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The Developing Law of Editorial Judgment

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Randall P. Bezanson*

The Developing Law of Editorial Judgment

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I. INTRODUCTION

State and federal courts are today engaged in the serious, some would say dangerous, business of defining editorial judgment as applied to claims of freedom of the press. Ironically, perhaps, this undertaking was constitutionally preordained by *New York Times Co. v. Sullivan*[1] and its successors, most notably *Gertz v. Welch*[2] and *Dun & Bradstreet v. Greenmoss Builders*.[3] It simply wouldn't do, in the long run, to recognize constitutional privileges for publications by the press without confronting the meaning of "the press." Defining "press," of course, is a matter that the Supreme Court has studiously, even adamantly, avoided.[4] But the Court has been able to do so only in terms, for the underlying problem of the scope of the constitutional privileges conferred on the press could not be escaped.[5] The categories or genre

1. 376 U.S. 254 (1964).
2. 418 U.S. 323 (1974).
3. 472 U.S. 749 (1985).
4. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring).
5. For a time, the meaning of the Press Clause, and the meaning of the "press," spawned considerable scholarly debate, much of it generated by Justice Stewart's article, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975). *See, e.g.*, Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980); Randall P. Bezan-

of expression presumptively excluded in conversation about the press can not be easily consigned to First Amendment oblivion: fiction; satire; parody; advertising; propaganda; information distribution; history; philosophy; aesthetic expression; and so on.

Once the genre genie is let out of the bottle, there is no putting it back. So while the Court's adamance about not defining the press continues, the definitional problem is not escaped. It is simply redefined, addressed in a less direct manner. The question being pressed in courts throughout the country today is not the definitional boundaries of the press, or "journalism," but the meaning of the press's central instrument, editorial judgment, and its main claim to constitutional protection, editorial freedom.

My purpose in this article is to catalogue, organize, and assess the rapidly growing body of case law, both federal and state, in which claims of editorial freedom and editorial judgment, clothed in press- or journalism-like garb, are being made. My purpose is largely descriptive, though my account will also prove, I hope, to be instructive. I have chosen to organize the cases and discussion around four separate, though often overlapping, approaches used by courts in defining, protecting, and limiting editorial judgment as an operative legal concept. The four approaches on the basis of which determinations about editorial judgment are made are: (a) subjective intention; (b) objective description (genre); (c) purpose; and (d) process.

Before turning to the cases and the approaches they reflect, I will briefly discuss in Part II some historical and theoretical ideas bearing on "Freedom of the Press." Set against this background, I will turn in Parts III—VI to a discussion of the cases and the varying approaches to editorial judgment that are now found in judicial opinions across a broad range of cases. My purpose will be to identify and critically examine each approach, its relation to the constitutional idea of freedom of the press, and to explore the relationships among the approaches.

As it turns out, the four approaches I will develop are highly interdependent; they are not competing but are instead complementary. Moreover, viewed in combination the approaches reflect two interesting and important conclusions. First, despite the remarkable range of settings and legal claims in which they are employed, the approaches serve to unify free press jurisprudence around the central question of

son, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Melville Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); William Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

editorial judgment, thus giving some intellectual coherence to the fast-growing body of "press law." Second, each of the several approaches is a different manifestation, or reflection, of a single coherent idea of the press's editorial judgment and its relationship to freedom of the press under the First Amendment, an idea grounded in "purpose" and served by "process."

II. BACKGROUND ON FREEDOM OF THE PRESS AND EDITORIAL JUDGMENTS CONCERNING NEWS[6]

> [T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name but a few. In contrast, the Free Press Clause extends protection to an institution.[7]

Editorial judgment concerns speech by the press. The press is an institutional speaker.[8] This conception of the press was understood in a rough and structural way at the time the First Amendment was ratified, for the press was even then seen as playing a systematic role in democratic society.[9] It has become more obvious with the emergence of the modern news organization beginning in the 19th Century.[10] The institutional quality of the press reflects, in part, the typical process of judgment that accompanies the press's speech, which is governed by the ethic of disseminating material deemed important for a public readership and selected by a process of reason and audience-oriented (and thus not strictly personal) judgment.[11] For the press, there can be, *by definition*, no group of owners or individuals within the organization whose own personal speech is being expressed through the publication.

Understanding the press as an institutional speaker for purposes of the First Amendment necessarily leads one to inquire into the na-

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6. The material in this section draws heavily on part of a previously published article: Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 806-15 (1995).
7. Stewart, *supra* note 5, at 633.
8. *See* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 806 (1995).
9. *See* Stewart, *supra* note 5. For scholarship on the meaning and function of the press under the First Amendment, see RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA: EXACTIONS ON THE PRESS FROM COLONIAL TIMES TO THE PRESENT (1994) [hereinafter BEZANSON, TAXES ON KNOWLEDGE IN AMERICA]; LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985); Anderson, *supra* note 5; Bezanson, *The New Free Press Guarantee*, *supra* note 5; Blasi, *supra* note 5.
10. For a splendid account of the emergence of the American newspaper, see MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS (1978).
11. *See* Bezanson, *Institutional Speech*, *supra* note 8.

ture of its constitutional protection.[12] Does that protection have the same character as the protection given individual speech, or is it different? Does the "institutional" character of press speech imply different standards or measures of First Amendment scrutiny, even if the objective is to achieve the same ultimate measure of protection?

The First Amendment, of course, mentions both speech and press. The differing origins of expression by individuals and by the press was thus deemed important enough to warrant separate mention. But in separately recognizing freedom of the press, the framers do not appear to have held a radically different view of the press's *speech* (as opposed to its identity as a speaker) from that held for individual speech.[13] On the surface of the constitutional language, it does not seem that the press was to be utterly free in its speech any more than was the individual. It is notable in this connection that many of the early State provisions for freedom of the press included a proviso that the press, like the individual, was to be responsible for abuse of its freedom.[14] And while the Framers clearly stated in the debates and writings surrounding the ratification of the First Amendment that the press served important and unique functions in organized society—"checking" functions, as Vincent Blasi has expressed it[15]—those functions were not considered unique to the press's speech, for they also characterize individual speech.[16]

More importantly, those functions did not imply a radically different conceptual framework for the development and expression of ideas and information in the press than that applicable to individual speech. Indeed, to the contrary, the same process of intentional, independent, and free-willed judgment leading to the formation and expression of one's own beliefs, values, and ideas that is protected for individual

12. For a broad-ranging and insightful discussion of the role of the press, from the perspective of political philosophy and ideology, see C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998). For a related examination of the impact of markets and economic forces on media content, see C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311 (1997). Other works on these subjects include the groundbreaking book by FRED SIEBERT ET AL., FOUR THEORIES OF THE PRESS (1956). *See also* J. HERBERT ALTSCHULL, AGENTS OF POWER: THE MEDIA AND PUBLIC POLICY (1984); MICHAEL SCHUDSON, THE POWER OF NEWS (1995); PAMELA SHOEMAKER & STEPHEN REESE, MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT (2d ed. 1996); LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS (John Nerone, ed., U. Ill. 1995); Steven J. Helle, *Libertarianism and Neoliberalism in First Amendment Law*, *in* LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS (J. Nerone, ed., U. Ill. 1995).
13. *See* LEVY, *supra* note 9; Anderson, *supra* note 5; Blasi, *supra* note 5.
14. *See* LEVY, *supra* note 9; BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9.
15. *See* Blasi, *supra* note 5; *see also* Lillian BeVier, *An Informed Public, an Informing Press: The Search for A Constitutional Principle*, 68 CAL. L. REV. 482 (1980).
16. *See* Blasi, *supra* note 5.

speech under the free speech guarantee, is one that, by analogy, seems also to fit the independent, non-self-regarding, reasoned process of judgment that best describes the press in the performance of its classic checking and informing functions. The institutional analogue to the exercise of communicative free will by individuals under the speech guarantee is the exercise of editorial judgment by the press.[17]

The press's constitutional protection, in other words, can be described as protection for an institutional equivalent of a "speaker" under the First Amendment. To put the point in the negative, the press's constitutional protection is not granted to the press as an institution itself, nor is it conferred on the press's speech. Instead, it is conferred on the press as a distinct constitutional speaker, *when the press is acting as a constitutional speaker*. The press as an institution is not immunized generally, but only in its activities as a speaker (or, presumably, in any other dimensions that prove necessary to preserving its capacity to speak).[18] Likewise, all "speech" by the press—all words, for example, that the press publishes—is not protected, but rather only that speech that is a product of the press's speaking.[19] The advertising sections of a newspaper, for example, would not be directly[20] protected as speech entitled to First Amendment protection for freedom of the press.

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17. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974). This is necessarily implicit in the actual malice standard applied to the press in defamation cases under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Randall Bezanson, *Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press: Observations on* Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 72 IOWA L. REV. 1359 (1987) [hereinafter Bezanson, *Political Agnosticism*].
18. Examples might include the privacy of conversations and communications that are part of the process of forming judgments about whether and what to publish, or freedom from otherwise neutral regulatory requirements that would sacrifice the press's independence from (or non-dependence on) the public and private centers of power and influence that the press is designed to check.
19. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).
20. As noted in note 18 *supra*, the advertising sections of a newspaper might warrant some measure of indirect protection to the extent that a particular regulation of advertisements might compromise the press's capacity to speak independently. Freedom from some forms of knowledge taxation, such as special or confiscatory taxes on advertisements, would be an example of this. Not surprisingly, the history of the struggle against knowledge taxation in England bears this out, as it was never thought that all taxes on the press, and especially taxes on advertising, violated the press freedom, but certain forms of differential or censorial taxes, even though not confiscatory, were understood to violate principles of press freedom because they threatened the independence of the press, or certain quarters of it, from government. These and other examples from the taxation setting are discussed fully in RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9.

What, then, are the criteria by which we can judge whether and when the press is "speaking" in a constitutionally protected way? The analogy to individual speech suggests that the press's claim to freedom is strongest when its speech is a product of a *process of judgment* that is independent, audience oriented, and grounded in a reasoned effort to publish information (typically current or currently relevant) judged useful and important for the maintenance of freedom in a self-governing society.[21]

The judgment process has three critical features. First, it must be independent, free of forces from government or from outside of government that compromise the free independent judgment of those assigned the task of writing and composing the publication.

Second, the requisite judgment must be impersonal, not in the sense that it cannot reflect views of the publisher, but rather in the sense that it must reflect a judgment that such views are important for an audience. The standards against which the judgments of individual reporters, editors, and publishers are made must be dispassionate, reasoned, and directed toward the public function the institution serves, and not couched narrowly in terms of the personal prejudices and preferences of the individual making the editorial decision, or the majority of those so authorized. In this respect the press is an institutional speaker speaking for the institution—the newspaper or network or magazine as an entity—and not for the individuals who comprise it.

Finally, the judgment must be made in the service of the public informing and checking functions to which the press, as a speaker under the First Amendment, is devoted. The question to be asked by an editor in the editorial process is not, "Do *I* like this story?" but rather, "Does this story, in my best judgment, serve the needs and interests of a public audience, especially as it relates to the information and ideas upon which members of the public audience will conduct their public and private lives?" The criteria, in other words, are not only extrinsic to the individual decision maker, but are related to the general purpose or function to be served.

The press's claim to freedom rests on the character of the judgmental process that leads to publication of speech.[22] In defining what the press is, therefore, the most important quality is editorial judgment, and the most important freedom is the freedom accorded that judgment. The Supreme Court has expressed this view explicitly on many occasions.[23] In *CBS v. DNC* for example, the Court put it pithily but

21. A fuller elaboration can be found in Bezanson, *Political Agnosticism, supra* note 17; and Randall P. Bezanson, Herbert v. Lando, *Editorial Judgment, and Freedom of the Press: An Essay*, 1978 U. ILL. L. F. 605.
22. *See supra* note 18.
23. *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

well when it said that under the First Amendment "[e]diting is what editors are for."[24] In *Miami Herald Publishing Company v. Tornillo*, the Court further stated:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.[25]

The Supreme Court has also implicitly recognized that expressive activities of the press that are not the product of editorial judgment are not protected under the press guarantee.[26] For example, the Court has sustained government regulation of the content and composition of newspaper want-ad sections.[27] Decisions about such matters as want-ad column headings, the Court held, are of a different character than the independent, public-regarding (as opposed to merely public-satisfying) choices about information relevant to the conduct of public and private affairs in a self-governing and free society. Few newspapers, it might be said, would describe such "business" decisions, which are not ordinarily made by the "news" side of the paper, as editorial decisions.

The central importance of editorial judgment is also reflected in the actual malice standard applied by the Supreme Court in libel cases. The essence of the actual malice inquiry is whether a fact was published maliciously with foreknowledge of its falsity or despite serious doubts actually entertained as to its truth.[28] The question, in other words, is whether the speech at issue was a premeditated lie. In placing this limitation on press freedom, the Court has effectively marked out a central feature of the editorial judgment required by the First Amendment, for the publication (as truth) of a premeditated lie reflects neither a impersonal (audience-oriented) nor a reasoned process of judgment and fails also to qualify as a decision that is governed by the standard of information useful to the public in the conduct of its private and personal affairs in a self-governing and free society.

* * *

24. *Id.* at 124.
25. Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974).
26. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
27. *See Pittsburgh Press Co.*, 413 U.S. 376.
28. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

The *Sullivan* and *Pittsburgh Press*[29] cases serve broadly to mark the boundaries of selection judgments protected as editorial judgment under the free press guarantee of the First Amendment. Those judgments must be grounded on a communicative purpose and must reflect choice of material in light of the *institution's own* communicative purposes, not simply the republication, as such, of another's speech. The press's ends, of course, transcend *and transform* any particular item of speech that is published, for the fact of publication in the press itself lends new significance to the particular material included in the publication—significance in relation to importance, relevance, and veracity. Editorial judgments by the press must reflect a decision made in light of the specific content being selected for publication and its relation to the communicative purposes of the publication as a whole.

The selection of an AP wire article, a reporter's story, a commentator for the opinion page, or an editorial position generally reflects a specific decision about the material chosen for publication. In contrast, the decisions to include a two-page "advertorial supplement" paid for and written by an advertiser, or to run an advertisement, while communicative, generally do not reflect specific decisions about the value or veracity of the contents of the supplement or ad; they reflect no intention, in other words, to adopt the advertorial or the ad as the publisher's own speech, thus transforming it into the institution's own choice of material that serves its public communicative purposes. The same might be said of the cable operator's judgments about channels to carry on its cable system: Such judgments, while communicative, are neither specific to the material selected nor transformative. This seems to be the very kind of conclusion the Supreme Court reached in the *Turner Broadcasting*[30] case, where the First Amendment protection afforded such selection judgments was, at best, modest, and where a principal issue debated in the opinions of the Court was whether the speech on the cable channel was more appropriately that of the channel architect and the programmers who originated the content rather than that of the cable operator whose selections were wholesale and nontransformative.[31]

* * *

In the sections that follow we will turn, through these and many other cases, to the many ways in which state and federal courts are addressing the editorial judgment question and, in the course of doing so, are reflecting attributes of intention, genre, purpose, or process

29. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).
30. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (Turner II); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).
31. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (Turner II); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

that characterize the press as an institutional speaker. As we will see, the courts are seeing the question of editorial judgment through the four "prisms" of subjective intention, objective description (genre), purpose, and process. Each of these prisms will be explored in Parts III-VI, which follow.

III. STAYING WITHIN THE BOUNDARIES OF JOURNALISM: JUDGING EDITORIAL JUDGMENT BY SUBJECTIVE INTENT

Courts often define editorial judgment in terms of the subjective state of mind of the speaker.[32] This is particularly true in libel and defamation cases, in which the speaker's state of mind regarding the truth or falsity of the speech becomes determinative of editorial freedom under the First Amendment. It is to the libel cases and to others that focus on state of mind that we shall first turn, asking what the malice and negligence inquiries reveal about editorial judgment—and discovering in the process how very little light they shed on the subject.

A. Subjective Intent in State Cases

In making actual malice determinations, state courts attempt to determine the speaker's subjective state of mind by two primary means. First, courts examine the speaker's observable conduct at the time of the speech act, viewing such outward manifestations as a potential insight into the speaker's state of mind.[33] In doing so, state courts largely ignore the content (truth, accuracy, subject matter) of the speech itself as a potential manifestation of the speaker's knowledge of the truth of the statement; they instead stress other extrinsic manifestations of the speaker's state of mind. For example, state courts emphasize the speaker's investigation of the source of the information expressed in the speech and the relationship between the speaker and the party alleging libel.[34] The second means by which courts attempt to determine the speaker's state of mind is through the personal testimony of the speaker.[35] State courts grant considerable

32. For cases supporting this proposition, see *Green v. Northern Publ'g Co.*, 655 P.2d 736 (Alaska 1982); *Planned Protective Servs., Inc. v. Gorton*, 245 Cal. Rptr. 790 (Ct. App. 1988); *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 480 N.E.2d 1005 (Mass. 1985); and *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237 (W. Va. 1992).

33. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 668 (1989); *New England Tractor-Trailer Training of Conn., Inc.*, 480 N.E.2d at 1010-11.

34. *See* Brian Murchison et al., Sullivan's *Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994).

35. *See id.*

weight to the speaker's own reflective statements concerning his or her belief as to the truth of the speech at the time the speech judgment was made.

State courts' use of this general approach in libel and defamation cases provides insight into state courts' assumptions about editorial judgment and the First Amendment guarantee of freedom of speech and press. First, state courts appear to be saying that the First Amendment does not protect the end product, or the speech itself as printed in a newspaper or shown on a television. Rather, the First Amendment protects the subjective editorial judgment employed by the speaker to produce that end product.[36] Moreover, state courts do not treat all subjective editorial judgments as equally worthy of First Amendment protection. Conscious judgments to speak or print information which the speaker knows to be false or which the speaker merely recklessly assumes to be true are not judgments believed to be worthy of protection.

Unfortunately, in the majority of the state libel cases the courts never expressly consider why judgments to express true information are protected while the same types of subjective judgments to express false information are not.[37] Most courts simply cite *New York Times v. Sullivan,* which is the vehicle by which courts often engage in this analysis of the speaker's state of mind, and then proceed mechanically to employ the actual malice framework. When courts do attempt to ground their opinions in the principles underlying the First Amendment, they largely restrict their attention to the speech and its instrumental value, not (surprisingly) addressing the attributes of expressive judgment. The courts, in other words, look to such considerations as (i) why judgments to disseminate information believed by the speaker to be true are protected; (ii) encouraging "good people" to participate in government; and (iii) guarding against self-censorship by critics of public officials. The more fundamental and noninstrumental reasons are to be found only beneath the surface of the opinions.

Illustrative of the actual malice analysis generally applied by state courts is *Newman v. Delahunty*.[38] In that case, the plaintiff, a former mayoral candidate, brought a claim for libel against an opposing candidate who distributed flyers accusing the plaintiff of taking part in corrupt land deals. In applying the actual malice standard, and ultimately finding that the defendant acted with actual malice, the court looked at two primary factors. First, the court discussed at length the ill-will that the defendant bore against the plaintiff, citing statements

36. Quinn v. Aetna Life & Cas. Co., 409 N.Y.S.2d 473, 479 (Sup. Ct. 1978) ("[W]hile the speech is not protected, the right to publish the speech is protected.").
37. *See* cases cited *supra* note 32.
38. Newman v. Delahunty, 681 A.2d 671 (N.J. Super. Ct. App. Div. 1994).

made by the defendant's wife and friends. The court reasoned that the defendant's animosity toward the plaintiff caused the defendant to misconstrue certain factual information (consciously and subconsciously) and knowingly to make false statements concerning the plaintiff: "It became clear from the case presented that what [the defendant] meant by 'corruption,' 'land deals' and 'justice for sale' was a product of his own malice, a misconstruction of [what were,] to him, inexplicable land transactions."[39] The court bolstered its actual malice finding with evidence that the defendant attempted to distance himself from the printing of, writing of, and payment for the flyers. For example, the defendant attempted to hide his relationship with the flyers' editor as well as disguise payment for the flyers in his campaign expenditure filings. The court reasoned that such distancing tangibly demonstrated that the defendant knew the contents of the flyers were false or potentially false.[40]

In determining whether the defendant's expression was a product of protected editorial judgment, the *Newman* court looked to factors wholly unrelated to the content of the speech itself. The court instead focused upon the subjective state of mind of the speaker as manifested by evidence other than the speech itself, relying upon statements the defendant had made to his wife and friends and upon the defendant's behavior in getting the flyer published.[41] The court's focus on state of mind was obedient to *New York Times v. Sullivan* and centered directly and exclusively on the editorial judgment made in advance of publication. The judgment was deficient, it appears, because it did not

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39. *Id.* at 676.

40. *See id.* at 679.

