guilty, or only that the plaintiff was under suspicion or investigation. If the meaning was that the plaintiff was guilty, proof of guilt was required to show truth. But when the meaning was only that the plaintiff was a suspect or being investigated, these courts have allowed defendants to prevail on a showing that it was true that the plaintiff was a suspect or being investigated as the defendant had reported. There are a few better-reasoned decisions in American courts that connect the issue of truth to the defamatory meanings of what was published and the harm to reputation that resulted.

The English courts—which have addressed this subject at the highest level, the House of Lords—have developed an approach that requires trial and appellate judges to decide what specific defamatory meanings a report can be found to convey and whether the defendant has alleged or proved facts showing that a specific meaning was true. At least three distinct meanings might be found in a media report identifying the plaintiff as a suspect or target of an investigation: (1) the plaintiff has committed a wrongful act, (2) there are reasonable grounds to suspect that the plaintiff committed a wrongful act (with the implication of conduct by the plaintiff that gave rise to a reasonable suspicion), and (3) there are grounds to investigate whether the plaintiff committed a wrongful act. That the plaintiff is a suspect might be a fourth type of defamatory

meaning.<sup>388</sup> The newspaper articles involved in the reported cases have usually been interpreted not to convey the meaning that the plaintiff was guilty. As a consequence, the defendant did not have to plead and prove that the plaintiff was guilty in order to prevail on the ground of truth. The articles usually were, however, found to convey the meaning that there were reasonable grounds to suspect that the plaintiff was guilty. This meaning could be “justified” only by pleading and proving that the plaintiff had so conducted himself (or herself or itself) as to create reasonable grounds for suspicion.

The English decisions are sophisticated and consistent with established principles of defamation law. They may, however, go too far in drawing narrow distinctions among defamatory meanings that differ in degree rather than kind. An American court would be well advised to be guided by the English and Commonwealth case law on the major points but avoid some of the subsidiary complexities. At a minimum, American courts should understand from the case law in jurisdictions outside the United States, as well as the case law within, that it is necessary to identify the specific defamatory meanings conveyed by the defendant’s report and that the defense of truth is established by proof that the defamatory meanings are true, not by showing that the plaintiff was investigated for illegal activity or regarded as a suspect. The approach adopted by the English courts does not fully vindicate innocent plaintiffs’ claims to a remedy for damage to reputation caused by false suspicions of wrongdoing, and it does not accept media defendants’ claims to be free of liability when a report that the plaintiff was a suspect or being investigated was correct.<sup>389</sup> It does, however, strike a reasonable balance between the two.

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<sup>388</sup> If it is decided by the court that a report could be found to have a particular meaning, or that the pleadings and evidence produced by the defendant are sufficient to show justification, a jury would determine whether the report did convey the meaning and, if so, whether the meaning was true. See GATLEY, *supra* note 2, at 1022–26, 1029.

<sup>389</sup> See, however, the decision of the House of Lords in the *Jameel* litigation that is discussed *supra* in the text accompanying notes 194–97. Extending further the qualified privilege invented in *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.), for responsible journalism reporting information of public interest, the House held that the privilege applied to the *Wall Street Journal* article and the *Journal* was not liable for publishing it. *Jameel (Mohammed) v. Wall St. Journal Europe Sprl.*, [2007] 1 A.C. 359



Whether the First Amendment will be interpreted to preclude liability when the description of the plaintiff as a suspect or under investigation was correct is an open question. Supreme Court decisions do support the argument that the First Amendment must protect true publications from liability, and it seems incongruous to allow liability for an accurate report when the Supreme Court has decided that the First Amendment requires substantial restrictions on defamation liability for reports that are not true. However, the Supreme Court has never decided that a defamation action cannot be based on false implications in an accurate statement. The decisions of the lower courts relevant to this issue are divided. The rejection of a “neutral reportage” privilege by some courts and the limitations within which the privilege has been confined by other courts suggest that “neutral reportage” of law enforcement investigations and investigators’ conclusions enjoys no specific First Amendment protection from defamation actions.

If reporting that a person is a suspect or under investigation is not protected by either the common law defense of truth or a First Amendment freedom to publish true statements, the risk of defamation liability is nevertheless low in the United States. One reason is that an accurate report of a statement by an official of a governmental law enforcement agency, or the details or conclusions of an investigation conducted by a governmental agency, may be protected from liability by the common law privilege to report official proceedings (the “public proceedings” or “fair report” privilege). If this privilege applies, “truth” is the accuracy of the report. When the report is an accurate, non-misleading account of governmental actions or records, it qualifies as true for purposes of the privilege even if what it conveys about the plaintiff is not true. If the privilege applies to reports of statements by police officers or prosecutors, a newspaper’s correctly reporting that the police had named the plaintiff as a target of a criminal investigation or as a suspect in a crime would be privileged even though the plaintiff had no involvement in that crime or any similar criminal act.<sup>390</sup>

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(H.L.). Privilege protects a publisher of defamatory matter from liability when the defense of truth does not.

<sup>390</sup> See, e.g., *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990) (report of police investigation initiated because of allegations involving plaintiff); *Howard v.*

A second reason why the risk of liability is low is that no public official or public figure who is defamed in that capacity can recover damages without establishing that the defendant published the defamatory matter with knowledge of its falsity or reckless disregard for truth or falsity. Reckless disregard includes publication of a statement when the defendant has serious doubts about its truth. This gives some support to an argument that reporting that a person is a suspect or the target of an investigation is in reckless disregard of truth when the reporter or publisher does not believe the person committed any wrongful act. However, the level of culpability intended by the requirement of knowing or reckless falsehood, which the Supreme Court characterized as “actual malice,”<sup>391</sup> is not present when the report is accurate. When the “actual malice” requirement has been applied, as in the *Jackson, Lawrence* and *Hatfill* cases, courts have ruled that the defendants are not liable.