41. Although the *Newman* court relied heavily upon the animosity between the defendant and plaintiff, there appears to exist some controversy over such a reliance upon the defendant's animosity toward the plaintiff in making an actual malice finding. For example, the court in *Dupler v. Mansfield Journal Co.*, 413 N.E.2d 1187 (Ohio 1980), citing two Supreme Court cases, *Beckley Newspapers Corp. v. Hanks*, 383 U.S. 75 (1967), and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), stated that "[a]ctual malice may not be inferred from evidence of personal spite, ill-will or intention to injure on the part of the writer. Rather, the focus of inquiry is on defendant's attitude toward the truth or falsity of the publication." *Dupler*, 413 N.E.2d at 1190-91. Perhaps the resolution to this apparent disagreement is that ill-will is a factor to be considered in determining actual malice, but is not itself sufficient to support such a finding.

The *Dupler* case is also interesting in that the court found irrelevant the fact that the defendant reporter admitted at trial that the comments he had attributed to the plaintiff in the allegedly libelous statement were in fact false. The court said that actual malice is measured from the time of publication: "The fact that [the reporter] changed his opinion over one year after the editorial, when presented with additional facts, is not evidence of his state of mind when he wrote the editorial." *Id.* at 1193. This reasoning is perfectly consistent with the view that what the First Amendment protects is not the speech itself, but rather the subjective judgment that leads to the speech.

reflect a conscientious effort to publish a truthful and objective—not self-interested—account. But the court's technical analysis did not address this broader reasoning explicitly, leaving it instead to necessary implication.

While the *Newman* court relied exclusively upon objective evidence which it believed provided a glimpse into the speaker's subjective mind, several state court opinions also rely heavily upon the speaker's own testimony of his or her subjective intent. Indicative of this approach is *HBO v. Harrison*.[42] In *Harrison*, a psychologist brought a defamation suit against film makers and HBO for a documentary about child custody cases, alleging that the film falsely criticized his involvement in one of the reported cases. In its consideration of the plaintiff's claim, the court held that an affidavit by an alleged defamer concerning his or her own state of mind may be sufficient, by itself, to negate actual malice and support a motion for summary judgment. A defendant's testimony would have such an effect, the court stated, if it is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted."[43] Based upon this standard, the court concluded that the uncontroverted affidavits of the defendants, all of which stated that they believed their film to be truthful, were sufficient to establish that the defendants had engaged in protected editorial judgment.

The court did not even consider the content of the film, nor did it investigate the underlying facts upon which the film was purportedly based. This is neither surprising nor incorrect as an application of the actual malice standard, but it is intellectually unsatisfying because such a limited inquiry cannot support the court's additional and affirmative conclusion that the publisher exercised protected editorial judgment. There is a critical distinction between a finding of no actual malice—that the judgment was not inadequate because it was not calculatedly false—and a very different conclusion that the judgment exercised was protected editorial judgment. The *Harrison* court focused exclusively upon the subjective intent of the speaker, giving wide deference to that intent even as expressed by the speaker herself, but did not adequately explain the basis for the broader conclusion that protected editorial judgment had been exercised, a conclusion that cannot rest on the publisher's subjective intent alone.

The Alaska Supreme Court placed similar emphasis upon the speaker's personal testimony in *Mount Juneau Enterprises, Inc. v. Juneau Empire*.[44] In that case, the plaintiff claimed that inadequacies in the defendant reporter's and defendant newspaper's preparation of the articles in question demonstrated a reckless disregard of truth suf-

42. HBO v. Harrison, 983 S.W.2d 31 (Tex. App. 1998).
43. *Id.* at 40.
44. Mount Juneau Enters., Inc. v. Juneau Empire, 891 P.2d 829 (Alaska 1995).

ficient to support a finding of actual malice. The plaintiff asserted that the defendant reporter offered only one side of the issue and relied primarily upon people with bias against the plaintiff, and that the newspaper never required the reporter to check the validity of her sources. The court rejected the plaintiff's claim that such procedural deficiencies alone established actual malice, concluding that "the application of the actual malice standard focuses on the defendant's subjective intent" and that "no one from the [defendant newspaper] acknowledged any reason to doubt the truth of what they printed."[45] The court then expressed a rule very similar to that set forth in *Harrison,* stating that a libel defendant may gain summary judgment based solely upon his or her testimony of truthful intent in situations where the plaintiff has failed to present conflicting evidence and the circumstances do not suggest that the allegedly defamatory statement was fabricated by the defendant or based on wholly unverified sources.[46]

Interestingly, the Alaska Supreme Court in an earlier case, *Moffatt v. Brown,*[47] took a different view of the role of procedural deficiencies in determining actual malice, expressly finding that the defendant reporter's procedural steps to verify his story were relevant. In *Moffatt,* the court rejected the plaintiff's libel claim against a right-to-life organization member who had written an article, reasoning that the plaintiff "provided no evidence whatsoever to show that [the defendant] subjectively entertained any serious doubts as to the truth of his statements."[48] The court then bolstered its conclusion by pointing to evidence that the speaker had carefully confirmed the facts upon which the allegedly libelous statement was based through several avenues, including interviews and attendance at meetings.[49]

This broader view of the role of procedural deficiencies of allegedly libelous statements appears more consistent with state courts' general emphasis upon manifestations of a speaker's subjective intent in ways other than the speech itself,[50] but it also poses substantial risks of analytical confusion. Verification of sources and other procedural steps may quite rightly be just another means by which a speaker's subjective intent can be analyzed in order to determine whether that speaker engaged in a protected editorial judgment.[51] But when procedural steps are considered in ways that do not relate to subjective

45. *Id.* at 838.
46. *See id.* at 839.
47. Moffatt v. Brown, 751 P.2d 939 (Alaska 1988).
48. *Id.* at 945.
49. *See id.*
50. *See supra* notes 32-33, 41.
51. *See, e.g.,* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989). The process cases, discussed *infra* Part VI, demonstrate that the majority of state courts do in fact consider procedural deficiencies in applying the actual malice standard. Thus, *Harrison* appears to be in the minority in its apparent

state of mind, as in *Moffatt*, there is a risk that courts are confusing the quite distinct questions of intent and process, and thus undermining the rigor and function of the actual malice standard and simultaneously intruding into precincts of journalism without a clear idea of the consequences for press freedom.[52]

A final state libel case which offers an insight into the subjective view of editorial judgment is *Spears v. McCormick & Co.*,[53] In that case, a husband and his mother sued a newspaper for defamation based upon a story it ran on spousal abuse which used fictitious names but which the plaintiffs claimed insufficiently protected the husband's identity as the abusing spouse. The court rather curtly rejected the plaintiffs' claim, but in its conclusion offered some insight into the courts view of editorial judgment. The court concluded:

> It is apparent that the reporter here was simply relating facts as told by "Gloria" [the fake name used to conceal the wife's identity; the wife was the primary source for the article] with no reason to question their truthfulness. The article involved here was not intended to further any allegations against the plaintiffs, but was instead meant to simply document the problems of a battered wife *as seen through the eyes of such a person*. The reporter did not have any apparent reason to doubt the validity of the statements given to her by "Gloria." We therefore conclude that plaintiffs have not shown with convincing clarity facts to justify the conclusion of malice by the defendants.[54]

Here the court is not concerned with the literal truth of the statements made by Gloria, but rather the reporter's perception of those statements, a question notably involving both the reporter's belief about actual truth *and* the reporters' belief about what message (Gloria's feelings, not the underlying facts) was being communicated. In both senses of "truth" the Court held that it is the subjective judgment of the speaker which is the act of First Amendment importance and which is therefore protected.

Although examining the subjective state of mind of the speaker as a basis for determining the existence of editorial freedom under the First Amendment is unquestionably most prevalent in libel cases, such analysis is also occasionally applied in other settings, and often with results that are more revealing of the broader question of the meaning of editorial judgment. One such non-libel case is *Nelson v. McClatchy Newspapers, Inc.*[55] Sandra Nelson was a reporter who covered the "education beat" for *The News Tribune* (TNT) in Tacoma, Washington, a McClatchy newspaper. In her off-duty hours, Nelson took part in highly visible political events promoting lesbian rights, feminist issues, abortion rights, and socialist causes. TNT became

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rejection of procedural deficiencies as a relevant basis for inferring actual malice on behalf of the defendant speaker.

52. *See* Murchison et al., *supra* note 34.
53. Spears v. McCormick & Co., 520 So. 2d 805 (La. Ct. App. 1987).
54. *Id.* at 809-10 (emphasis added).
55. 936 P.2d 1123 (Wash. 1997).

aware of Nelson's political activity and informed her that such participation compromised TNT's appearance of objectivity. More specifically, her activity violated TNT's ethics code, which was precisely designed to limit reporters' involvement in activity which might cause the public to believe TNT's news reporting was biased. Nelson, however, refused to limit her political activity so TNT transferred her to a less visible copy editor position. After unsuccessfully seeking to regain her reporter position, Nelson sued TNT, claiming that TNT violated the Fair Campaign Practices Act (FCPA), which prohibited employers from discriminating against employees based on their political activity.

The Washington Supreme Court found the FCPA to apply to Nelson's claim but then concluded that the FCPA, as applied, unconstitutionally infringed TNT's First Amendment rights. To reach this conclusion, the court began by citing *Miami Herald Publishing Company v. Tornillo*[56] for the principle that the free press clause guarantees a newspaper's editorial discretion to control the content of its publication. The court then reasoned that controlling a newspaper's credibility in the eyes of its readers, sources, and advertisers is an important component of a newspaper's discretion over its content. The court wrote, "[I]n order to preserve its managerial prerogative to control its editorial integrity, a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists."[57]

The court's reasoning is indicative of a "purpose" analysis, discussed later, in that the newspaper's control over its staff's conduct is a protected editorial judgment because it has as its purpose the preservation of the credibility of the information conveyed by the newspaper to the public. This judgment bears the hallmarks of the model editorial judgment (discussed later) that rests on the purpose being served by an editorial judgment to publish material: the disciplinary decision reflected a judgment that reporters' decisions must be made in the interest of the audience; they must reflect a judgment about the usefulness and value of information to the audience, not simply dictated by (or purchased by) a special interest; and they must not be self-interested or governed by personal bias.[58]

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56. 418 U.S. 241 (1974).
57. *Nelson*, 936 P.2d at 1132.
58. Similar reasoning to that employed in *Nelson* was adopted in a D.C. Circuit case, *Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), where the court held that a challenged newspaper ethics code could be enforced outside collective bargaining to the extent necessary "to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." *Id.* at 561.

Yet the court's decision also rests on the intent or state of mind that more generally marks editorial judgment. A newspaper's decision to publish information, whether the information originated with the newspaper or is selected from other sources, constitutes a decision intentionally to adopt as its own expressive product the material conveyed in its pages, transforming it into speech that carries with it the newspaper's credibility and its judgment about value and audience need. The individual reporter's preferences are irrelevant, for the publication decision transforms the reporter's work into the expressive product of the institution. It is the capacity of TNT, not Nelson, to make this kind of judgment that animated the court's decision, revealing in a useful and fuller way the intentional, institutional act of exercising editorial judgment.

The court's rejection of Nelson's claim of wrongful discrimination based on her beliefs reflects this broader reading, as it rested on accepting her very assertion and then explaining why it foreclosed, rather than supported, liability. Nelson had argued that *Associated Press v. NLRB,*[59] a case in which the Supreme Court reinstated a worker the AP had fired for organizing its work force, established that the regulation of high profile employee activity does not go to a newspaper's core function and is therefore not protected by the free press clause. The *Nelson* court rejected this characterization, reasoning that the Supreme Court based its reinstatement holding in *Associated Press* upon the fact that the true motivation for the firing related to union membership, not to a matter of editorial discretion.[60] Nelson, the court held, had in fact been transferred for editorial discretion purposes and not out of an unrelated animus for her political views.

Like the libel cases, the *Nelson* court therefore rested its analysis of TNT's editorial judgment claim on state of mind. Unlike the libel cases, however, which judge state of mind in the limited setting of judgments about the truth of matter published, state of mind in *Nelson* took two forms: whether TNT's disciplinary decision was motivated by editorial concerns going to the paper's content and integrity; and whether Nelson's conflict of interest—or conflict of allegiance to impartiality—disqualified her from claiming editorial freedom interests in her own right.[61]

59. 301 U.S. 103 (1937).
60. *See Nelson,* 936 P.2d at 1132.
61. One final note on the *Nelson* case is that one justice dissented, arguing that "[t]he First Amendment does not give a newspaper immunity from general laws absent a showing of interference with the newspaper's right to determine what to print." *Id.* at 1133. Working from this decidedly narrower understanding of the First Amendment, the dissent had little difficulty concluding that Nelson's transfer was not protected from FCPA regulation by the First Amendment because TNT had not proven that Nelson's work as a reporter in any way limited TNT's control over its printed content.

B. Subjective Intent in Federal Cases

The federal cases reflect and build on this understanding of the actual malice inquiry.[62] For example, *Newton v. NBC*[63] involved a defamation action filed by Wayne Newton against NBC, claiming that one of the network's documentaries had falsely conveyed the impression that he had received improper financial assistance from organized crime sources. The district court had held NBC liable, concluding that:

> Since [NBC] had voluntarily edited and combined the audio with the visual portions of the broadcast in a way that created the defamatory impressions and since those impressions were clear and inescapable, the jury could reject as incredible the testimony of the NBC journalists that they had not intended to leave the false impression.[64]

The Court of Appeals condemned the district court's analysis for "substitut[ing] its own view as to the supposed impression left by the broadcast for that of the journalists who prepared the broadcast."[65]

Two other cases addressing the lawfulness of firing reporters because of their work, resolved similarly to *Nelson* by viewing the firing decision as itself an editorial judgment of the publisher, are *Epworth v. Journal Register Co.*, No. CV 94 0065371, 1994 WL 613432 (Conn. Super. Oct. 31, 1994), and *Laschever v. Journal Register Co.*, No. CV 94 0065372, 1994 WL 613427 (Conn. Super. Nov. 1, 1994).

62. Another example is *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986). In this public figure defamation action, a former governor of South Dakota brought suit against *Newsweek* based on an article that implied that he had engaged in a malicious, revenge-based prosecution while serving as the state's attorney general. The subject of the alleged malicious prosecution was a Native American rights activist named Dennis Banks, who had at one time accused Janklow of raping a young Native American girl. The *Newsweek* article also suggested that Janklow's attempts to extradite Banks while serving as governor were motivated by revenge.

Janklow's claim was that the *Newsweek* story's imbalanced factual presentation created a defamatory impression. However, since the *Janklow* court determined that the challenged implications were in fact opinions based on objectively verifiable facts, the actual malice standard could not be met. Accordingly, the content of the challenged speech itself became legally insignificant. The court acknowledged this principle as follows:

> Every news story . . . reflects choices of what to leave out, as well as what to include. We can agree that this story would have been fairer to Janklow and more informative to the reader if the chronology of the rape charge against Janklow and the riot prosecution against Banks had been more fully explained . . . . [However], [c]ourts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors.

Id. at 1306.

63. Newton v. NBC, Inc., 930 F.2d 662 (9th Cir. 1990).
64. *Id.* at 680 (quoting district court).
65. *Id.* at 681.

The *Newton* case vividly illustrates the point that the challenged speech itself—including a meaning it reasonably conveyed—may not be considered in determining actual malice. Rather, actual malice must be based on the publisher's state of mind, a question largely unrelated to the actual meaning or value or harm occasioned by the challenged speech. Absent such extrinsic proof, an editor's speech selection judgments concerning public figures are absolutely protected under the First Amendment. As the *Newton* court expressed it:

> Although the material portrayed in the broadcast does not portray Newton in the most flattering light possible, that fact is irrelevant to the actual-malice inquiry. . . . We decline to substitute our judgment for that of NBC in presenting its story. Editorial decisions about broadcasts are best left to editors, not judges and juries.[66]

Actual malice concerns the editor's motive in publishing a story—whether, and only whether, the story was published as a calculated lie and thus for reasons definitionally excluded from editorial judgment. Actual malice does not concern fairness or completeness of a publication or the soundness of the news judgment underlying a publication decision.

This principle was perhaps best summarized by the second circuit in *Machleder v. Diaz*.[67] In *Machleder* a proprietor of a toxic waste disposal facility filed a false light defamation suit against CBS following a broadcast which contained edited footage from an ambush interview conducted by CBS journalists. Although the record showed that Machleder had repeatedly stated his desire not to appear on camera in a polite and civil manner, the broadcast only aired Machleder's final appeal to be left alone, in which he communicated with apparent anger and hostility toward the journalists. Accordingly, Machleder asserted that CBS had "deliberately created a false light portrayal of him in order to sensationalize an 'otherwise uneventful story.'"[68] Reflective of the principle that only a demonstration of actual malice undercuts First Amendment protection of editorial decisions, the court stated that:

> A court cannot substitute its judgment for that of the press by requiring the press to present an article or broadcast in a balanced manner. It may only assess liability when the press so oversteps its editorial freedom that it contains falsity and does so with the requisite degree of fault.[69]

The actual malice standard, as applied in the federal cases, is narrowly circumscribed.[70] But it is also incomplete. The federal cases, in

66. *Id.* at 686.
67. Machleder v. Diaz, 801 F.2d 46 (2d Cir. 1986).
68. *Id.* at 55.
69. *Id.*
70. The standard is only satisfied with the presentation of evidence sufficient to demonstrate that a defendant published what she knew to be false, or that publication took place with reckless disregard for the truth. "[A] showing of highly

particular, refer often to the general aims of the First Amendment and freedom of the press, aims grounded, as the Court stated in *Harte-Hanks Communications v. Connaughton,* on:

> Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of defamation carve out an area of "breathing space" so that protected speech is not discouraged.[71]

Yet despite this oft-cited and lofty rhetoric, the relation of these goals to the actual malice test is not clearly articulated. Why is knowing falsity disqualified as editorial judgment? Or is it? Is knowledge of falsity simply inexcusable or particularly harmful editorial judgment? Both conclusions are hard to explain—why would it be inexcusable, and how do the reasons for this relate to what editorial judgment actually consists of? Harm seems unlikely to be a function of intent.

C. Conclusion

The actual malice test does not serve to define the meaning of protected editorial judgment. Instead, it performs the much more limited function of disqualifying some editorial judgments from constitutional protection. While the disqualifying criterion is based on state of mind, it is more basically grounded in the conclusion that certain types of choices do not serve the ends of freedom of the press—ends reflected not in the exclusively negative actual malice inquiry, but instead in

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unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," without more, will not suffice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 664 (1989) (internal quotation marks omitted). Likewise, evidence that a publication decision was motivated by profit considerations is insufficient, alone, to demonstrate actual malice. This principle is highlighted by the Supreme Court in the *Connaughton* opinion:

> If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times Co.* to *Hustler Magazine* would be little more than empty vessel.

Id. at 667. Finally, it is clear that the actual malice standard is not met simply because a jury's interpretation of the meaning of a publication leads it to a conclusion that differs from the publisher's.

71. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 686 (1989). Similarly, in *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 n.4 (8th Cir. 1989), the court stated that:

> To avoid abridging free exchange, we do not second-guess nor otherwise intrude upon editorial judgments about what to print. Thus, we have held that a state may not impose liability simply because clearer language or the inclusion of additional reports would rule out an objectionable implication.

The court in *Newton v. NBC, Inc.*, 930 F.2d 662, 683 (9th Cir. 1980), stated that:

> The importance of permitting journalists to interview diverse sources, pursue multiple story lines, and draw their own honest and professional conclusions from their research dictates that the media should not fear that its journalists' professional judgments will be second-guessed by juries without the benefit of careful appellate review.

other criteria for editorial judgment, discussed in later sections, that bear on purpose and process. To put the point a bit differently, within the broad universe of editorial selection judgments which (based on the purpose they ostensibly serve) deserve First Amendment protection, there exists a need for a limiting principle. Such a limiting principle must function to remove from the protection of editorial judgment those particular judgments which, although of the *type* that promote the goals of a free press, so disserve that value that their limitation would not be considered constitutionally offensive. With respect to the press, the limiting principle is the actual malice standard set forth in *New York Times v. Sullivan.*[72]

Accordingly, whether or not an editorial judgment falls within the universe of editorial judgments that are protected by the First Amendment poses a threshold question. If the judgment is otherwise constitutionally protected, inquiry into a speaker's mental state may cause it nevertheless to be excluded from First Amendment protection. If, however, an editorial judgment does not bear sufficient indicia of constitutionally protected editorial discretion to invoke the First Amendment, the speaker's mental state will not become relevant in reviewing restrictions placed upon such an editorial judgment. This threshold question, however, is rarely explicitly addressed in judicial opinions. More often than not, judicial opinions in the public figure defamation context indulge the presumption that the editorial judgments being challenged qualify for First Amendment protection based on factors external to the speaker's mental state.

Perhaps the most significant effect of this formulation is that the constitutional stature of the speech itself is, in effect, placed beyond scrutiny by the actual malice inquiry. Because a finding of actual malice is a pre-condition of liability, a court will have no occasion to review the speech itself unless and until a plaintiff has demonstrated actual malice on the part of the speaker. Since a demonstration of actual malice in the absence of false and defamatory speech is a legal impossibility, the umbrella of First Amendment protection afforded to speech selection judgments by media publishers in the public figure defamation context can extend quite broadly.

The actual malice inquiry is avowedly focused on the subjective state of mind of the publisher at the time of publication. It asks only whether falsity was calculated or whether the publisher's decision was sufficiently indifferent to likely falsity that the publication decision should not be respected under the First Amendment. Actual malice, in short, reveals a frame of mind, an animating intention for the publication, that belies any significant publisher concern for the audience or for the function being performed in the selection and presentation

72. 376 U.S. 25 (1964).

of information, or news. Actual malice reflects, instead, an animating intention that seems wholly personal to the publisher; it reflects a judgment that the publication decision is self-interested, perhaps grounded in feelings of personal animus or self interest by the individual responsible for the published statement. To the extent that this is so, a publication decision grounded in actual malice violates basic tenets of journalism: that publication choices must be made with a view to the audience being served and the public function of the information being disseminated; and such choices must be grounded in reason and process, not in self-interest and personal gain.

The actual malice idea, therefore, is ultimately grounded in, yet is only a limited manifestation of, purpose and process considerations: public decisions made with a view to an audience, grounded in public purpose or function; and forms of decision that are conducive to impersonal rather than personal, other-related rather than self-interested, choices. This understanding of the actual malice inquiry reveals its incompleteness. It would be mistaken to assume that a publication decision made without actual malice is for that reason entitled to protection as an exercise of editorial judgment under the First Amendment. The absence of actual malice, in other words, tells us little about the nature or value or quality of the decision or the resulting publication. It reveals equally little about the nature of the judgmental process that yielded the publication.

Actual malice, in short, is a disqualifying standard. Publication decisions governed by actual malice receive no protection as editorial judgments in the news setting. But it does not follow that editorial judgments that are free of actual malice are, for that reason alone, entitled to constitutional protection. More must be present in a publication decision to support a conclusion that it is entitled to constitutional protection as an exercise of editorial judgment by the press. The additional elements are not, however, to be found in the subjective intent (or actual malice) inquiry, but instead in the more thoroughly explanatory inquiries that focus on purpose and process.

Actual malice does, as we will see, have a connection to editorial judgment—impartial, reasoned, non-self-interested judgments about material needed by an audience.[73] But the connection is largely unarticulated in the state and federal cases. It emerges only in the cases discussed later which focus on purpose and process, the hallmarks of the type of judgments deemed editorial judgments for purposes of freedom of press. The role of the actual malice test is related to these matters—but its role is also very limited.

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73. The issues are taken up more directly in the later discussion of *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). *See infra* text accompanying notes 236-39.

IV. MEASURING EDITORIAL JUDGMENT BY ITS OUTCOME: JUDGING THE GENRE OF JOURNALISM BY OBJECTIVE DESCRIPTION

Editorial judgment and editorial freedom are often seen as hallmarks of a genre of journalism or news which are categories of activity and publication that are given content-based definition by virtue of academic and professional norms, and which can be judged by a largely extrinsic and descriptive account. Unlike the actual malice cases, which approach editorial judgment in terms of state of mind and intent, the descriptive, or genre, approach defines editorial judgment in terms of its artifact, the content of a publication. The deficiencies of the genre approach become clear from a review of the cases employing it.

Editorial judgment is often defined by an almost exclusively extrinsic and objective judgment of the content produced by the editorial judgment. This content-based view of editorial judgment is pervasively definitional in nature, with the definition controlling the applicability (or inapplicability) of the First Amendment's protections. Courts engage in this objective and definitional evaluation of editorial judgment in three instances. First, courts define editorial judgment in terms of "newsworthiness," or legitimate interest to the public. This classification arises primarily in invasion of privacy cases. The other two instances in which courts define editorial judgment based upon its outcome take place in the libel setting. The first such instance involves courts defining editorial judgment based upon the truth or falsity of the speech product. Second, courts in the libel setting also define editorial judgment based upon whether the product of the editorial judgment is fact or opinion.

The state cases focusing on newsworthiness, opinion, and falsity, as a general matter, center on the content of the challenged statements and not on the judgmental process that resulted in their publication. This is understandable, for the courts are approaching the issues against the background of the common law, and the common law paid little attention to the identity of the publisher—news versus criticism versus gossip, etc.—but instead turned on the statement made and the harm it caused.[74] The common law privileges were sufficient to respond to the different settings of publication. Special rules for news publications, or editorial judgments, were simply not considered necessary and therefore attention to the editorial judgment itself, rather than its textual end product, was not relevant.

The constitutionalization of libel and privacy law has done little to disturb the common law's operation in the interstices of newsworthiness, fact and opinion, and truth or falsity. And where the First

74. *See id.*

Amendment has intruded into these areas, such as in *Milkovich v. Lorain Journal*,[75] the Supreme Court has painted with a broad brush, leaving the common law rules and privileges very much alive at the definitional and operational level. So in these areas, for the moment at least, the common law's content-based approach is likely to continue to govern judicial decisions, notwithstanding the irony that the content approach treats the publisher and the editorial judgment with indifference, and such indifference in other areas of libel and privacy law has led the Court to intervene and upset the common law in order, explicitly, to recognize the special protection that editorial judgment must be afforded.[76]

The federal cases that approach editorial judgment in terms of the content of the publication or by judging its genre fall into two groups. The first group reflects an attempt to assess, by objective measures, a publication's *newsworthiness*. This inquiry consists of an examination of the speech itself, from which it might be inferred that the particular editorial judgment that yielded its publication should be shielded from claims alleging invasion of privacy. The second group involves an inquiry into whether a published statement is opinion or fact, and likewise consists of an objective assessment of the content (text, meaning) of the challenged speech. If such an assessment yields the conclusion that the challenged speech is more akin to opinion than to fact, the editorial judgment which gave rise to the speech is accorded more generous constitutional protection than statements of fact which, if false, are given little intrinsic value under the First Amendment. Why this is so is not clear in the cases, as we will see, but perhaps the best justification is that evaluative statements rest more purely on the aesthetic and compositional judgments that lie at the heart of editorial freedom.[77]

A. Newsworthy Status

If the product of an editorial judgment is deemed "newsworthy," that editorial judgment is entitled to full First Amendment protection and is thereby insulated from invasion of privacy claims.

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75. 497 U.S. 1 (1990) (reinstating, essentially, the common law approach to fact and opinion), *discussed infra* Part III.B.1. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), for example, the Court held that falsity must be proved by a libel plaintiff, at least in media cases and those involving public figures, but the Court said nothing to disturb the operation of the common law approach to the meaning of false fact, other than shift the burden of proof.

76. *E.g.*, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Florida Star v. B.J.F., 491 U.S. 524 (1989); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

77. *See* Murchison et al., *supra* note 34.

1. Newsworthiness in State Cases

The California Supreme Court's recent opinion in *Shulman v. Group W Productions, Inc.*,[78] is clearly the most comprehensive state judicial decision concerning the principle of newsworthiness.[79] *Shulman* involved an invasion of privacy suit brought by a woman whose medical treatment following a car accident was videotaped and broadcast by the defendant broadcasting company on an emergency rescue show without the plaintiff's permission. The court in *Shulman* began its consideration of the plaintiff's claim by setting forth the necessary elements of a publication of private facts claim: (1) public disclosure (2) of a private fact (3) that would be offensive and objectionable to the reasonable person and (4) that is not of legitimate public concern, or "newsworthy."[80] The court stated that the fourth element was critical to the plaintiff's case; if the contents of the broadcast were of legitimate public concern, then the plaintiff simply could not establish a viable publication of private facts claim.[81]

The court viewed "newsworthiness" not merely as an element of the state tort law, but also as a constitutional defense to, or privilege against, liability for publication of truthful information. First Amendment protection of the publication of factual information rested squarely upon the "newsworthiness" of the speech.[82] The constitutional and tort definitions of newsworthiness were deemed congruent, thus making unnecessary separate inquiries into newsworthiness as a tort element and newsworthiness as a constitutional limitation.

Newsworthiness, of course, is extremely difficult to define, especially when such constitutional significance hangs upon its definition. Courts have long struggled to accommodate the conflicting interests of individual privacy and press freedom in attempting to define newsworthiness, and the U.S. Supreme Court, in the *Cox Broadcasting*[83] and *Florida Star*[84] cases, provided little general guidance as to what constitutes "a matter of public significance."

78. Shulman v. Group W Productions, Inc., 74 Cal. Rptr. 2d (1998).

79. Because *Shulman's* extensive analysis of newsworthiness is largely representative of the analyses set forth in many of the other newsworthiness cases, I will discuss *Shulman* at length with relatively little discussion of many other newsworthiness cases that could be used. *E.g.*, Gilbert v. Bernard, 4 Mass. L. Rptr. 143 (Mass. Super. 1995); Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994); Quinn v. Aetna Life & Cas. Co., 409 N.Y.S.2d 473 (Sup. Ct. 1978); Wavell v. Caller-Times Publ'g. Co., 809 S.W.2d 633 (Tex. App. 1991).

80. *Shulman*, 74 Cal. Rptr. 2d at 852.

81. *See id.* at 853.

82. *See id.*

83. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

84. Florida Star v. B.J.F., 491 U.S. 524 (1989).

The *Shulman* court stressed that the dual nature of newsworthiness—as both a normative and a descriptive idea—has made defining it more difficult:

> Newsworthiness—constitutional or common law—is also difficult to define because it may be used as either a descriptive or a normative term. Is the term "newsworthy" a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it a value predicate, intended to indicate that the publication is a meritorious contribution and that the public interest is praiseworthy? A position at either extreme has unpalatable consequences. If "newsworthiness" is completely descriptive—if all coverage that sells papers or boosts ratings is deemed newsworthy—it would seem to swallow the publication of private facts tort, for it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest. At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.[85]

From this starting point, the *Shulman* court engaged in a lengthy survey of various attempts by California courts to define newsworthiness,[86] concluding that two competing interests must be balanced in determining whether speech is newsworthy or of public interest. First, the analysis of newsworthiness requires courts to some degree to engage in a normative assessment of the "social value" of a publication. All material that might attract readers cannot be deemed to be of legitimate public interest for constitutional purposes. Second, the evaluation of newsworthiness depends on the degree of intrusion into the plaintiff's private affairs and the extent to which the plaintiff played an important role in the public event.

In balancing these interests—the newsworthiness (value) of the activity or event that brought the plaintiff to public attention, and the newsworthiness (invasiveness) of the precise facts disclosed about the plaintiff—a logical nexus must exist between the plaintiff and the matter of public interest for a claim of newsworthiness to succeed. For example, even though a particular event may be newsworthy, if identification of the plaintiff as a person involved in the event, or publication of information about the plaintiff in relation to the event, adds nothing of significance to the story, the publication constitutes an invasion of privacy notwithstanding the *event's* newsworthiness.[87] The editorial judgment being assessed, in other words, consists largely of the decision to combine the event and the person in the challenged publication.

With this framework established, the *Shulman* court turned to the facts of the case. The court concluded that the videotape of the extraction of the plaintiff from her car and her transport by helicopter was in fact newsworthy and was therefore insufficient to support an invasion

85. *Shulman*, 74 Cal. Rptr. 2d at 855.
86. *See id.* at 855-57.
87. *See id.* at 858.

of privacy claim or receive First Amendment protection. The court reasoned that the general activity which was newsworthy was the conduct of the nurse attending the plaintiff and the nurse's challenging task of providing emergency medical assistance to accident victims. The court concluded that the plaintiff played an important role in this newsworthy event, as the plaintiff was the patient, and without a patient the newsworthy subject matter regarding the nurse's activities would be destroyed. Finally, the court found that the more intimate statements made by the plaintiff were permissibly broadcast because they did not constitute "a morbid and sensational prying into private lives for its own sake,"[88] but instead were included for the sake of the theme of the article.

The court's conclusion, of course, says nothing definitive about the intentions reflected in the actual editorial judgment. Morbidness and sensationalism may, in fact, have been the reasons for carrying the story in the first place, and for portraying intimate and personal details of the plaintiff's treatment following the accident. The emergency care theme may simply have been an after-the-fact justification for a decision to use gripping footage simply because it was available, though unplanned in advance and taken without reference to a news theme. The court's objective approach to newsworthiness erects a conclusive presumption—based on the content of the publication alone, judged after the fact—that the editorial judgment rested on a publisher's decision that the personal facts were at least relevant and useful, if not necessary, to effective communication of the emergency care theme.[89]

The presumption, it appears, is constitutionally required and necessary, a logical premise of the descriptive approach to editorial judgment. It is hardly obvious, however, that it is empirically verifiable, or even likely. And, indeed, this is the shortcoming of the descriptive account of newsworthiness: it depends on after-the-fact, overbroad, and quite artificial reconstructions of editorial judgments, and does so without explaining why doing so is either necessary or desirable.[90] If

88. *Id.* at 859 (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

89. For a discussion of the necessary relationship between a personal fact and a communication in the privacy and news setting, see *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979); Randall P. Bezanson, *Public Disclosures as News: Privacy Invasions and Injunctive Relief Against the Press*, 64 IOWA L. REV. 1061 (1978).

90. *See, e.g.*, Gaeta v. HBO, 645 N.Y.S.2d 707, 709 (N.Y. Civ. Ct. 1996) (holding newsworthy the unconsented use of plaintiff's facial expressions in cable program depicting and discussing nudity as judgment about relevance and newsworthiness best left to editorial discretion); *see also* Weiner v. Doubleday & Co., 549 N.E.2d 453 (N.Y. 1989) (holding that personal relationship between a psychiatrist and a former patient who planned a murder, and failure of patient's family and professionals to treat patient's illness, were sufficiently related that editorial judgment of newsworthiness of relationship not abuse of discretion).

the judgment was as the court assumed, it deserved the protection of the First Amendment. If it was instead the product of whim or caprice or callous indifference, or if it was the equivalent of posting a gruesome picture on a web site just for the fun of it, or to grab attention, the judgment would have little value under the First Amendment, and none under the Free Press guarantee.

Discomfort with the potential breadth of the newsworthiness inquiry is evident in *Green v. Chicago Tribune Co.*,[91] where the court applied essentially the same standard as did the *Shulman* court, but defined "newsworthiness" more narrowly. In *Green*, the *Chicago Tribune* photographed Ms. Green's son in the hospital after the boy died of a gunshot wound caused by gang violence. The *Tribune* then published the photo, accompanied by the words spoken by the mother to her dead son in the hospital, in a front-page story concerning gang violence. The boy's mother sued for invasion of privacy. The court, applying the four-pronged test articulated in *Shulman*, focused upon the legitimate public concern element. The *Tribune* argued that no invasion of privacy occurred because the subject of the news article which incorporated the photograph and statement was the death toll resulting from gang warfare, which is clearly a matter of legitimate public concern.

According to the court, however, the relevant inquiry was whether the photograph of the plaintiff's dead son and her statements to him were substantially related to the public concern about gang violence.[92] The court then denied the *Tribune's* motion for summary judgment, concluding that a jury could reasonably find that the public did not need the plaintiff's intimate statements to her dead son to convey the human suffering of gang violence. In support of its holding, the court quoted from the Restatement of Torts a passage which is often quoted as courts consider the "newsworthy" element:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[93]

The line, according to the court, is not simply a function of logic and descriptive analysis. It is partly normative, based on community mores. Whether the *Tribune* crossed the line, the court held, is a matter for the jury to decide.

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91. Green v. Chicago Tribune Co., 675 N.E.2d 249 (Ill. App. Ct. 1996).

92. *See id.* at 255.

93. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

A third case which offers an insightful attempt to define "newsworthy" is *Briscoe v. Reader's Digest Association*.[94] In *Briscoe* the plaintiff brought an invasion of privacy claim against *Reader's Digest* for a story it published concerning the plaintiff's crime of hijacking a truck eleven years earlier. As a result of the story, the plaintiff's friends and daughter scorned and abandoned him. The plaintiff conceded that the story itself may have been newsworthy but argued that the use of his name was not. The court agreed that the publication of past crimes itself was newsworthy because discussion of past crimes may be educational and the public has a strong interest in preventing crime. The court felt, however, that neither this nor any other sufficient public interest was served by the publication of the plaintiff's name.[95] *Reader's Digest's* motion for summary judgment was accordingly denied, as was an absolute defense of newsworthiness. It was left to the jury to determine whether the public interest in the plaintiff's name was outweighed by society's interest in the rehabilitative goal of the penal system—and thus whether an exercise of editorial judgment that may well have been thorough and thoughtful should be disqualified from protection because the story it yielded is judged after-the-fact to be of insufficient value. This, of course, is the other side of the *Shulman* coin, and it is equally a product of the descriptive inquiry.

These cases demonstrate that courts engaging in the "newsworthy" analysis in invasion of privacy cases are largely unconcerned with the editorial judgment of the speaker. Rather, they focus exclusively upon the outcome of that judgment, using the speech artifact to objectively determine whether the information conveyed is information to which the public is entitled. In doing so, the courts are wholly indifferent as to whether the publisher actually believed the speech to be newsworthy or even made a publication decision with that question in mind.

2. *Newsworthiness in Federal Cases*

The question of newsworthiness arises when an individual makes a claim that a truthful publication has given rise to an actionable invasion of his or her privacy. Generally speaking, the press may not publish personal and private facts which are likely to offend the sensibilities of a reasonable individual. However, the concept of newsworthiness creates a First Amendment privilege such that once a court finds a publication newsworthy, the attendant decision to publish receives unqualified First Amendment protection. An inquiry into news-

94. 4 Cal. 3d 529 (Cal. 1971). *See also* Hall v. Post, 355 S.E.2d 819 (N.C. Ct. App. 1987) (holding that newsworthiness of facts of a 17-year-old adoption is a matter for the jury).
95. *See Briscoe*, 4 Cal. 3d at 537.

worthiness requires a court to balance the public interest in the receipt of certain information against an individual's interest in keeping the information private. If the court finds that the information is of legitimate interest to the public, the editorial judgment to include the information (provided that it is either true, or, if the information pertains to a public figure, included in the absence of actual malice) will be considered privileged. If, on the other hand, the court finds that the information is of no legitimate interest to the public, the editorial decision to include the information will be stripped of First Amendment protection.[96]

a. Judging Newsworthiness by Content

The majority of cases that use an objective standard of newsworthiness to define the boundaries of constitutionally protected editorial judgment arise in state court.[97] There are, however, a few federal cases which illuminate this mode of analysis. Generally speaking, federal courts grant the media a great deal of latitude in determining that the publication of personal and private facts are newsworthy.[98] In *Cox Broadcasting Corp. v. Cohn*,[99] a rape victim's father brought suit against a television station for broadcasting his daughter's name. The television station had obtained the name from a public document. The Supreme Court held that the First Amendment created an absolute privilege protecting the publication of information contained in

96. Such a determination necessarily involves an inquiry into whether or not the challenged speech provides the public with important information that the public needs, as opposed to merely wants. To hold that the public needs certain information is, in a sense, to hold that the information is necessary to the maintenance of an informed citizenry, well equipped to engage in meaningful debate on public issues. There is thus a very strong overlap between editorial judgments which gain First Amendment protection based on their newsworthy status, and editorial judgments which gain protection based upon the ends which they further.

97. *See supra* Part III.A.1; *see, e.g.*, Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665 (Ct. App. 1984) (newspaper reveals sexuality of gentleman who had heroically foiled an assassination attempt on President Ford); Cape Publications, Inc. v. Bridges, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982) (newspaper runs photographs of nude kidnapping victim being lead to safety by police); Taylor v. KTVB, Inc., 525 P.2d 984 (Idaho 1974) (station broadcasts footage of nude man being lead from his home by police); Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979) (newspaper reports name of woman whom state had involuntarily sterilized).

98. *E.g.*, Apicella v. McNeil Labs., Inc., 66 F.R.D. 78, 84-85 (E.D.N.Y. 1975) (stating that Medical Letter, a newsletter with 70,000 subscribers, was treated for discovery purposes as exercise of freedom of the press because it "performs a public and professional service by providing information on various drugs"); Ault v. Hustler Magazine, Inc., 13 Media L. Rep. 2232, 2236 (Or. Dist. Ct. 1987) (holding that photos of anti-porn crusader in Hustler, as part of article, were newsworthy because article "contains facts and ideas and [were] therefore newsworthy").