When the plaintiff is not classified as a public official or public figure, the *Gertz* requirement of no liability without fault applies. Whether a media defendant could be found to be at fault when it

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Oakland Tribune, 245 Cal. Rptr. 449 (Cal. Ct. App. 1988) (report that plaintiffs were under investigation for misuse of public funds); *Turnbull v. Herald Co.*, 459 S.W.2d 516 (Mo. Ct. App. 1970) (report that plaintiff was suspected of burglary and receiving stolen goods by police); *Kilgore v. Koen*, 288 P. 192 (Or. 1930) (report that plaintiff was suspected of thefts by sheriff’s officers). The extent and application of this privilege is a large subject outside the scope of this article. Whether a claim of privilege could succeed when it is reported that someone has been subject to investigation or named as a suspect would depend upon whether the privilege would be extended beyond reports of official acts, such as arrest and prosecution, to generally include reports of actions by government officials or reports of statements made by them; whether the privilege would be held to include reports of information that was not generally available to the public, such as information provided by a government official to an individual reporter, or the contents of investigative reports that had not been released to the public or the press; and whether the privilege would be held to protect reports of statements from a government record or official that the reporter or publisher believed were false. Authority on these points is divided. See generally ELDER, *supra* note 358, §§ 3:1–:26; ELDREDGE, *supra* note 4, at 419–38; HARPER, JAMES & GRAY, *supra* note 4, § 5.24; SMOLLA, *supra* note 190, §§ 8:66–8:78. Reasons why the privilege may not apply are identified in Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237, 238–40, 243, 253–55 (2005).

<sup>391</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

was correct in reporting that the plaintiff was under investigation or suspected of unlawful conduct by law enforcement personnel is not explored in the cases discussed in this article. Normally, fault would be excluded by the accuracy of the report, or reasonable care for accuracy. However, it could be contended that in view of the harm to the plaintiff that would foreseeably be caused by publication of the report, the defendant reasonably should not have published it without at least verifying that there were substantial grounds for the investigation of the plaintiff or the description of the plaintiff as a suspect and giving some consideration to whether it was in the public interest to publish the report.

There have been some published expressions of concern, including Judge Wilkinson's dissent in the *Hatfill* case,<sup>392</sup> that potential liability may have chilling effects on the reporting of important news.<sup>393</sup> However, the risk of liability seems to have had little deterrent effect on the American news media. Reports that a person is a suspect in a crime, or that an individual or company is being investigated for unlawful conduct, are published all the time, as are reports of unverified accusations and even rumors.<sup>394</sup> Only a few of the individuals, companies and organizations named in these reports have the determination and financial resources to litigate a defamation claim against a media defendant. Some have done so, usually without success. More will do so in the future, probably also without much success. The examples of Richard Jewell, Steven Hatfill, Michael Jackson, the Global Relief Foundation and less prominent parties, such as Emerick Jacobs and Alonzo Lawrence, offer little hope to innocent or presumptively innocent plaintiffs. Even when it is accepted that the defendant's publication caused or increased damage to the reputation of an innocent party, courts in the United States tend to find grounds for holding that the defendant is not liable.<sup>395</sup>

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<sup>392</sup> See *supra* text accompanying notes 108–80.

<sup>393</sup> *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. App. 1997); SACK, *supra* note 191, § 7.3.2.3; Donnellan & Peacock, *supra* note 390, at 244.

<sup>394</sup> See Buell, *supra* note 365, at 986–91. Judge Wilkinson's dissent in *Hatfill* mentioned "daily media reports on criminal activity" that identified suspects. *Hatfill v. N.Y. Times*, 427 F.3d 253, 259 (4th Cir. 2005) (Wilkinson, J., dissenting).

<sup>395</sup> See Donnellan & Peacock, *supra* note 390 (the only substantial work on this topic published previously).

That result might be correct, but the reasons given for it are typically incorrect or incomplete. As far as defamation law is concerned, a publication is not “true” because it accurately reports the conclusions of third parties or otherwise is literally accurate. What is “true” for First Amendment purposes may be different. If the public interest and freedom of the press require that there be no defamation liability for correctly informing the public that someone is a suspect or under investigation, this should be squarely grounded in a rule that the First Amendment protects true reports, not achieved by loose or inept applications of defamation law.<sup>396</sup>

An award of damages is a rather poor remedy for harm to reputation, but it is the only judicial remedy available.<sup>397</sup> If people identified as suspects or investigation targets cannot recover damages or otherwise achieve vindication in a defamation action, their only remedy is to communicate the truth, as Abraham Lincoln suggested.<sup>398</sup> But communicating the truth will not vindicate the defamed person, or the publisher of the defamation, unless there is an accurate understanding of what “truth” really is.

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<sup>396</sup> Donnellan & Peacock, *supra* note 390, argue for recognition of a First Amendment rule barring liability for accurate reports of government investigations and accusations. Elder, *supra* note 47, argues against interpretations of the First Amendment and the common law that would immunize accurate reports of defamatory matter irrespective of its falsity and any fault in publishing it.

<sup>397</sup> American courts do not grant injunctions against defamation or order retraction of false statements, and there is no practice of granting declaratory judgments on the truth or falsity of a defamatory statement. See DOBBS, *supra* note 5, at 1193–96; SACK, *supra* note 191, § 10.6; SMOLLA, *supra* note 190, §§ 9:85–:93.

<sup>398</sup> See *supra* text accompanying note 1.