99. 420 U.S. 469 (1975).

public documents, even if publication of such information would be offensive to the reasonable person.[100] Likewise, in *Florida Star v. BJF*,[101] the Supreme Court refused to impose liability on a newspaper that had published the name of a rape victim which it obtained from a police report. While declining to hold that a tort remedy for the publication of private information may never be constitutional, the Court's decision illustrates the degree of latitude which it was willing to afford publishers in this context.

In *Gilbert v. Medical Economics Co.*,[102] defendant publisher had done a story on a series of medical malpractice actions filed against plaintiff anesthesiologist. The article maintained that the prevalence of malpractice claims was causally related to "a collapse of self-policing by physicians and of disciplinary action by hospitals and regulatory agencies."[103] The article identified the plaintiff by name, and included her photograph. The article also revealed that the plaintiff had been experiencing marital and psychiatric difficulties. Plaintiff alleged that "although the general theme of the article was newsworthy and therefore privileged, the defendants nevertheless had tortiously invaded her privacy by including in the article her name, photograph, and certain private facts about her life that were not privileged."[104]

In rejecting plaintiff's claim, the court explained that:

> [T]o properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. When these conditions are satisfied, the facts in the publication and inferences reasonably drawn therefrom fall within the ambit of First Amendment publication and are privileged.[105]

The court held that the newspaper's "truthful representations [were] substantially relevant to a newsworthy topic because they

100. The *Cox* decision provides a fine example of how a decision to protect an editorial judgment based on an objective determination of newsworthiness overlaps with modes of analysis rooted in purpose. In the majority opinion, Justice White states:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id. at 495.

101. 491 U.S. 524 (1989).
102. 665 F.2d 305 (10th Cir. 1981).
103. *Id.* at 306.
104. *Id.* at 307.
105. *Id.* at 308.

strengthen[ed] the impact and credibility of the article."[106] The court's opinion also demonstrates the flexibility editors enjoy in determining whether or not specific, private facts are sufficiently related to a topic of public interest to be deemed constitutionally privileged. The *Gilbert* opinion suggests that the privilege will be implicated whenever "the inferences . . . drawn . . . are not . . . so purely conjectural that no reasonable editor could draw them other than through guesswork and speculation."[107] Notably, the standard does not turn on whether the particular editor drew the inferences, but rather whether he or she *could* have drawn them.

b. *Judging Newsworthiness by Genre*[108]

A related but alternative approach to newsworthiness is to judge, not the material's *worthiness*, but its quality as *news*. This approach does not focus on the public value of a publication's content, or the relation between a published statement and a distinct (and transformative) theme, but instead on whether the publication qualifies, as judged by objective and often technical criteria, as "news." This is a form of content analysis which is best described as genre analysis, focusing not on content alone, but on content in its publication context. The approach is much like that employed in the ill-fated multi-factor, circumstantial test of *Ollman v. Evans*, by which the D.C. Circuit attempted to define opinion as a distinct category or genre of speech.[109]

An important case involving newsworthiness, which embedded that question not in value as such, but instead in explicit consideration of the genre of a challenged publication, is *Haynes v. Alfred A. Knopf, Inc.*[110] *Haynes* involved a journalistic history of African-American migration from the South to the urban centers of the North. Cen-

106. *Id.* The *Gilbert* decision represents another example of how judicial determinations that editorial decisions are privileged as newsworthy often times are rooted in a purpose-driven conception of the First Amendment. The *Gilbert* opinion states:

> If the press is to have the generous breathing space that courts have accorded it thus far, editors must have freedom to make reasonable judgments and draw one inference where others also reasonably could be drawn. This is precisely the editorial discretion contemplated by the privilege.

Id. at 309.

107. *Id.*

108. For a more extensive discussion of genre analysis in public disclosure and appropriation cases as well as libel, commercial speech, copyright, and intellectual property cases, see Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 315-366 (1998) [hereinafter Bezanson, *Quality*].

109. 750 F.2d 970 (D.C. Cir. 1984) (en banc). The *Ollman* case and the Supreme Court's decision rejecting its approach, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), are discussed at *infra* text accompanying notes 137-42.

110. 8 F.3d 1222 (7th Cir. 1993).

tral to the work were chronicles of the life of a woman named Ruby Lee Daniels. Ms. Daniels had been married to the plaintiff, Luther Haynes, for many years, and much of Ms. Daniels' story, as relayed in the book, concerned her marriage to Mr. Haynes. The publication elaborated on Mr. Haynes' alcoholism, neglect of fatherly duties, and abusive behavior toward Ruby. The events of the book which involved Mr. Haynes concluded in 1965. The book was published in 1991.

Mr. Haynes brought suit in federal court alleging invasion of privacy. Recovery for an involuntary loss of privacy, the Seventh Circuit's opinion noted, demands "not only that the private facts publicized be such as would make a reasonable person deeply offended by such publicity but also that they be facts in which the public has no legitimate interest."[111] In rejecting Mr. Haynes' cause of action, the court noted that the work contained important commentaries on policies pertaining to both public aid and public housing. As in the *Gilbert* case, First Amendment protection of the author's choice to include vivid accounts of Mr. Haynes' past turned on a determination that the events revealed were newsworthy:

> People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.[112]

But the term "newsworthiness" seemed ill-fitting when applied to a serious work of social history written in the narrative style. To be sure, the material could be considered newsworthy in the sense that it was factual material relevant to a contemporary event or issue, but the idea of newsworthiness needed the context of genre as well—was it published as news, as fiction, as history, as satire, etc.—in order for the court fully to understand the challenged material's value.

Mr. Haynes claimed that the publisher easily could have taken steps to protect his privacy through the use of pseudonyms. In an approach resting firmly in objective and explicitly genre-based analysis (though distinct from that taken by the *Gilbert* court), the court reasoned that imposing such an obligation on the publisher would have transformed the work into fiction, resulting in "[t]he nonquantitative study of living persons . . . be[ing] abolished as a category of scholarship, to be replaced by the sociological novel."[113] The court, in other words, concluded first that the book fit the criteria of a defined genre—not news, but sociological nonfiction—and then concluded that the challenged statements fell within the range of statements characteristic of, or relevant to, that genre. The statements, therefore, could have

111. *Id.* at 1232 (citations omitted).
112. *Id.*
113. *Id.* at 1233.

been the product of a perfectly conventional editorial judgment in the genre, and were thus protected as the product of such a judgment, whether the presumed editorial judgment was actually ever made.

To put the point a bit more sharply, Mr. Haynes' argument about use of pseudonyms would have been different, and perhaps more forceful, in the genre of conventional news, where the informative and attention gathering function performed by the genre could be accomplished without the actual name. But in the genre of sociological analysis presented narratively (rather than just statistically), use of a pseudonym would have deprived the work of its very genre identity, and indeed its very communicative function. As the court put it:

> [T]he nonquantitative study of living persons would be abolished as a category of scholarship [by such a rule]. That is a genre with a distinguished history punctuated by famous names, such as Dickens, Zola . . . and Wolfe.
>
> . . . .
>
> Does it follow . . . that a journalist who wanted to write a book about contemporary sexual practices could include the intimate details of named living persons' sexual acts without the persons' consent? Not necessarily . . . .[114]

The genre analysis of *Haynes* was applied directly, though circuitously, to the genre of news in *Zacchini v. Scripps-Howard Broadcasting Co.*[115] Hugo Zacchini performed a human cannonball act at fairs. At one of his early performances at a county fair in Ohio his act was filmed, over his objection, by a local television reporter, whose station ran a fifteen-second segment of the act that evening. The segment, of course, was the most dramatic fifteen seconds of Zacchini's act. It showed the cannon being fired and Hugo Zacchini being propelled from it into the air.[116] This was the heart of the performance, and Zacchini, understandably concluding that its broadcast had dampened the interest of potential future fair-goers,[117] brought suit claiming that the television broadcast had appropriated his legally protected interest in the commercial value of his act.[118]

In its opinion in the *Zacchini* case, the Supreme Court focused its attention on whether the segment's broadcast as news, in and of itself, compelled its immunity from any form of liability, and if so, whether broadcast of the "entire act" (as a practical matter) somehow disqualified it from being treated as news.[119] As the Court put it:

> It is evident . . . that petitioner's state-law right of publicity would not serve to prevent [the television station] from reporting the newsworthy facts about [Zacchini's] act. Wherever the line in particular situations is to be

114. *Id.* at 1233, 1234.
115. 433 U.S. 562 (1977). The following discussion draws on a more extended discussion of the *Zacchini* case in Bezanson, *Quality, supra* note 108, at 344-48.
116. *See Zacchini*, 433 U.S. at 563-64.
117. *See id.* at 575.
118. *See id.* at 564.
119. *See id.* at 574.

> drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.[120]

The Court appears to be saying, in other words, that the question present in the case was not one of newsworthiness alone (or even very much), but instead a distinct question of whether the act's broadcast on television represented a different genre of communication from its performance at the fair, and if so whether its broadcast satisfied the technical requirements that precondition any claim that a distinct genre was employed. Was it, in short, news, or was it just republished entertainment? If the claim that the broadcast represented the distinct genre of news could be made out, the broadcast should be treated as transformative—as transforming Zacchini's communication into another—and its degree of First Amendment protection should rest on the value of that transformation to the aims of the First Amendment. If not, its claimed protection as news would fail, no matter its worthiness (for other purposes). The approach bears a striking resemblance to the reasoning employed under different headings by the Court.[121]

Applying this approach to Zacchini's claim would yield the following analysis. Zacchini's genre was the dramatic performance of an act for an audience. This definition of genre is not restricted to a place (such as performance at a fair) or a time or, most importantly, to a live setting (such as a performance before a live audience) as opposed to a broadcast. Such a narrow definition would not capture the full aesthetic content of the act; it would not reflect the commercially feasible settings in which it might, without substantial modification, be communicated; and it would defeat the very policy interests being served by the tort. The genre claimed by the television station, in contrast, was news. This, of course, is a distinct genre with its own technical requirements, such as usefulness to an audience, interest, accuracy of representation, and value to the community as judged editorially.[122]

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120. *Id.* at 574-75.

121. For example, in the copyright field, the boundary between news (as a fair use) and infringement has often been based on questions of genre, or specifically whether a "use" involves sufficient "value added" as news to transform the copyrighted work into "news." *See, e.g.*, Roy Export Co, v. CBS, Inc., 672 F.2d 1095 (2d Cir. 1982) (concluding that Charlie Chaplin films used in CBS program on his life did not qualify as fair use); Wainwright Secs., Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977) (concluding that portions of a commercial newsletter used in a financial column did not constitute fair use); *see also* Bezanson, *Quality*, *supra* note 108, at 315-366.

122. The elemental characteristics of news, of course, are both contestable and frequently contested. The ones I have posited, however, seem adequate to the task in *Zacchini* and would, I think, be generally accepted in the journalism community.

The question presented by the case, then, is whether to adopt Zacchini's view that the broadcast was simply a republication of his act as entertainment, and thus unprivileged, or whether the station's claim that its broadcast had transformed the segment of Zacchini's act into a new and distinctly valuable genre of news should be credited. The Justices posed this question by asking whether the "entire act" had been broadcast, and therefore whether the station's claim should be disbelieved because the act was entertainment pure and simple.[123] But this is a pretty blunt-edged analysis resting on a conclusive, though debatable, presumption that broadcasting the entire act, or the heart of the act, makes it entertainment and nothing more. To avoid this, it would be better to approach the question from the other end (as, in all fairness, the Court must be understood to have required), measuring the segment broadcast, including the pictures as well as the surrounding text, against the elemental or technical characteristics of news as a genre.

Such an approach would require, first, that the station identify the broadcast's news content and news function. Assuming that the function was simply to report the occurrence of a notable event—assuming, in other words, that the act's presentation was not part of a larger story, such as how people do silly things that risk their lives for money—the question would then become whether depiction of the entire act was necessary to serve that news function (utility to the audience, value to the community) or whether that function could be performed as well, if not more effectively, without broadcasting the effective heart of the performance. To put the question a bit differently, the issue would be whether the act was transformed into something new through its use in the news broadcast—whether the station had added value through its use for news[124]—or whether its significance remained the same, with its venue simply having been changed.

This is the type of analysis the Court expected the Ohio Supreme Court to engage in on remand. That court had earlier disposed of Zacchini's claim by adopting a broad First Amendment privilege for news broadcasts which, at a purely descriptive level, this was.[125] But the Supreme Court would have none of it. The fact that the broadcast was of "legitimate public interest," as the Ohio Supreme Court had declared, was not enough to warrant First Amendment immunity.[126] Virtually anything can be clothed in such sweeping garb, be it news, entertainment, theatre, music, or most any other genre. News, the Court necessarily implied, is more than that.

123. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575-76 (1977).

124. *See, e.g.*, *Roy Export Co.*, 672 F.2d at 1095; *Wainwright Secs.*, 558 F.2d at 91.

125. Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 461 (Ohio 1976).

126. *See Zacchini*, 433 U.S. at 565.

c. Comparing Newsworthiness by Content and Genre

Notwithstanding divergent rationales, what the newsworthiness cases have in common is that the editorial judgments which gave rise to their publication were judged for constitutional purposes by whether *the speech itself* was deemed objectively newsworthy, or whether the speech fit the definitional genre of "news." By extension, editorial judgments which result in the publication of private information are deemed newsworthy so long as the private facts published bear a rational relationship to a larger event, or sequence of events, which comport with objective conceptualizations of newsworthiness. By this analytical methodology the courts create *constructive* editorial judgments, and then judge their protection.

Ms. Gilbert's name, photograph, and psychiatric history in and of itself may not have been newsworthy. However, once Ms. Gilbert became associated with a medical malpractice case, the courts were not hesitant to hold these personal facts newsworthy. Likewise, use of Mr. Haynes' name may or may not have been a necessary component of public comment on misguided welfare polices. Nonetheless, once Mr. Haynes' behavior became associated with a case study in the failure of the public aid system, the details of his private struggles were likewise held to be newsworthy. Zacchini's claim was more problematic, for the absence of a larger theme independent of the act itself made difficult the conclusion that the broadcast had transformed the act from its own genre, entertainment, into news.

Intuitively, this makes sense. Even though these editorial judgments concerned speech which may arguably be characterized as "newsworthy by association," or "tangentially newsworthy," the ultimate standard in these privacy cases is whether or not the information disclosed is of legitimate interest to the public. Information closely associated with events and issues which are objectively newsworthy may fairly be characterized as satisfying this standard.

What must also be understood, however, is that this approach also functions as a presumption about the underlying editorial judgment, the actual choice by the writer or editor to include the challenged material for a reason. The objective analysis conclusively presumes that the reason was of the right sort, whether or not it was actually so in reality. And it poses the risk, as in *Zacchini*, of disqualifying an apparent editorial judgment (a bad one perhaps, but one likely to have been made) from any First Amendment protection by ignoring any inquiry into it because the analysis becomes lost in the mists of genre analysis.

B. Fact-Opinion Distinction

A defamatory opinion (if there is such a thing) is protected from liability under state libel law, but a defamatory assertion of fact is not so protected. Mere comment or opinion on public matters, even though defamatory, enjoys unqualified protection under the First Amendment. Although the Supreme Court's decision in *Milkovich v. Lorain Journal*[127] rejected the unqualified opinion privilege as ignoring the reality that "expressions of 'opinion' may often imply an assertion of objective fact," the general rule that opinion is entitled to First Amendment protection persists.[128] This rule therefore places great importance upon the definition of fact and opinion, and courts have adopted a wide variety of frameworks under which to make the distinction. An examination of a handful of these frameworks illustrates courts' relative disregard of the editorial judgment itself in favor of basing decisions strictly on the outcome of that judgment.[129]

1. *Fact-Opinion Distinction in State Cases*

In *NBC Subsidiary (KCNC-TV), Inc., v. Living Will Center*,[130] a business selling living wills for $29.95 brought a defamation suit against NBC for a story it broadcast in which an individual stated, "I think it [the plaintiff's business] is a scam." The court, after stating that statements of "pure" opinion are constitutionally privileged and not actionable as defamation, set forth a three-pronged "contextual" test to determine whether a statement is one of fact or pure opinion. The test directed courts to consider: (1) whether the statement was cautiously phrased in terms of apparency; (2) the entire published

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127. 497 U.S. 1 (1990).

128. *See id.* at 17-18.

129. The cases are legion and all rest on content analysis. The more recent ones, following *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1 (1990), focus most strongly on the reasonable interpretation of the audience (whether the reasonable reader or viewer would interpret the statement as stating or implying fact) and, often, on the common law rule that evaluative statements based on disclosed true facts are privileged. *See, e.g.*, Turner v. Devlin, 848 P.2d 286 (Ariz. 1993); Rappaport v. VV Publ'g. Co., 618 N.Y.S.2d 746 (N.Y. Sup. Ct. 1994); Worldnet Software Co. v. Gannett Satellite Info. Network, Inc., 702 N.E.2d 149 (Ohio Ct. App. 1997); West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994) (rejecting a strictly textual analysis). The earlier cases tend to apply the more textually centered approach employed in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), which looked to context as a method of judging text and which was rejected in *Milkovich*, *see, e.g.*, *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317 (Conn. 1982); *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985) (en banc), or on approaches based on defamatory meaning grounded in text and reasonable interpretation, *Forsher v. Bugliosi*, 608 P.2d 716 (Cal. 1980), or a form of innocent construction rule applied to possible alternative meanings, *e.g.*, *Haberstroh v. Crain Publications, Inc.*, 545 N.E.2d 295 (Ill. App. Ct. 1989).

130. 879 P.2d 6, 8 (Colo. 1994).

statement in context, not just the objectionable word or phrase; and (3) all the circumstances surrounding the statement, including the medium through which it was disseminated and the audience to whom it was directed.[131]

Applying the first element, the court concluded that the use of the term "scam" in this instance amounted to "nothing more than a subjective judgment regarding the value of the [plaintiff's product], expressed in imaginative and hyperbolic terms, and as such, it neither contains nor implies a verifiable fact, nor can it reasonably be understood as an assertion of actual fact."[132] The context of the speech also supported this conclusion, according to the court, as the report stated that there was nothing defective about the living will forms sold by the plaintiff but simply that similar forms could be obtained for no cost at a local library. Thus, the statement was not made in a context in which the plaintiff was alleged to have acted fraudulently, but rather in a context where it was established that the same product could be obtained more cheaply. Finally, the court found that the broadcast as a whole had presented all the information necessary for the public to draw a conclusion different from that reached by the individual who stated that the plaintiff's business was a "scam."[133]

The court's analysis demonstrates that editorial judgment itself is of little consequence to the First Amendment issue. Although the court did consider several factors that might be understood to focus on the editor's judgment at the time of publication (such as the phrasing of the statement and the audience to which the statement was directed), the court's ultimate determination rested not on what was intended by these judgments but on how the product of these judgments was perceived by the audience.[134] The outcome of the editorial judgment overshadowed the judgment act itself. The published text and its meaning to an audience governed the question of fact or opinion, notwithstanding that the fact/opinion distinction is itself a surrogate for the type of editorial choice being examined, and the legal responsibilities, if any, that it should be made to bear.

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131. *See id.* at 9 (quoting Burns v. McGraw-Hill Broad. Co., 659 P.2d 1351, 1360 (Colo. 1983)).
132. *Id.* at 12.
133. *Id.* at 15.
134. In *Matchett v. Chicago Bar Ass'n*, 467 N.E.2d 271 (Ill. App. Ct. 1984), the court applied the innocent construction rule to the underlying factual predicate of a statement, concluding that the presence of an innocent construction—that a judicial candidate had been rated unqualified because of age rather than other reasons, such as lack of competence—rendered the "unqualified" statement a matter of opinion. This is an uncommon, and unnecessary, application of the rule. For present purposes, however, the point is that the innocent construction rule rests on a constructive audience interpretation approach in judging the content of a statement.

The Connecticut Supreme Court's opinion in *Mozzochi v. Hallas*[135] more clearly exhibits this content-based view. In *Mozzochi*, the court set forth the following framework for determining whether a statement is fact or opinion:

> A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known. In a libel action, such statements of fact usually concern a person's conduct or character. An opinion, on the other hand, is a personal comment about another's conduct, qualifications, or character that has some basis in fact. This distinction between fact and opinion cannot be made in a vacuum, however, for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the fact which he has stated.[136]

While the court refers to the intent of the speaker, this potential factor is ultimately subordinated to an external determination of whether the speech artifact itself presents information that is "capable of being known," which is an inherently objective inquiry.[137]

2. *Fact-Opinion Distinction in Federal Cases*

The underpinning of the fact-opinion distinction is the premise that a statement of opinion, as opposed to a statement of fact, cannot, by definition, be libelous. By extension, speech which, while not necessarily opinion, is so objectively satirical that a person could not reasonably interpret it as a statement of fact, also falls outside the definition of libel.[138] While libelous speech has long been recognized as beyond the scope of constitutional protection, potentially defamatory media speech which is *not* libelous qualifies for full First Amendment protection. Accordingly, an objective appraisal that an editorial judgment has given rise to speech which represents a statement of fact is a pre-condition without which a state of mind inquiry is inappropriate.

In *Milkovich v. Lorain Journal Co.*,[139] the Supreme Court rejected a strict fact/opinion dichotomy in favor of two broader questions. The first question concerned whether or not speech is provably false. The

135. Mozzochi v. Hallas, No. CV950556163S, 1998 WL 19910 (Conn. Super. Ct. Jan. 6, 1998).

136. *Id.* at *4 (quoting Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1321 (Conn. 1982) (citations omitted)).

137. *See Goodrich*, 448 A.2d at 1321; *see also* Rappaport v. VV Publ'g Corp., 618 N.Y.S.2d 746, 748 (N.Y. Sup. Ct. 1994) ("In evaluating plaintiff's assertions, this court is constrained to interpret the challenged language from the viewpoint of the average reader, without straining to find a defamatory meaning beyond the natural and ordinary meaning of the language at issue.").

138. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988).

139. 497 U.S. 1 (1990).

second question concerned whether or not speech can reasonably be construed as stating actual facts. In the words of the Court:

> [A] statement on matter of public concern must be provable as false before there can be liability under state defamation law, at least . . . where a media defendant is involved . . . . [A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.[140]

As to the second question, the *Milkovich* court explained that constitutional protection also exists for statements which "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[141] As such, the Court has created two loose objective standards which function as limitations on libel-based exceptions to the First Amendment.

Of course, courts rarely bother to address explicitly whether or not defamatory statements comport with these standards prior to the commencement of an actual malice inquiry. However, in those cases in which challenged speech is not provable as false, or could not be reasonably construed as an assertion of actual fact, such objective determinations function to convert speech otherwise actionable into a protected exercise of editorial judgment. At least this is so under the Court's broad and absolute—and perhaps also improvident—statement in *Gertz* that opinions are absolutely protected under the First Amendment.[142] This view suggests that editorial judgments about fact are different and of lesser stature than those about opinion, an implication that is clearly wrong as an absolute statement made without respect to genre (e.g., news, history, satire) and context. The better view would be that statements of opinion are protected (by the First Amendment and, indeed, by the common law) against liability for defamation, not because the editorial judgment underlying them is different or superior (the contrary may well be the case), but because to assign liability for factual error to a nonfactual statement would be inadmissible. The *Gertz* opinion said as much, at least by clear impli-

140. *Id.* at 19-20 (footnote omitted).

141. *Id.* at 20 (quoting Falwell, 485 U.S. at 50). This represents yet another area where purpose driven justifications underlie judicial determinations that editorial judgments retain constitutional immunity based upon an objective appraisal of the resulting speech. Specifically, the Court states that a requirement that challenged speech may be "'reasonably interpreted as stating actual facts' . . . provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.* (quoting Falwell, 485 U.S. at 53, 55).

142. The Court put it as follows in *Gertz*:

> [Under] the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1973) (footnote omitted).

cation, in the equally overbroad statement that "there is no constitutional value in false statements of fact."[143] Perhaps not, but the editorial judgment that yields it, just as the one that yields publication of opinion, may well be entitled to constitutional protection. This, indeed, is the necessary outgrowth of the privileges established in *Sullivan* and *Gertz*.

As we have seen to this point, a determination that a speech selection judgment is worthy of First Amendment protection begins with a finding that the judgment in question is the *type* of judgment which serves the First Amendment ideal of free and uninhibited debate on issues of public importance. This requires an inquiry into the purposes served by the *type* of judgment in question. This inquiry is often not explicitly described, especially in those cases involving media defendants. Nonetheless, a judicial determination that a certain *type* of speech does not serve this abstract First Amendment ideal may result in a holding (perhaps unintended) that the editorial judgment underlying the challenged speech does not qualify as a constitutionally protected exercise of editorial judgment.

Once the purpose criteria is satisfied, the speech itself is placed beyond the reach of judicial evaluation, unless an inquiry into the speaker's[144] state of mind results in a finding of actual malice. Until this happens, the speech, even if untruthful or misleading, remains a protected exercise of editorial judgment. There are two exceptions, however, to this general rule. First, under certain circumstances, the *challenged speech itself* will be appraised by the objective standard of newsworthiness in order to determine whether or not the protections of editorial judgment apply. This exception occurs almost exclusively when courts address claims brought against media defendants for invasion of privacy. Another exception to the general rule examines whether or not the *challenged speech itself* may be fairly characterized as an assertion of fact. In a sense, an affirmative answer to this question represents a pre-condition without which a state of mind inquiry is inapplicable. When the question is answered in the negative, the speech, even when defamatory, becomes a protected exercise of editorial judgment.

C. Truth-Falsity Distinction

Statements on matters of public concern which are not proven to be false are protected under the First Amendment from liability under state libel law, while those proven to be false are not. Here the inquiry centers on the meaning of a word or statement chosen, presumably as an instance of editorial judgment, to express an idea. The focus

143. *Id.* at 340.
144. In this context "speaker" may refer to a journalist, an editor, or a publisher.

in the cases is either textual—is the meaning claimed a reasonable one, or the only reasonable one[145]—or grounded in audience interpretation, or both. Virtually no attention is given to the editorial judgment itself, apart from its linguistic end product.

1. *Truth-Falsity Distinction in State Cases*

In *State ex rel Suriano v. Gaughan*,[146] a physician brought a defamation action against a newspaper for its publication of an article stating that the plaintiff and other physicians were no longer providing health care to persons insured under the state insurance program. The court, in setting forth its standard for distinguishing between a true and false statement, stated that "minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge is justified."[147] Parsing closely the words of the article and surmising how the average reader would interpret the article, the court concluded that the article was "substantially true" and therefore protected by the First Amendment.[148] And in doing so the court followed the approach employed generously at common law, where falsity was most often presumed, where meaning was determined in context by the audience's reasonable interpretation, and where motive and intention were largely irrelevant except in relation to punitive damages.[149]

In focusing on audience interpretation of meaning in their truth-falsity analysis, courts in libel cases focus primarily upon the *outcome* of the editorial judgment, inferring from the artifact of publication alone that the judgment leading to its publication must have possessed attributes of expressive choice that warranted First Amendment protection. But the connection between the content of a publication and the presence of editorial judgment is potentially coincidental only, and thus the content, or genre, inquiry is ultimately unsatisfying when it comes to distinguishing protected from unprotected editorial judgment, though that is precisely the consequence of the inquiry's application. Editorial judgment based on calculated falsehood would be protected if the publication fit the content-based or genre-related criteria. Likewise, the most responsible and careful editorial judgment would go unprotected if its end product turned out, in fact, to be false, imply a fact, or invade a person's privacy.

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145. *See* Haberstroh v. Crain Publications, Inc., 545 N.E.2d 295 (Ill. App. Ct. 1989) (innocent construction rule); Matchett v. Chicago Bar Ass'n, 467 N.E.2d 271 (Ill. App. Ct. 1984) (same).
146. 480 S.E.2d 548 (W. Va. 1996).
147. *Id.* at 561 (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (citations omitted)).
148. *Id.*; *see also* Clardy v. Cowles Publ'g Co., 912 P.2d 1078 (Wash. Ct. App. 1996) (finding that the "gist of the article" was true despite admitted inaccuracies).
149. *See* W. PROSSER, HANDBOOK OF THE LAW ON TORTS §§ 106-111 (3d ed. 1964).

D. Conclusion: The Limits of Genre

At first blush, the way in which courts define editorial judgment in the subjective cases in Part III and the objective cases discussed here appear similar. In both situations, the court looks primarily at objective evidence to determine the existence of an editorial judgment protected by the First Amendment. Upon closer examination, however, the analyses of the courts in the subjective and objective cases are significantly different. While courts in the subjective cases determine actual malice by reference to objective manifestations of the speaker's subjective intent, evaluation of the speech artifact itself, as an objective manifestation of that intent, is judiciously avoided.[150] In contrast, courts in the objective cases focus almost exclusively on the speech itself in determining whether the speaker engaged in an editorial judgment protected by the First Amendment; the state of mind of the publisher is legally irrelevant.

More importantly, in the subjective cases the courts analyze objective evidence with the sole objective of ascertaining the speaker's state of mind when the speech judgment was made. The same cannot be said of the courts' analyses in objective cases. A court that engages in a "newsworthy" analysis does not seek to ascertain whether the news reporter or editor believed the speech to be newsworthy when making the decision to speak or publish.[151] Rather, the court merely determines whether the editorial judgment, whatever its character, resulted in a product the First Amendment was designed to protect. The same must be said of the fact-opinion and truth-falsity analyses, as in neither case does the court seek to ascertain whether the speaker believed the statement to be true (although the court does consider this in determining actual malice) or to be an opinion, nor does the court examine the nature of the judgment itself, or even whether any judgment was made at all by the publisher.

In sum, the objective description cases appear to bear no express relationship to the editorial judgment act made by the publisher, since in defining whether the product of a speech judgment is newsworthy, true, or an opinion, the courts simply are not concerned with the editorial judgment itself, except insofar as it produced a speech artifact.[152] Instead, the logic appears to be that a publication judged descriptively as "newsworthy" must, by necessary implication, have been a product

150. *See supra* Part III.

151. If this were the standard for determining "newsworthiness," all articles in a newspaper would be protected by the First Amendment because newspapers presumably only print what they believe to be of public interest (of course this depends on how they define "public interest").

152. For example, the standard employed in *Winstead v. Sweeney*, 517 N.W.2d 874, 876 (Mich. Ct. App. 1994), was whether the public "may reasonably be expected to have a legitimate interest in what is published."

of a form of editorial judgment that deserves First Amendment protection. The logic, of course, is either wrong or wholly circular, for "newsworthiness" might be a product of chance or caprice or, even, misdirected avarice.[153]

Perhaps because of this the objective cases are unique, and uniquely unsatisfying. In the other approaches to editorial judgment discussed in this article there exists at least some discernible link between the subjective editorial judgment made by the speaker and *the speaker's* First Amendment protection (or lack thereof). The three instances in which courts engage in an objective analysis of the outcome of the editorial judgment, lacking any connection to the editorial judgment act, are discussed below.

While newsworthiness is not the only setting in which editorial judgment is judged exclusively on the content of a published statement, or on descriptive and genre-related criteria as applied to a resulting publication, newsworthiness is perhaps the clearest and most revealing setting in which such an approach has taken root. The shortcoming of the approach is clear upon reflection, and it is ultimately fatal. This is because the descriptive contents or the value or the assigned meaning of a publication bears no necessary relation to the type or quality of decision that led to its publication. Yet the type and quality of editorial judgment are, most often, the very foundations upon which the genre analysis is justified, and they are the very ultimate conclusions that the results of genre analysis are intended to yield. At least this is true for purposes of constitutional analysis, which rests the degree of constitutional protection not simply on the artifact of communication but also, and often mostly, on the communicative acts and choices that precede its publication.[154] Any other approach, the Supreme Court has observed, could too easily draft the courts into service as roaming commissions on the importance of information and the tastefulness of its publication.[155] It would draw courts, also, into a potentially limitless extension of traditional First Amendment protection to all of the desiderata of new technologies, where speech increasingly exists *only* in its artifactual form.

The newsworthiness inquiry is not, of course, foreign to the Supreme Court even outside the invasion of privacy setting. Interestingly, it is in settings other than privacy that the inadequacy of news-

153. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

154. The Court is tireless, it seems, in its repeated quotation of the statement that "[e]diting is what editors are for" and that it is the freedom of editors to make choices about "material to include and exclude" that the First Amendment guarantee of freedom of the press safeguards. *See* Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241 (1974); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

155. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1973); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62 (Harlan, J., dissenting).

worthiness as a descriptive or genre-related standard has become evident and has led to alternative approaches resting on criteria more expressly related to editorial judgment and grounded in standards of purpose and process. In *Rosenbloom v. Metromedia, Inc.*,[156] the Court held that libels involving public issues were protected by the First Amendment. Public issues were defined analogously to newsworthiness in the privacy setting, though in different verbal formulations, as matters relevant to controversial or important political, social, cultural or economic matters, and to the exigencies of life in an organized society. This approach is both descriptive and avowedly normative, as with newsworthiness in the privacy setting. The difficulty of capturing the concept in a judicially manageable, predictable, and non-intrusive standard led the Court to expressly reject *Rosenbloom* in favor of a non-newsworthiness, plaintiff-based definitional approach in *Gertz v. Robert Welch, Inc.*[157]

More recently, the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[158] has resorted to distinguishing purely private libels (receiving no constitutional protection) from those privileged under the First Amendment by whether the libelous statement involves a matter of public concern.[159] The "matter of public concern" concept is eerily reminiscent of *Rosenbloom*, and indeed many commentators have concluded that newsworthiness has crept back in through the back door of "public concern." The Court's careful articulation of the standard, however, suggests a different possibility, discussed at greater length below: that "public concern" is a criterion going to (i) the fact of a potentially undifferentiated and large public audience, rather than an audience restricted in size and in the ability to republish, and (ii) focusing on the publisher's editorial intentions with respect to a general audience, rather than with respect to an audience limited in purpose and motive.[160] Notably, this alternative view of the public concern standard serves to reveal the unmanageability of the newsworthiness standard and its lack of apparent relationship to the underlying editorial judgment, replacing it with criteria focused instead on purpose and process characteristics of the editorial judgment that yielded the publication.

Purpose and process reveal most starkly the criteria that mark editorial judgment as a species of judgment by the press. Exploration of their application in decided cases reveals starkly, too, how important a role purpose and process are coming to serve in defining and placing boundaries on editorial judgment claims, especially in today's increas-

156. 403 U.S. 29 (1971).
157. 418 U.S. 323 (1973).
158. 472 U.S. 749 (1985).
159. *See id.* at 761.
160. *See* Bezanson, *Quality*, *supra* note 108.

ingly diverse and technological communications environment. It is to these ultimate criteria, then, that we now turn our attention.

V. JUDGING THE INTERESTS TO BE SERVED: EDITORIAL JUDGMENT AS AN INSTRUMENT OF PURPOSE

Increasingly, claims of editorial freedom are being measured by the purpose(s) that animate the institutions and processes of publication. Journalism's purposes are seen to be public in orientation, yet simultaneously independent of the public's wish or will, and focused on information and opinion deemed useful and appealing to a public audience.[161] Publications geared to this balanced orientation possess the attributes of public mission *and* fierce independence that have come to mark the press as it has evolved in Western culture over the past 500 or so years.[162] The sentiment was expressed poignantly in an appeal by the People's Charter Union in England in January 1849, seeking repeal of the Stamp:

> [W]e demand, then, that ignorance should no longer be compulsory. *** By the penny stamp not only are we debarred from the expression of our thoughts and feelings, but it is made impossible for men of education or of capital to employ themselves in instructing us. . . . And if we are asked why we cannot be satisfied with the elegant and polite literature which may be had cheaply, we reply that we can no longer exist upon the earth without information on the subjects of politics and political economy . . . .[163]

A. State Cases

The analysis of editorial judgment based on purpose rests on the premise that journalism is public in orientation yet at the same time independent of the particular will or wish of the public. In light of this basic understanding of journalism, one can see emerging within state court decisions a paradigmatic exercise of editorial judgment, as measured by its purposes, which is worthy of the strictest of First Amendment speech protection. Judgments which fall short of this paradigm may receive less stringent First Amendment protection or, even worse, may be deemed to fall outside of the purview of the First Amendment and therefore receive no constitutional protection whatsoever.

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161. For a discussion of the idea of independence of judgment, from both government and from the audience's unalloyed will, see Randall P. Bezanson, *The Atomization of the Newspaper: Technology, Economics, and the Coming Transformation of Editorial Judgments About News*, 3 COM. LAW & POL'Y 175 (1998).

162. For insightful and interesting treatments of the history of journalism, see J. HERBERT ALTSCHULL, FROM MILTON TO MCLUHAN: THE IDEAS BEHIND AMERICAN JOURNALISM (1990); SCHUDSON, THE POWER OF NEWS, *supra* note 12.

163. The Appeal, reported in COLLET DOBSON COLLET, HISTORY OF THE TAXES ON KNOWLEDGE: THEIR ORIGIN AND REPEAL (fasc. rep. 1971) (1933), is reprinted in RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9.

The paradigmatic editorial judgment which has emerged from state case law appears to possess three hallmarks. First, protection under the free press guarantee extends to editorial judgments that seek to provide information upon matters important to a public audience rather than to a narrow and restricted segment of the public. Second, protected press publication is the product of an editorial judgment which is independent of the will of the public or a particular segment of the public, and the purest form of editorial judgment is also independent of commercial purposes. Finally, the publications protected under the free press guarantee are the product of an editorial judgment made at a content-specific, or "retail" level at which the publisher acts with a specific communicative purpose *of its own*. Editorial judgment is least respected when made at a categorical or content-indifferent level, a "wholesale" decision to disseminate a broad spectrum of undifferentiated information conveying many ideas and yielding, for the publisher, a very diffuse (or nonexistent) communicative purpose.[164] For the sake of convenience, I will refer to the first element as the "public interest" element, the second as the "independence" element, and the third as the "retail judgment" element.

Unlike the subjective intent analysis in Part III, which was largely restricted to defamation cases, purpose analysis cases cover a broad spectrum of topics as well as mediums. Despite this diversity, there are common strands running through the cases, as each stresses one or more of the hallmarks of the model of editorial judgment set out above. The following discussion divides the "purpose" cases into subgroups based upon which of the three articulated elements the case discusses most.

1. *Public Interest*

McNamara v. Freedom Newspapers, Inc.[165] offers the most simple and straightforward application of the purpose analysis. In *McNamara*, the defendant newspaper published a photograph of the plaintiff's son playing soccer, catching him in full stride while his genitalia were exposed. The newspaper, unaware of the exposure, published the photograph in conjunction with an article covering the game. The plaintiff brought an invasion of privacy claim against the newspaper,

164. This posited hallmark of the paradigmatic "purpose" editorial judgment overlaps to a considerable extent with the "process" cases discussed in Part VI. However, the inclusion of retail-level analysis in this section is appropriate because a much more identifiable and pointed purpose can be expressed and seen in a retail-level decision as opposed to a wholesale judgment. For example, the decision to broadcast a single television program involves a more pointed communicative purpose than the decision of a cable operator to broadcast all television programs carried on A&E. Nonetheless, the retail-wholesale distinction will also be discussed at greater length in Part VI.

165. 802 S.W.2d 901 (Tex. App. 1991).

which the court summarily rejected. The court reasoned that the photograph was published in connection with a newsworthy event—the soccer game—and therefore concluded that "[t]he First Amendment privilege immunizes the reporting of private facts when discussed in *connection with* matters of the kind customarily regarded as news. Under this privilege, a factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities."[166]

The court granted the newspaper full editorial freedom because its purpose was public in nature, it was acted upon independently of public and commercial pressures, and the editorial decision took the form of a particularized publication judgment made at the retail level. *McNamara* provides a particularly poignant example of the importance of the public orientation of the speech, for if this photograph had been *knowingly published* for child pornography purposes it clearly would not have received the same treatment as an editorial judgment protected by the First Amendment.

In *Anti-Defamation League of B'nai B'rith v. Superior Court*,[167] the court applied a similar analytical approach in a more complex setting. In *Anti-Defamation League*, the court considered whether a non-profit Jewish organization was protected under the First Amendment from invasion of privacy claims for information which it had gathered and disseminated. The court ultimately concluded that because the organization disclosed non-public information to foreign governments which had "no compelling need to know such information," rather than to the public at large, it was not entitled to full protection under the First Amendment. The court reasoned that in such circumstances the protections of the First Amendment are not available "because private disclosures of such information to foreign governments could not conceivably constitute a legitimate and constitutionally protected journalistic activity."[168] Thus, the court denied the organization's editorial judgment claim due to the lack of public orientation involved in the organization's information dissemination judgment.

King v. Photo Marketing Ass'n International (In re Photo Marketing Ass'n, Inc.),[169] is another case which considered the public interest necessary for protection as an editorial judgment. In that case, the court considered whether a photo dealers' association which gathered data concerning the operations of its members for publication in trade news periodicals was protected by the First Amendment from compelled disclosure of information about one of its members. The organization argued that although it did not disseminate information to the

166. *Id.* at 904 (citation omitted) (emphasis added).
167. 79 Cal. Rptr. 2d 597 (Ct. App. 1998).
168. *Id.* at 610.
169. 327 N.W.2d 515 (Mich. Ct. App. 1982).

public at large, it nonetheless qualified as a "journalist" because it gathered information from its members under a guarantee of confidentiality, it processed the information for publication in newsletters and a monthly magazine, and it sought to disseminate trade news of interest to its members and others in the industry. The publication was limited in focus, but not restricted in availability to others.

The court agreed with the association, observing that:

> [T]he [association] does not compile the requested information for the purpose of creating a news story of interest to the "general public"; rather, its publications which summarize confidential data are intended for the narrower audience of its members and others in the trade. However, we find that the mere fact that a publication is technical in nature does not preclude the application of the First Amendment privilege against disclosure of confidential information.[170]

The court then supported its conclusion by stressing the similarities between the activities of the photo association and the activities of a traditional news reporter such as a newspaper. The information compiled and published by the organization is "news" to those in the photograph industry. Furthermore, this "news" is gathered pursuant to an agreement of confidentiality just as in the newspaper context, thereby placing the association in a "unique position of trust" which enables it to gather information which is of interest to the photo industry.[171] Thus, to violate this trust relationship by an order compelling discovery would impair the organization's ability to gather data and would hinder the free flow of information to the "interested public."

The *Photo Marketing* court, like the court in *Anti-Defamation League*, was forced to determine when information is of substantial interest to the public as a whole and made sufficiently available to the public to be deemed the product of an editorial judgment worthy of First Amendment protection. The court answered this question by judging the general public (though not the audience) interest in the material published and the editorial process's orientation to this general interest rather than to a narrow audience. The material was protected as the product of editorial judgment under the free press guarantee of the First Amendment, but the court also seemed to recognize that it was reaching the outer boundaries of First Amendment protection.

In *Roemer v. Retail Credit Co.*,[172] the California Court of Appeals, much like the court in *Anti-Defamation League*, found that this outer boundary of First Amendment protection had been breached. The *Roemer* court held that an agency which provided commercial investigative reports to subscribers (mainly insurance underwriters) was not

170. *Id.* at 517.
171. *See id.*
172. 119 Cal. Rptr. 82 (Ct. App. 1975).

protected under the First Amendment for false reports which it had disseminated to four insurance companies. The court concluded that private credit reports are not protected by the First Amendment because while the credit standing of an individual may be a matter of public interest, the investigative agency's decision to publish it was not based on any public need or interest. Rather, the publication judgment involved only the provision of specialized information to a selective *and finite* audience. Thus, the purpose of the speech was not sufficiently public-oriented to warrant First Amendment protection.[173]

These cases reflect a line drawn not in terms of the size of the audience or the value or public content of the publication, as such, but instead in terms of the public orientation of the judgment leading to publication; the criteria employed in deciding what and when and how to publish.[174] The purposes served by the publication decision must not, as in the *Anti-Defamation League* case, be private and personal. Nor must the choice of material for publication rest on circumscribed commercial purposes, as in *Roemer*. Whether this is so, however, is governed not by the audience or the content itself, but by the orientation of the selection judgment and the absence of any restriction that the information may be of general interest and may be able to find its way beyond a limited or targeted audience to a more general one.[175]

2. *Independence*

In *Sprouse v. Clay Communication, Inc.*,[176] an unsuccessful gubernatorial candidate brought a libel suit against a newspaper that had allegedly published a series of articles that, by grossly misleading headlines rather than by outright false statements in the body of the article, implied wrongdoing by the plaintiff in past real estate transac-

173. *See also In re* Burnett, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993) (holding that a publisher of several insurance trade publications was entitled to First Amendment protection, but also discussing a small number of cases in which courts found insufficient public interest to be deemed worthy of First Amendment privilege).
174. *See* Quinn v. Aetna Life & Cas. Co., 409 N.Y.S.2d 473 (Sup. Ct. 1978) (granting newspaper First Amendment protection for editorial judgment to carry ad, but advertiser not protected because of limited purpose). The distinction also exists in cases arising under the New York privacy law, which draws a distinction between use of photos and personal information for purposes of trade or advertising from other uses, including news. *See* Howell v. New York Post Co., 612 N.E.2d 699 (N.Y. Ct. App. 1993).
175. *See also* Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988) (en banc) (commercial speech); *In re Burnett*, 635 A.2d 1019 (finding insurance trade publications entitled to protection); Stahlbrodt v. Commissioner of Taxation & Finance, 654 N.Y.S.2d 938 (Sup. Ct. 1996) (holding shoppers subject to tax based on lack of news content).
176. 211 S.E.2d 674 (W. Va. 1975).

tions. Although the court applied the traditional actual malice standard in finding for the plaintiff, the driving force behind the court's conclusion was its belief that the defendant newspaper had departed from its public orientation and instead had adopted a political agenda catering to a particular segment of the public.

> The basic issue concerns whether evidence indicating that a newspaper foreswore its role as an impartial reporter of facts and joined with political partisans in an overall plan or scheme to discredit the character of a political candidate is relevant in determining whether the newspaper acted in reckless and willful disregard of the truth when it published grossly exaggerated, defamatory headlines which were unsupported by the factual recitations in the body of the story. This Court holds that once an overall plan or scheme to injure has been established, an unreasonable deviation between headlines and the remainder of the presentation is in and of itself evidence of actual malice which . . . supports a jury verdict for libel.[177]

In reaching this conclusion, the court stressed that the purpose of the First Amendment is to engender wide-open, robust and uninhibited political discussion and that this purpose is most clearly evident in newspapers which operate as independent news gathering agencies.[178] Juxtaposing this paradigm with the defendant newspaper, the court concluded that because the defendant was not acting as an independent news gathering agency it should not be entitled to the full protections and privileges of the First Amendment.[179]

Sprouse clearly enunciates the principle that to constitute the paradigmatic editorial judgment protected by the free press guarantee of the First Amendment, the purpose of the speech must be geared toward the needs of the audience and may not be based exclusively upon a self-interested statement of the speaker's own political views. The failure to abide by this principle completely deprives a speaker of First Amendment protection.

A similar, though technically less harsh, consequence befalls a speaker whose purpose in speaking is deemed to be primarily commercial in nature. For example, in *Fargo Women's Health Organization, Inc., v. Larson*,[180] the court sought to determine whether advertisements by a clinic which offered abortion-alternative counseling constituted commercial speech. If so, the advertisements were properly enjoined. Although acknowledging that the clinic did not charge for its services, the court found the advertisements to be commercial speech because they were "placed in a commercial context and [were] directed at the providing of services rather than toward an exchange of ideas."[181] Furthermore, the court rejected the clinic's argument that its advertisements were not commercial speech because they consti-

177. *Id.* at 680-81.
178. *See id.* at 687.
179. *See id.*
180. 381 N.W.2d 176 (N.D. 1986).
181. *Id.* at 181.

tuted advocacy of the pro-life position, reasoning that the advertisement did not make substantial references to public issues.[182]

In *New York Public Interest Research Group, Inc., v. Insurance Information Institute*,[183] a research organization sued an insurance information organization for allegedly misleading advertisements which sought to tie rising insurance costs to "the lawsuit crisis." With the outcome of the suit hinging upon whether the advertisement was deemed to be commercial or non-commercial speech, the court engaged in a lengthy discussion of the purposes of the First Amendment and how they pertain to commercial speech. The court reasoned that non-truthful commercial speech is left unprotected because it does not increase the amount of information which consumers may employ in making their economic decisions, which is the primary rationale for the protection of commercial speech. In drawing practical distinctions between commercial and non-commercial speech, the court stated that the touchstone is the common-sense notion of the primary purpose of the expression.

> If, within a common sense reading, an advertisement is obviously intended to promote sales, it is commercial speech. If a public message or discussion is incorporated, it is still commercial speech. If, however, the advertisement is a direct comment on a public issue, unrelated to proposing any particular commercial transaction, it is protected.[184]

Applying this framework, the court found that the insurance organization's advertisements, which stated that the high cost of liability insurance was due solely to an explosion of law suits and that insurance companies bear no responsibility for rising premiums, were not commercial speech. The court reasoned that the ads did not propose a commercial transaction since they were not generally directed at potential buyers of the organization's product. Moreover, the ads had three major purposes, all of which might fuel public debate: (1) to influence the public, as potential voters, to encourage legislative tort reform; (2) to encourage readers, as potential jurors, to decrease plaintiffs' recoveries by lowering awards; and (3) to improve the image of the insurance industry.[185]

NYPIRG and *Fargo Women's* demonstrate that the courts' reason for deeming editorial judgments with commercial purposes less meritorious is related to *both* the public interest and the independence hallmarks of the paradigmatic editorial judgment. First, the sole policy reason for protecting commercial speech, as stated by the *NYPIRG* court, is to increase the level of information consumers possess in making economic decisions. Because the value of commercial speech

182. *See id.*
183. 531 N.Y.S.2d 1002 (Sup. Ct. 1988).
184. *Id.* at 1011.
185. *See id.* at 1012.

is so limited, commercial speech only serves the public interest when it is true, unlike political speech, for example, which serves other First Amendment interests, such as participation in the democratic form of government, even when its truth is in question.[186] Thus, built into a commercial editorial judgment is the ever-present possibility that it may have no First Amendment value whatsoever if the speech is not true. This severely limits the public's interest in the speech and therefore causes it to fall short of the paradigmatic editorial judgment.

Second, editorial judgments to promote commercial interests are inherently made for the financial interests of a very small and identifiable segment of the public. As such, these editorial judgments are less independent of the particular will of the public or a particular segment of the public. Such editorial judgments, much like the politically motivated judgments made by the newspaper in *Sprouse*, are therefore less geared toward the needs of a public audience and more toward the self-interested desires of the speaker.

Finally, in *Anderson v. Fisher Broadcasting Cos., Inc.*,[187] the defendant broadcasting company videotaped the scene of an automobile accident in which the plaintiff was injured. In the video, the plaintiff was clearly recognizable and was shown bleeding and in pain while receiving emergency medical treatment. The defendant did not use the video to report on the accident in the defendant's regular news broadcast, but instead used the video several weeks later to promote a special news report about emergency help dispatching. The plaintiff then brought an invasion of privacy claim against the defendant.

The trial court held that the defendant's use of the video to promote a special news report remained protected by the First Amendment because the news report in which it was used was newsworthy. The appellate court reversed, finding that an issue of fact existed on whether the use of the video of the plaintiff's injured condition was newsworthy, since it was not used to report the plaintiff's accident itself but only to draw viewers to a different program in which the accident was not mentioned.[188] The appellate court's uncertainty about whether the use of the video constituted commercial or noncommercial speech turned, effectively, on purpose: Was the publication decision independent and public-oriented, or instead self-interested and commercially driven?

On further appeal, the Oregon Supreme Court sought to avoid the constitutional issue by resolving the case on other grounds, concluding that the plaintiff had failed to state a remediable claim because he had only suffered "hurt feelings" and no economic or other more tangible

186. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
187. 712 P.2d 803 (Or. 1986) (en banc).
188. *See id.* at 805.

harm.[189] However, in its discussion of whether the plaintiff's claim was remediable, the court posed an interesting question: "Does the distinction between 'commercial' and 'noncommercial' use of a person's name, likeness, or life history rest on a difference in the interest invaded by the publication or in the character of the publisher's motives and purposes?"[190] The court reasoned that the answer to this question was crucial in determining whether the plaintiff's claim was remediable.

The court's resolution of the case allowed it to avoid a direct answer, as its conclusion that the plaintiff failed to state a legally adequate claim of harm[191] made a decision on the larger question unnecessary. If, as seems plain, the First Amendment's focus, at least at the definitional level, must be on the speech and the expressive acts, and not on the competing interests, the court's question cannot be so easily avoided. The question must, in the end, rest on the publisher's motives or purposes. Commercial information is not, intrinsically, unique. It is not identifiably distinct from other information. A picture of a Campbell's soup can may be a sales pitch, or it may be art. The difference, as the Supreme Court has said, is in the manner of its presentation and the expressive purposes that can be inferred from that.[192] The constitutional question, in other words, turns on the quality of the expressive judgment leading to a publication. By analogy, the same is and must be true for the press: Is the expressive choice one made independently and with a public, not a private, orientation?

3. *Retail-Level Judgment*

An expressive purpose can be attributed to a speaker, including a speaker claiming to exercise freedom of the press, only if the information disseminated is in some sense purposefully chosen for publication. Choice of material need not, of course, consist only of ideas and expression originated by a speaker. Much material published by the "press" is written or produced by others—Op-Ed pieces, stories from the AP wire, independently produced video, for example. But it is selected by the publisher for inclusion in a publication; it is, in effect, adopted as a reflection of the publisher's judgment about what is worth publishing, and thereby transformed into the publisher's own expression. Editorial judgment, then, implies some level of choice specific to the material being published. The absence of any real choice is

189. *See id.* at 814.
190. *Id.* at 811-12.
191. The court held that a plaintiff cannot succeed on an invasion of privacy claim unless he or she has suffered some tangible economic harm or some other harm beyond "hurt feelings." *Id.* at 814.
192. *Virginia State Bd. of Pharmacy*, 425 U.S. 748.

the absence of editorial judgment. Two cases arising in quite different settings illustrate this principle.

In *United Mine Workers of America v. Parsons*,[193] a union sought to compel a state-supported university to grant it advertising time on the university's radio station (MSN) so that it could respond to anti-union political speech broadcast as part of an advertisement on MSN. MSN was not a radio broadcaster itself. It instead produced a sports program "package" which it provided to individual radio stations for broadcast. As part of the deal, MSN required local radio stations to carry fifteen minutes of advertising provided by MSN pursuant to agreements which MSN itself made with advertisers. The advertisements were received by MSN as a finished product provided by the advertiser, but MSN expressly reserved some rights to disapprove of the commercial content.

In considering the union's claim, the court focused primarily upon the union's rights under the public forum doctrine to receive fair opportunity to express its own views in this specialized public forum. More importantly for present purposes, however, the court also considered the university's claim that requiring it to grant the union equal advertising time would impose an unconstitutional burden on its First Amendment right to control the content of its broadcast in violation of the principles set forth in *Miami Herald Publishing Co., v. Tornillo.*[194]

The *Parsons* court rejected the university's claim, distinguishing the case from *Miami Herald:*

> The Mountaineer Sports Network [MSN], on the other hand [as compared to the newspaper publisher in *Miami Herald*], exercises no editorial judgment over the advertisements it broadcasts. Indeed, respondents concede that MSN is merely a conduit for the views of its advertisers. MSN is no more than a special state revenue account within the Department of Intercollegiate Athletics at WVU. It has no employees or staff. It is not a private entity seeking to advocate its own political views, and therefore, it has no free speech interests similar to those held by the newspaper in *Miami Herald.*[195]

The court further distinguished *Miami Herald* on the basis of the medium of speech employed, reasoning that *Miami Herald* was "clearly limited" to print media, which traditionally have received much greater First Amendment editorial protection.[196]

The court in *Parsons* suggested that to qualify as a protected editorial judgment not only must the speech be of public interest and independent of controlling political and commercial agendas, it also must be made on a particularized level which gives full effect to a specific content and thus can be understood to serve a specific communi-

193. 305 S.E.2d 343 (W. Va. 1983).
194. 418 U.S. 241 (1974).
195. 305 S.E.2d at 357.
196. *See id.* at 358.

cative purpose of the publisher. The wholesale adoption of the messages of several advertisers, political and/or commercial, conveys a diffuse array of messages and therefore fails to meet the paradigmatic quality of an editorial judgment. It cannot be said to reflect an independent choice about material that is deemed useful to an undifferentiated audience. It instead reflects no choice, or perhaps only the choice to sell space for another's expression for a price, and nothing more. As a result, such a judgment is entitled to lesser or, as in *Parsons*, no First Amendment protection under the free press guarantee.

The second case arose in the context of new information technology. In *Daniel v. Dow Jones & Co.*,[197] Dow Jones' news retrieval service was sued by a subscriber who claimed to have been injured by a false and misleading news report carried on the service. The court held that Dow Jones could not be held liable to a subscriber, reasoning that the Dow Jones service was similar to the more traditional forms of news distribution, such as vendors and news services like Associated Press, neither of which exercises any form of editorial judgment with respect to a publication sold or distributed as news.[198] Dow Jones' decision to make the on-line news service available to subscribers was, to be sure, an expressive one entitled to protection as an instrument for the free flow of information, but it was not an editorial judgment protected under the guarantee of freedom of the press. It was, in effect, a decision *not* to exercise editorial judgment but instead simply to pass information on in unvarnished form, and thus, as a matter of tort law, Dow Jones could not be held liable for the negligent exercise of a specific, or retail-level, judgment that it did not make, and indeed disavowed.[199]

B. Federal Cases

Claims of editorial judgment are often measured by the purposes that animate the institutions and processes of publication. Journalism's purposes are public in orientation, yet simultaneously independent of the public's wish or will. These notions of independence and public service underlie a lengthy history of First Amendment jurisprudence fashioned to advance our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[200] As a result, those *types* of speech selection judgments that one might intuitively associate with this "profound national commitment," tend to receive the highest degree of First Amendment protection. The protection of underlying selection judg-

197. 520 N.Y.S.2d 334 (Civ. Ct. 1987).
198. *See id.* at 337-38, 340.
199. *See id.* at 336-338.
200. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

ments rests, in turn, on the premise that "the lifeblood [of a free press] is editorial freedom."[201]

The federal cases focus on three characteristics of editorial judgments. The first is breadth of audience and subject matter. When a speech selection pertains to a publication that is extremely narrow both in subject matter and circulation, it is less likely to receive full constitutional protection. The second is purpose. When speech selection judgments are animated by self-interested, non-communicative, or commercial purposes, rather than by the interests and needs of an audience, courts are more likely to find intrusions into the editorial process constitutionally acceptable. The third is specificity. Those speech selection judgments made at the "wholesale" level tend to receive less protection than those made at the "retail" level.

1. Subject Matter and Audience Breadth

Editorial judgment consists of the selection of material for a general, or at least a potentially undifferentiated, audience[202] with the selection grounded in the interests of the general audience.[203] As the Supreme Court has said, the press serves "as a powerful antidote to any abuses of power by governmental officials,"[204] and more broadly "inform[s] and educat[es] the public, offering criticism, and providing a forum for discussion and debate."[205] This implies, at least, a public orientation, and an exercise of judgment with a view to an audience and its interests and needs.[206] The mere transfer or sale of informa-

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201. Muir v. Alabama Educ. Television Comm'n, 656 F.2d 1012, 1016 (5th Cir. 1981).

202. *See* Titan Sports, Inc. v. Turner Broad. Sys., Inc., 151 F.3d 125 (3d Cir. 1998) (denying the World Championship Wrestling Hotline shield law and federal common law protection against discovery for the press because the hotline provided no originated material and was not intended for dissemination to the public).

203. The need for a broad audience for which the information is disseminated is reflected in both constitutional and tort law policies. *See, e.g.*, First Equity Corp. of Fla. v. Standard & Poor's Corp., 869 F.2d 175, 180 (2d Cir. 1989) (stating that loose-leaf financial summary service for 7,500 subscribers was not subject to liability for negligent falsehood because, as a matter of tort law, the publication "is a source of information disseminated to a wide public"); Demuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990, 993 (E.D.N.Y. 1977) (explaining that the Merck Index, listing information of chemicals and manufactures distributed widely [276,500 copies circulated], was protected from liability for negligent falsehood by tort and constitutional principles because of "interest in the untrammeled dissemination of knowledge").

204. Mills v. Alabama, 384 U.S. 214, 219 (1966).

205. First Nat'l Bank v. Bellotti, 435 U.S. 765, 781 (1978).

206. There is a long and largely unbroken history of state and federal accommodation to newspapers and other forms of distribution of current information to the public. At the state level, statutory provisions embodying such preferences are commonly found in sales, use, and other tax provisions. *See* BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9, at 105-215. The federal postal system, of course, has a long and deep tradition of setting advantageous rates and policies

tion between private parties and strictly for private use, like the transfer of patient information among treating physicians, is not an exercise of editorial judgment or editorial freedom, as the publication decision bears no relation to public or audience need and it is strictly governed by private and therefore non-expressive purposes.

The application of this principle to claims of editorial judgment by the press is reflected in the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[207] In the course of its regular credit reporting business Dun & Bradstreet, a credit reporting agency, erroneously reported that Greenmoss Builders had filed for bankruptcy, information that was alleged to be "false[,] and grossly misrepresented [plaintiff's] assets and liabilities."[208] The false information was distributed to a total of five subscribers to the credit reporting service for use in their business activities, and the subscribers were not free to redistribute the information to a general audience. The private purpose of the communication and the narrowness of the audience to which the information was published led the Court to conclude that the defamatory statement "involve[d] no issue of public concern."[209] Accordingly, the constitutional privileges applicable to libel claims under *Sullivan* and *Gertz* were not applicable to Greenmoss Builders' claim, which would instead be governed solely by the common law rules of strict liability without fault.[210]

The Court's conclusion, embodied in a plurality opinion by Justice Powell, was grounded on the idea that "not all speech is of equal First Amendment importance," and that "speech on matters of purely private concern is of less First Amendment concern."[211] In such cases, "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. [Such cases] are wholly

for the distribution of news and newspapers. *Id.* at 216-251. Currently, the favorable second-class postage rates are available, inter alia, to periodical publications that contain "information of a public character, or devoted to literature, the sciences, art, or some special industry." 39 C.F.R. pt. 3001, App. A, § 200.0106. Another interesting illustration is the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified as 42 U.S.C. § 2000aa (1994)), which enacted a privilege against the use of search warrants when law enforcement agencies seek materials from "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

207. 472 U.S. 749 (1985).
208. *Id.* at 751.
209. *Id.* at 757.
210. *See id.* at 758-61.
211. *Id.* at 758-59.

without the First Amendment concerns" with which the Court had been struggling in the *Gertz* case.[212]

The Court's application of the public concern standard, however, did not turn on the intrinsic "value" of the information under the First Amendment,[213] but instead on the purpose served by its publication as reflected in the private nature of the speech transaction and the restricted audience to which the information was disseminated. As Justice Powell expressed it, "'whether . . . [speech] addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . .' [The] credit report . . . was speech solely in the individual interest of the speaker and its specific business audience."[214] Furthermore, Justice Powell explained, "since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any 'strong interest in the free flow of commercial information.'"[215] Such an "editorial judgment," the Court suggests, involves speech selection, but not selection for a broad audience with the audience's needs for public information in mind, and thus not editorial judgment by the press—or even editorial judgment protected under the speech guarantee of the First Amendment. The narrowness of function and audience belied any claim that the expression served a communicative purpose protected by the Constitution—an expressive choice animated by public communication and an "interest in the free flow of . . . information"[216]—rather than a purpose grounded "solely in the individual interest of the speaker and its specific business audience."[217]

Similar reasoning also underlies the D.C. Circuit's 1987 decision in *SEC v. Wall Street Publishing Institute, Inc.*[218] At issue in the *Wall Street Publishing Institute* case was "the SEC's request, under the anti-touting provisions of the Securities Act of 1933 . . . for an injunction that would require the magazine to disclose consideration received in exchange for publishing articles that feature particular

212. *Id.* at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (1977)).

213. Indeed, it could not have done so, as the fact of a company's bankruptcy, in itself, is clearly of public interest and value in any sense in which those concepts were employed to justify constitutional protection in the *Sullivan* and *Gertz* cases. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

214. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761-62 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

215. *Id.* at 762 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)).

216. *Id.*

217. *Id.*

218. 851 F.2d 365 (D.C. Cir. 1988).

firms' securities."[219] The publication in question featured in-depth articles covering particular firms. The articles described the featured firms in "unabashedly glowing terms." This was because the articles, for the most part, were authored by the firms themselves, and published substantially as submitted. In other situations, the featured firm hired either a public relations firm or freelance writers to compose the articles. In both cases, the author was compensated by the featured firm as opposed to the magazine.

On the face of it, the SEC's endeavor to compel the magazine editors "to publish that which reason tells them should not be published" is clearly impermissible under *Miami Herald Publishing Co. v. Tornillo*.[220] The court, however, noted that "[s]peech relating to the purchase and sale of securities . . . forms a distinct category of communications in which the government's power to regulate is at least as broad as with respect to the general rubric of commercial speech."[221] Certainly this position is driven at least partly by the court's belief "that the government may have the power to regulate Stock Market Magazine . . . because of the federal government's broad powers to regulate the securities industry."[222]

Of equal importance, however, is the fact that the publication at issue treats a very narrow subject matter and serves a very specific purpose, namely to provide a conduit by which featured firms may solicit investors. In neither respect is there any need or, for that matter, occasion for the Wall Street Publishing Institute to exercise any form of editorial judgment, and certainly none related to a general audience and pertaining to matter of which the public should be aware.

Yet the court ultimately held that the SEC's request could not be granted because "[c]onditioning regulation on the extent to which text is used . . . would result in both SEC and court interference with the 'crucial process' of editorial control."[223] The court explained that "[t]he fundamental difficulty with the SEC's interpretation of 'consideration' . . . as applied to this case, *involving a magazine in many respects similar to one of general circulation*, is that one of the objects of its requested injunction . . . inevitably implicates interference with fully protected journalistic activity."[224]

On the surface of the opinion, the *Wall Street Publishing Institute* case makes two points about editorial judgment. First, it emphasizes the point that less First Amendment protection may attach to editorial judgments concerning publications which are narrow and specific

219. *Id.* at 366.
220. 418 U.S. 241 (1974).
221. SEC v. Wall St. Publ'g Inst., 851 F.2d 365, 373 (1988).
222. *Id.* at 372.
223. *Id.* at 374.
224. *Id.* at 375 (emphasis added).

in subject matter, which cater to narrow audiences, which are not intended for a general audience, and which do not treat issues broadly defined as public in nature.[225] Second, it illustrates that the closer a publication comes to resembling a magazine of general circulation, the less likely a court is to tighten the reigns of editorial freedom in service of other legitimate objectives. But these are simply the surface manifestations of the case. Both narrowness of audience and subject matter are objective manifestations of the underlying editorial judgment assumed to have been made: a judgment driven not by public orientation and need but by private motive and, in the *Wall Street Publishing Institute* case, most likely by greed.

A final case, *SEC v. Capital Gains Research Bureau, Inc.*,[226] is worth noting because, while resting on statutory rather than constitutional grounds,[227] it articulates ideas of editorial judgment and press function in an interesting and revealing way. The *Capital Gains Research* case involved interpretation of Investment Advisers Act of 1940.[228] Capital Gains (CGRB) was a registered investment advisor which published "Capital Gains Report," an investment newsletter published monthly and mailed to approximately 5000 subscribers, in which securities were recommended for purchase by the customer. CGRB was "scalping," a practice of buying shares in companies about to be recommended, and selling them after the market rose as a result of the recommendation and customer purchases. The SEC issued an injunction requiring CGRB to disclose in the Capital Gains Report that it was following this practice.[229]

The case turned on the meaning of fraud and deceit under the Act—whether intent to injure was required, or whether a broader and more remedial meaning was intended, at least with respect to the prophylactic remedy of injunctions requiring disclosure. The Court unanimously held that the broader interpretation was applicable in light of legislative history and the purposes of the act. The key criteria for fraud and deceit warranting required disclosure was the fiduciary ob-

225. *See* Titan Sports, Inc. v. Turner Broad. Sys., Inc., 151 F.3d 125 (3d Cir. 1998) (holding that shield law and federal common law protection against discovery for the press denied to the World Championship Wrestling Hotline because the hotline provided no originated material and was not intended for dissemination to the public).

226. 375 U.S. 180 (1963).

227. To similar effect, and also resting on statutory grounds, is *Hodgson v. United Mine Workers of America*, 344 F. Supp.17 (D.D.C. 1972), in which an NLRB election was overturned because its outcome was potentially affected by the publishing activities of a union newspaper completely financed by union funds and used as a "campaign instrument for the incumbent[] [officers] . . . during a critical period of the election campaign." *Id.* at 23.

228. 54 Stat. 847, 852, 853 (1940) (codified as amended at 15 U.S.C. §§ 80b-1, 80b-6, 80b-9 (1994)).

229. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 181-83 (1963).

ligation of full disclosure to clients and the requirement of disinterested judgments and advice without conflicts of interest or self-interest interfering with the decision to recommend securities.[230]

The publisher's editorial decisions, the Court stated, must be disinterested, independent, and made in terms of client or customer interest, in this case the interest of the audience for the newsletter.[231]

> The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. It misconceives the purpose of the statute to confine its application to 'dishonest' as opposed to 'honest' motives.[232]

While fiduciary is not a term likely to be applicable to the press (except under an audience right theory, which is radically different than freedom of editorial judgment[233]), the case touches upon the "duty" of the press and to whom it is owed. If disinterestedness is a critical element of editorial judgment, to whom is that duty owed and for what purpose? Is it owed to the subscriber: the editorial judgments must be made in light of the subscriber's interests, which might be viewed as a need for useful information impartially gathered and presented, as in the British struggle for press freedom from the Stamp?[234] Or is it owed to the "public" in some more abstract political sense, with the subscribers and readers as secondary, not primary, beneficiaries; so that the duty is to assemble and report information and opinion of public significance at any given time, independently and therefore in a fashion not undermined by self-interest, the demands of government policy, or other extraneous factors?

Accountability under this view is to the public interest: enforcing it requires determining the public interest, which the First Amendment might be easily interpreted to prevent government from doing. There being no other standard of public interest, the freedom of a competitive and private press supplies in systematic terms the public interest justification, not in terms of the product of any particular member of the press or any story, but in terms of the thrust or gravitational pull of a system of independence from government in making such decisions, the only quid pro quo being that the press's decisions

230. *See id.* at 185-86.
231. *See id.* at 191-92.
232. *Id.* at 201.
233. Decisions resting expressly and more or less exclusively on an "audience rights" theory of freedom of the press include *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (sustaining the federal right of response in political debate requirements) and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). The theory is rarely invoked today, perhaps because by placing the audience's interest above that of the press, and permitting government regulation in order to vindicate the audience interest, it is flatly inconsistent with editorial freedom of the press and independence of the press from government control and oversight.
234. *See* BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9.

must also be "independent" of the press's own "personal" self interest (as opposed to survival). Editorial judgments marked, in other words, by independence, public rather than self-interested orientation, and the goal of disseminating information and opinion of current value to a general audience, are the preconditions without which the purposes of press freedom could not be realized.[235]

2. *Purpose*

The purpose cases consist of two groups. The first involves whether the publication judgment is animated by a purpose to communicate information that is representative of actual events and non-misleading to the audience. The second group involves whether the publication was governed by any purpose to communicate information judged by the publisher to be valuable or useful to the audience, or whether instead it reflected no publisher judgment whatever, or reflected no more than a commercially facilitative publication decision. The first group, in short, explores the nature of the judgment made; the second explores whether any qualifying judgment was made at all.

The first group is illustrated by the Supreme Court's decision in *Masson v. New Yorker Magazine, Inc.*[236] A central issue in the *Masson* case involved the inaccurate use of quotations. It was claimed that Janet Malcolm, the writer of the challenged article about Jeffrey Masson and the Freud archives, placed quotations around statements that reflected her "rational interpretation" of Masson's responses, but not Masson's actual words. The challenged misquotations did not consist only of grammatical repair but instead were transformative of meaning, infusing Malcolm's interpretation of Masson's words and intention into different words which, because of the quotations used, led the reader to believe that Masson had actually said them.

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235. The importance of editorial judgment about the content of a publication remaining free of outside pressure that would distort a publisher's decisions was emphasized in *Pacific Gas & Electric Co. v. Public Utils. Comm'n*, 475 U.S. 1, 10-11 (1986). In explaining why the First Amendment was violated by a requirement that a utility company include a flyer from a ratepayer group with the utility's newsletter to customers, the Court explained the basis for its decision in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) and the importance of editorial freedom uninfluenced by factors other than a publisher's own judgment. The *Pacific Gas* Court noted that in *Tornillo*, the newspaper's "'treatment of public issues and public officials—whether fair or unfair—constitute[d] the exercise of editorial control and judgment'" and that "Florida's statute interfered with this 'editorial control and judgment'" by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond . . . where the newspaper might prefer to be silent." Concluding that "[s]ince all speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible." *Pacific Gas & Electric Co.*, 475 U.S. at 10 (quoting *Miami Publ'g Co.*, 418 U.S. at 257-58).

236. 501 U.S. 496 (1991).

The question for the Court was whether the use of quotations to convey an author's rational interpretation (when the rational interpretation departed substantively from meaning conveyed by the subject's actual words) was constitutionally protected under the First Amendment. The Court's answer revealed that purpose analysis can apply to questions of representativeness and accuracy outside the actual malice setting. Journalists often, the Court said, convey their own rational interpretation of what they have seen or heard. If in doing so the journalist's editorial judgments are intended to convey a representative and accurate account of events, those judgments are protected by the First Amendment even though they fall short of the mark. But placing the rational interpretation in words of another through quotation transforms the meaning of the statement published: it is no longer the reporter's rational interpretation, but instead the publication of what another person actually said. The story is no longer the described event, but the subject's own description of the event as conveyed through the quote.

The misquotation by definition cannot be a rational interpretation, for the matter communicated is no longer the event itself but the quotation itself, and misquotation can not be a rational interpretation of the quotation. In this case there is no constitutional protection for the editorial judgment to use the quotation marks, for their use is flatly inconsistent with a reasoned (or rational) editorial judgment to communicate representative and actual information to an audience.[237]

The Court's own reasoning is worth quoting at some length. "The protection for rational interpretation," the Court said, "serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources."[238] But interpretive license implies an effort rationally to reflect the events being described in an accurate way.

> The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the statement of [Masson], not Malcolm's rational interpretation of what [Masson] has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statement in their subjects' mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule.... We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice.[239]

The misquotation, in other words, would not be a transformative interpretation of another's ideas into the publisher's own communicative

237. *See id.* at 519.
238. *Id.*
239. *Id.* at 519-20.

message, but a misrepresentation of the publisher's effort, through use of quotations, to do exactly the opposite. To protect such a practice would be to credit the publisher's effort to achieve a purpose—editorial selection of material originated by others to achieve an independent communicative design—which the very use of quotations disavowed.

The second group of purpose cases are closely related to the first group. But while the first group, represented by *Masson*, looks to editorial judgments whose purpose is to represent actual events or statements, admittedly an interpretive task, the second group inquires into whether any effort to represent events was attempted by the editor or publisher, and if it was, whether what was being represented was not the editor's reasoned interpretation of actual events or information but, instead, a representation of events or information as constructed by the editor's commercial or financial self-interest. The question is not, strictly speaking, one of objectivity. It is instead whether the editorial judgment strives (though imperfectly) to represent a reality based on the audience's interest in information, or instead a reality based on the editor's commercial interests alone. Both, in some metaphysical sense, are realities, but only the first qualifies for protection as the product of editorial judgment by the press.

Unsurprisingly, the second group of purpose cases arises principally at the intersection of freedom of the press and commercial speech. The seminal case is *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[240] which involved a newspaper's challenge to an order that it cease its practice of publishing help-wanted ads in sex-segregated columns. The Pittsburgh Press, of course, claimed that the order was a blatant usurpation of its editorial freedom because it dictated to newspaper publishers the manner in which their publications must be arranged. As Justice Stewart put the matter, in dissent, the issue presented by the case was "whether any government agency . . . can tell a newspaper in advance what it can print and what it cannot."[241]

The majority, however, did not accept this view of the case. The difference between the majority and dissent focuses directly on the scope of editorial judgment protected by the First Amendment. In sustaining the order, the Court concluded that the newspaper's layout decision was inspired by commercial and purely formal considerations. It was not intended to take a view or state a position, and it bore no intended or actual relationship to the selection of particular information or ideas to be published to the paper's audience. The purpose of the sex-based columns was not communicative in the sense

240. 413 U.S. 376 (1973).
241. *Id.* at 400 (Stewart, J., dissenting).

that the publisher's purpose was to express its own view; it was instead commercially facilitative. Thus separated from the news side of the newspaper, the Court concluded that "[t]his is not a case in which the challenged law arguably disables the press by undermining its institutional viability."[242]

Another case that is quite similar is *Ragin v. New York Times Co.*[243] In *Ragin*, the plaintiffs had alleged that the *Times*' twenty-year-old practice of publishing real estate advertisements that virtually never depicted African-Americans as potential home buyers or renters violated the Fair Housing Act of 1968. After concluding that "a trier [of fact] plausibly may conclude that in some circumstances ads with models of a particular race and not others will be read by the ordinary reader as indicating a racial preference,"[244] the court rejected the *Times*' claim that the statute in question, as applied to the *Times*, violated the First Amendment.

Although the *Times* argued that "enforcement of the Fair Housing Act against newspapers [would] compromise the unique position of the free press," the court adhered to the position that such an action posed no threat to journalistic independence. The court stated that:

> [a]s the Supreme Court in *Pittsburgh Press* was unable to discern any significant interference with the traditional 'protection afforded to editorial judgment and to the free expression of views . . . however controversial' so we perceive no disruption of the press's traditional role that will result from prohibiting the publication of real estate ads that, to the ordinary reader, indicate a racial preference.[245]

The *Ragin* case, of course, clearly involved the communication of particular ideas by the *Times*. Indeed, the basis for the claim in the case, and the ground for the court's conclusion that the Fair Housing Act may have been violated, was the racially discriminatory message that the readers were presumed to have received.

Yet the question remains whether the claimed editorial judgment pertained to that message, or whether the message was either inadvertent or, if intended, inspired not by a purpose to communicate information and opinion the *Times* has judged useful for its readers, but rather by the *Times*' desire to facilitate the profitable business of publishing real estate advertisements. If the message were inadvertent, it could hardly be claimed to be the product of editorial judgment by the *Times*. If it were simply intended to facilitate business for the *Times* or appeal to the baser instincts of its advertisers (not its read-

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242. *Id.* at 382.
243. 923 F.2d 995 (2d Cir. 1991).
244. *Id.* at 1000 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, (1980) and Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).
245. *Id.* (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).

ers), the editorial judgment could hardly be described as directed to the publication of information or opinion of value to the public and selected independently of forces or aims that would corrode its constitutionally protected purpose.[246] The court's conclusion that the plaintiffs' claim involved no "disruption of the press's traditional role," though partly intuitive, reflects this view of the case, for the *Times'* editorial decision lacked those "attributes of public mission and fierce independence" which the First Amendment was fashioned to protect.[247]

A final case focusing on purpose involves the recurrent question of when and why state assisted, student-run, school newspapers may refuse to carry certain advertisements. In *Mississippi Gay Alliance v. Goudelock*,[248] the Mississippi State University newspaper refused to carry an advertisement for a gay community center. Although the majority upheld the paper's decision as an exercise of editorial judgment protected by the Supreme Court's decision in *Miami Herald Publishing Company v. Tornillo*,[249] a lengthy dissent addressed the need for "a reconciliation between the interests . . . of student autonomy in control over the contents of the newspaper, and . . . nondiscriminatory public access to a communication forum sponsored by the state."[250] The reconciliation suggested was one grounded on purpose, distinguishing editorial decisions on "editorial product"—material judged by the paper to be useful to its readers and related to its news mission—from decisions to carry advertisements that represent the unedited and largely unevaluated speech of others, decisions that facilitate the paper's business interests and not its editorial obligations. As the dissenting judge put it:

> I think that the two interests discussed above can be accommodated through a doctrine which permits student editors of state newspapers unfettered discretion over what might be termed the 'editorial product' of the newspaper, yet requires that when the newspaper devotes space to unedited advertisements or announcements from individuals outside the newspaper staff, access to

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246. The cases, of course, are not altogether consistent in approaching the problem. For two illustrative cases going the other way—perhaps inconsistently with *Pittsburgh Press*—see *News & Sun-Sentinel Co. v. Board of County Comm'rs*, 693 F. Supp. 1066 (S.D. Fla. 1987) (invalidating law requiring contractors to include certificate of competency number in ads, on ground that the law intruded unconstitutionally into newspaper editorial judgment by placing enforcement burdens on press to check ads for compliance); *Memphis Publ'g. Co. v. Leech*, 539 F. Supp. 405 (W.D. Tenn. 1982) (invalidating required warning in alcohol ads that transporting liquor into Tennessee without permit is illegal, on ground that law intrudes on editorial discretion of newspaper editors about ads to accept).

247. *See* Ragin v. New York Times Co., 923 F.2d 995, 1003 (2d Cir. 1991).

248. 536 F.2d 1073 (5th Cir. 1976).

249. 418 U.S. 241 (1974).

250. *Mississippi Gay Alliance*, 536 F.2d at 1087 (Goldberg, J., dissenting).

such space must be made available to other similarly situated individuals on a nondiscriminatory basis.[251]

In other words, when a newspaper in fact exercises editorial judgment with a view to its audience (thus transforming the expression into its own communicative product), it is protected by the free press guarantee from regulation, even regulation in the form of a requirement to publish additional information for purposes of balance or fairness. The majority felt that the paper had done so, having made a content-specific editorial decision about the ideas the paper would publish.[252] The dissenting judge felt differently, concluding that the exclusion, while content specific, was predicated on the editors' private preferences and not on the newspaper's editorial judgment about the needs and interests of the audience.

There is ample room for disagreement between these two views; sufficient room, indeed, that the First Amendment should probably be viewed as requiring indulgence of the newspaper's claim. But it is an entirely different matter when the publication rests on no judgment whatsoever about the material published, other perhaps than a judgment not to judge it, or to judge it on grounds divorced from the interests of the audience.[253] In such cases the protection associated with

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251. *Id.* at 1087. Another case that raises roughly the same issue is *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997). In *Yeo* a father of students at a local high school sued the school board when both the yearbook and the school newspaper refused to accept his paid advertisement urging students to pursue abstinence over other means of contraception and disease control. When the case was initially heard by the court of appeals, the court held that the school had created a public forum, and accordingly could not refuse to carry plaintiffs' advertisement. "State actors," the court stated, "cannot open their facilities and other avenues of communication to the public and yet seek to retain unbridled discretion to refuse a proposed use of the forum for any reason they subsequently deem sufficient." On rehearing en banc, the suit was dismissed when the court held that there was insufficient state action to support a claim under section 1983. Yet, prior to the en banc hearing, the court of appeals had held, albeit *sub silencio*, that First Amendment protection of the student editors' publication choices did not apply to the selection of paid advertisements.

252. Similar reasoning was used to support a newspaper's claimed right to edit a submitted advertisement in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971).

253. In addition to the cases discussed in this section, see *Wick v. Tucson Newspaper, Inc.*, 598 F. Supp. 1155, 1160 (D.C. Ariz. 1984) (finding shopper's qualifications as newspaper and protection for editorial decisions were dependent in part on whether publisher's purpose "is distributing primarily news and editorial opinion or primarily advertising material"); *Levitch v. CBS, Inc.*, 495 F. Supp. 649, 661-62 (S.D.N.Y. 1980) (holding that broadcast network alleged boycott of independent producers in favor of "decision to air only in-house news and documentary productions" is editorial judgment but is not protected editorial judgment if done for purpose of "interfering with business relationships in a manner proscribed by the antitrust laws"); *Fitzgerald v. NRA*, 383 F. Supp. 162, 166 (D.C.N.J. 1974) (deciding not to publish advertisement for candidate to NRA board in newsletter not protected because made in bad faith by management for purpose of "self perpetu-

editorial freedom will not apply. This is because there is simply no editorial judgment to keep free.

3. *Specificity*

A distinction has long been drawn in First Amendment doctrine between regulations of expression that are general, or content neutral, and those that are specific to the content or message being communicated. Content specific regulations are subject to more exacting scrutiny on the ground, among others, that they present a danger of government censorship and control of particular ideas or information.[254] A similar distinction is drawn in the context of editorial judgment on the related ground that content specific restrictions threaten press freedom and independence, a rationale that in turn rests on the premise that editorial judgment performs its most important function when the choice of specific information or ideas rests in the private, independent hands of the press.[255] Editorial judgments made at the particular, or retail, level are, in other words, more highly valued under the First Amendment than those made at a general, or wholesale level.[256] This is because they are communicative (the judgment itself is part of a design to communicate a message), because they re-

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ation of the incumbent NRA hierarchy"). *But see* Sluys v. Gribetz, 842 F. Supp. 764 (S.D.N.Y. 1994) (explaining that newspapers' acceptance of bribes in form of advertising dollars in exchange for favorable coverage of advertisers did not deprive the resulting editorial decisions of full First Amendment protection).

254. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 745-849 (2d ed. 1988).

255. The distinction between specific and categorical editorial judgments arises often in the context of claims by newspapers for protection for advertisements or advertisement layout decisions. On the one hand, the Court has held that purely categorical decisions, such as want-ad headings, are not protected editorial judgments. *See generally* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). On the other hand, courts have sustained editorial judgments about advertisements when, and to the extent, that they reflect a choice specific to the advertising material being edited or rejected. *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (declining ads with specific content is protected editorial judgment); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) (holding that modification of submitted ad is protected editorial judgment).

256. See *Titan Sports Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125 (3d Cir. 1998), where the court held that the applicable press shield law and federal common law protection against discovery for the press did not apply to the World Championship Wrestling Hotline because the hotline provided no originated material and was not intended for dissemination to the public. The absence of originated material, of itself, was not determinative of the claim of editorial freedom—much material chosen for publication is not originated by the publisher. Instead, the court focused on the fact that the material was borrowed entirely from other publishers with no independent investigation and no judgment about which parts of the material would be used, concluding that no editorial judgment, specific or general, had been made in the selection and transmission of the material on the hotline, and thus no editorial freedom was at stake.

flect the editor's own message (a message either of endorsement or of transformation into a new message by the editor), and because they are understood to do so by the audience.[257]

The distinction was drawn and explained by the Supreme Court in the *League of Women Voters* case.[258] The case involved a challenge to the Public Broadcasting Act's prohibition on editorializing by noncommercial educational broadcasters.[259] In striking down the prohibition, the Court explained the special protection for editorializing by the press, the classic form of specific, or retail level, editorial judgment.

> [T]he special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press . . . carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs. Indeed, the pivotal importance of editorializing as a means of satisfying the public's interest in receiving a wide variety of ideas and views through the medium of broadcasting has long been recognized by the FCC.[260]
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> . . . [I]n sharp contrast to the restrictions upheld in *Red Lion* or in *CBS v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, [the prohibition on editorializing by public broadcasters] directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner.[261]

Whether editorial judgments made at the categorical, or wholesale level, should be treated the same for constitutional purposes as specific, or retail level, decisions is the subject of much current litigation in the federal courts. Perhaps the most important recent decision touching on this question is *Turner Broadcasting Systems, Inc. v. FCC*,[262] which involved Turner Broadcasting's challenge to the "must carry" rule, by which channel space must be set aside by cable operators in order to carry the signals of local broadcasters. The choice of material to carry on a cable channel, Turner claimed, was an editorial judgment protected by the First Amendment, notwithstanding the fact that the cable operator is making a categorical decision about the expression it will admit to its system. The operator's decision, in other words, relates at best to a thematic selection of material originated by unaffiliated program producers and never reviewed on a program-by-program basis by the cable operator.

The Court's decision in the *Turner* case rested on two distinct and important grounds. First, the Court held that the program carried on

257. *See generally* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).
258. FCC v. League of Women Voters, 468 U.S. 364 (1984).
259. *See* Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified at 47 § 390), as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730 (1981) (codified at 47 U.S.C. § 399).
260. *League of Women Voters*, 468 U.S. at 382.
261. *Id.* at 385.
262. 512 U.S. 622 (1994) (Turner I).

a cable channel (as opposed to the cable operator's channel carriage decision) is protected speech and that, under conventional First Amendment analysis, the must carry rule is subject to reasonable scrutiny as a content neutral regulation of speech. Second, and more important for present purposes, the Court refused to treat the cable operator's decision to select its channels as an exercise of editorial judgment entitled to near absolute protection under the editorial freedom reasoning of *Miami Herald Publishing Co. v. Tornillo*.[263] The court explicitly stated that "[c]able programmers and cable operators engage in and transmit speech, and . . . are entitled to the protection of the speech and press provisions of the First Amendment."[264] Yet the Court concluded that although "the provisions [under consideration] interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations,"[265] such interference represents a content neutral incidental burden on speech subject only to the intermediate scrutiny paradigm set forth in *O'Brien*.[266]

The essential reasoning at work, while not explicit in *Turner*, was made quite explicit in the nearly contemporaneous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[267] where the competing metaphors of the newspaper and the cable operator were brought to bear on the right of a parade organizing group to First Amendment protection in the selection of participants in a parade. In *Hurley* the Court extended First Amendment protection to the "editorial" choices about parade participants on the ground that the parade organizer "decided to exclude a message it did not like from the communication" transmitted by the parade, and thus acted "as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[268] In making specific editorial choices about the messages of others that would serve its own communicative purposes, the parade organizer acted like "[a] newspaper, . . . [which] 'is more than a passive receptacle or conduit for news.'"[269]

The choices, the Court said, were unlike those most often characteristic of cable operators, "because '[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable opera-

263. *Id.* at 653-657.
264. *Id.* at 636.
265. *Id.* at 643-44.
266. *Id.* at 661-64; United States v. O'Brien, 391 U.S. 367 (1968).
267. 515 U.S. 557 (1995).
268. *Id.* at 574.
269. *Id.* at 575 (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

tor.'"[270] Cable operators, in short, neither make decisions about specific content in order to communicate their own view, nor are they understood to be doing so by the viewer. Their decisions are categorical and general, not specific, and thus lack the communicative design that editorial judgments must possess for First Amendment protection.

The conclusion that editorial judgments made at a categorical, or wholesale, level are not subjected to the strict limits of the free press guarantee rests, it appears, on the conclusion that wholesale speech selection choices lack the hallmarks of independent choice geared toward audience need that the free press guarantee demands of editorial judgments.[271] Indeed, they lack an essential quality of conveying a message *from the publisher* to the audience, as opposed to transmitting a message from the originator through a passive publisher who is indifferent to content, at least from a communicative point of view.[272] Just as the regulation of wholesale level judgments are more likely to be viewed as content neutral,[273] so also the generality of grounds on which such judgments rest deprives them of the quality of specific and purposeful communicative choice that editorial judgment by the press necessarily implies.

This interpretation of the *Turner* case is far from explicit in the Court's opinions. Indeed, there are other cases that suggest something quite different: that a cable operator's channel decisions do constitute protected editorial judgment, and that other wholesale-level choices of speech material are similarly protected. But upon reflection the conflict between these cases and this interpretation of *Turner* and other more recent decisions, such as *Denver Area Educational Telecommunications Consortium v. FCC*,[274] is more apparent than real, for the Court's approach in the other cases yields a decidedly more modest level of First Amendment protection than do the free press editorial judgment cases, and most of the other cases rest, in the end,

270. *Id.* at 576 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994) (Turner I)).

271. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 573-78 (1995) (extending First Amendment protection to selection of participants in a parade because the selections were thematic and specific to each potential participant. The parade was therefore, like "[a] newspaper . . ., more than a passive receptacle or conduit for news.").

272. *See id.* at 573-78.

273. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (Turner II); *see also* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Bezanson, *Quality*, *supra* note 108; Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 Iowa L. Rev. 953 (1998).

274. 518 U.S. 727 (1996).

on conventional free speech paradigms.[275] This is understandable, by the way, for it is beyond dispute that a cable operator, or any other common carrier, is involved in the distribution of speech, and even though the speech freedom may belong to the producer or programmer, and not to the common carrier, content based regulation of the channels through which the protected speech is distributed threatens the First Amendment rights of the producers and programmers of the speech and may be vindicated by them through the common carrier.

An example of the apparent but not real conflict is *Preferred Communications Inc. v. City of Los Angeles*.[276] In *Preferred Communications* a cable franchiser challenged the city's practice of limiting the number of cable operators that could operate in a given area through a licensing system. The court stated:

> In addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will include. Editorial judgment is entitled to First Amendment protection. Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so, however, we believe it would be treated for First Amendment purposes as would theater owners, booksellers, and concert promoters. Their First Amendment protection is not diminished because they distribute or present works created by others.[277]

The First Amendment protection afforded to booksellers, concert promoters, and theater owners is firmly rooted in the premise that those who deliver the speech of others, "even if they are not 'expressing' themselves, further a first amendment interest in making protected materials available to the public."[278] Implicit in this rationale is the notion that constitutional protection must be afforded to editorial judgments made at the wholesale level since such judgments play a crucial role in delivering information to the public at large. The basis for the First Amendment's protection, however, is that the public's receipt of such information represents a necessary component of informed debate on issues of public concern, a rationale related not to the freedom of an editor to exercise editorial judgment, but to the self-governing, marketplace of ideas and purposes that animate large parts of free speech (not free press) theory.

The distinct ground for First Amendment protection of libraries and distributors of speech, including news, on the one hand, and publishers of information that have originated or specifically selected the

275. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (sustaining state regulation of candidates participating in political debate on public television network); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (sustaining FCC's minority preference policies); Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (sustaining required set aside of channels for noncommercial or educational programming by DBS providers).

276. 754 F.2d 1396 (9th Cir. 1985).

277. *Id.* at 1410 n.10 (citations omitted).

278. Cinevision Corp. v. City of Burbank, 745 F.2d 560, 568 (9th Cir. 1984).

published material, on the other, was revealed in an ironic way in *Cubby, Inc. v. CompuServe, Inc.*,[279] one of the first cases dealing with on-line information services.[280] The issue in the case was whether CompuServe, distributor of the Journalism Forum, which included bulletin boards and topical databases, could be held liable for defamation for statements carried on the Journalism Forum that were critical of a competing newsletter called "Skuttlebut."[281] CompuServe claimed that it could not be held liable as a publisher or a republisher of information; it was, instead, a mere distributor. To bolster its claim, CompuServe argued that it did not exercise editorial control over the Forum but, instead, contracted the management and editorial functions to another entity (which exercised editorial judgment "in accordance with editorial and technical standards and conventions of style as established by CompuServe").[282] The court agreed, concluding that CompuServe was entitled to First Amendment protection, but a lower standard than that accorded a publisher, because CompuServe is like "an electronic, for-profit library" whose database "is the functional equivalent of a more traditional news vendor."[283] For First Amendment purposes CompuServe was deemed a common carrier, a news delivery service or a newsstand, in the traditional common law parlance.[284] CompuServe's defense, ironically, was that it expressed no ideas of its own; it was entitled, the court held, to no First Amendment protection grounded on editorial judgment, for it exercised none.

Judicial determinations that individual speech selection judgments merit First Amendment protection as editorial judgments under the free press guarantee rest not on the goal of advancing the

279. 776 F. Supp. 135 (S.D.N.Y. 1991).

280. Other cases include *Telecommunications Research & Action Center v. FCC,* 801 F.2d 501 (D.C. Cir. 1986) (holding that teletext service can, as broadcast signal, be made subject to the Fairness Doctrine) and *Daniel v. Dow Jones & Co.,* 520 N.Y.S.2d 334, 336-338 (Civ. Ct. 1987) (holding that news retrieval service "is not liable to its readers for negligent false statements" because, as mere distributor exercising no editorial judgment about specific content and not claiming material as its own expressive product, it was not a publisher but a distributor entitled to constitutional protection in that capacity, but not as a newspaper). *But see* Legi-Tech v. Keiper, 766 F.2d 728 (2d Cir. 1985) (holding that operator of information retrieval service entitled to full First Amendment protection). For academic commentary, see ANNE BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS (1994); M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989); M. ETHAN KATSH, LAW IN A DIGITAL WORLD (1995); Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century,* 13 FORDHAM URB. L.J. 801 (1984-85); Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action,* 81 GEO. L.J. 409 (1992).

281. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137-38 (S.D.N.Y. 1991).

282. *Id.* at 137.

283. *Id.* at 140.

284. *See generally* PROSSER, *supra* note 149, § 109, at 794.

free exchange of ideas, but instead on the essential role played by independent judgments about current information, geared toward public need and distributed through the press.[285] Basing editorial freedom instead on the premise that it promotes the free exchange of ideas would create a conundrum, for a court could never pass judgment as to whether or not a particular speech selection judgment actually promotes First Amendment values without decimating the editorial freedom which the court initially endeavored to substantiate. It is necessary, then, that courts use criteria of purpose, not content, to identify the *types* of editorial judgments protected under the free press guarantee, not the *particular* editorial judgments deserving of protection. It is for this reason that the purpose inquiry focuses on the independence of judgment, the purpose it is intended to serve, and the specificity of judgment about material to be communicated.

C. Conclusion

The purpose inquiry is at once the most difficult and sensitive, but also the most important. Editorial judgment is an extremely broad concept, ranging in scope of application from news choices made by the daily newspaper editor, to advertisements carried in a newspaper or magazine, to materials dealt with by a historian, to jokes selected by a comedian, to camera angles chosen by a filmmaker, to pornographic material included on a web site. Expressed in its generic sense—as simply a choice of material for expression—it is a meaningless, almost vacuous, standard for First Amendment judgment, and this is especially so in the narrower setting of freedom of the press, where the Supreme Court has most often employed the term.

It is necessarily the case, then, that freedom of the press connotes editorial judgment of a particular sort and of a particular value. And perhaps the most direct approach to defining editorial judgment by the press is in terms of purpose. A purpose-oriented definition relates directly to the ends served by the First Amendment's guarantee of freedom of the press. It also enables courts employing it to avoid unwise, if not unconstitutional, judgments about content of expression and its value, an enterprise rightly abandoned by the Supreme Court in the *Rosenbloom* case.[286] Of equal importance, a purpose-oriented definition of editorial judgment avoids the many and intractable pitfalls that would result from a purely institutional definition, for the press takes too many forms to be captured in even the broadest definition of institutional attributes.

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285. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

286. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

The purpose inquiry being employed by state and federal courts is built on three basic criteria, or requirements. It assumes that to qualify as editorial judgment by the *press*, the choice of material (i) must concern information and opinion of current value to the public, or to an undifferentiated audience of interested consumers of non-fictional current information; (ii) must be made independently, oriented to the audience's needs as well as preferences; and (iii) must be grounded on a judgment about the specific content being published. These three criteria aptly describe the paradigmatic qualities of editorial judgments concerning "news"—decisions about public value and need for current information, arrived at independently of government compulsion or coercion, advertiser dictate, or purely self-interested motive. The criteria also effectively steer clear of judicial assessment of value or content, asking only that the choice made by an editor bear the hallmarks of orientation toward independent assessments of value, including the requirement that the editor or selector seeking constitutional protection actually make a judgment particular to the specific material published.

The criteria thus rest on an assessment of purpose, but do so in terms of the decision-making process that yields publication, rather than in terms of the end result of that process, the content published. If successfully applied by courts such an approach can guarantee the breathing space for a varied and changing "press" whose protection rests on fidelity to certain approaches to publication and not on a judicial assessment of the value of its expression, the institutional or organization form that it takes, or the medium in which it operates.

VI. EDITORIAL JUDGMENT AS PROCESS: IDENTIFYING THE ESSENTIAL PROCESS QUALITIES OF JOURNALISM

The final, and perhaps most recently developing, approach to defining editorial judgment is marked by attention to standards of procedure or process. Journalism and protected editorial activities recognized under the free press guarantee of the First Amendment possess, under this view, a few select and necessary procedural hallmarks: decisions about publication and material to publish that possess a necessary minimum of independence; appropriate habits of verification; enforcement of compositional choices and decisions that remain within the genre of nonfiction. The cases span a broad range, from newsgathering claims in which the newsgathering activity allegedly bears no relation to any anticipated publication process; to cases in which discretion about the fact or content of publication was simply not exercised, or was even given over to another; to cases in which choices about material to be published were made at a "wholesale" or packaged level rather than at a "retail" level based on attention to specific content.

A. State Cases

The approach to defining editorial judgment by the procedure or process employed by the speaker rests upon the assumption that editorial judgments worthy of First Amendment protection must possess certain substantive characteristics—such as orientation to publication, choice with reference to an audience, objectivity, and truth-seeking—which are manifested by the presence of minimal procedural hallmarks. Two primary procedural hallmarks emerge from state case law. First, at least some semblance of appropriate verification procedures must be used, such as investigating the source of information and confirming the accuracy of the information. Second, discretion over the precise content of the publication must be exercised. That is, the judgment process as to the material to be published must be made at a "retail" level based on attention to specific content, rather than at a "wholesale" or packaged level.

1. *Verification Procedures*[287]

The most often discussed procedural hallmark of a protected editorial judgment is the use of appropriate verification procedures by the speaker. However, while inadequate verification procedures are often asserted by plaintiffs as demonstrating a defendant publisher's reckless disregard for the truth, state courts have been very reluctant to base actual malice findings upon procedural deficiencies. Thus, although verification procedures are often discussed in state court decisions, the decisions suggest that only minimal habits of verification are required in order that the resulting publication be accorded First Amendment protection as an exercise of editorial judgment.

An example of the courts' relaxed view of procedural proficiency is *Ortiz v. Valdescastilla*.[288] In *Ortiz*, a private individual brought a libel claim against the publishing newspaper and the author of an allegedly libelous article. Because the libel suit was brought by a private individual, the *Sullivan* actual malice standard was not applied to determine the existence of the speaker's First Amendment protection. Instead, the court applied a more liberal standard, stating that the defendants would be stripped of their First Amendment protection if the plaintiff could establish by a preponderance of the evidence that

287. Like the subjective intent cases, verification procedure cases most commonly arise in the libel setting as courts undertake the actual malice analysis. In a sense, the verification procedure cases can be considered a subclass of the subjective intent cases because, as discussed in Part II, courts often look to the lack of appropriate editorial procedures as an objective manifestation of the speaker's subjective disregard of the truth. For a more extended discussion of courts' attention to verification procedures in libel cases, see Murchison et al, *supra* note 34.

288. 478 N.Y.S.2d 895 (App. Div. 1984).

the defendants acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[289]

Applying this standard, the court found that the *newspaper* had not acted with gross irresponsibility and was therefore entitled to First Amendment protection. The court cited the fact that the newspaper had relied upon an author with an established reputation and had no reason to question the content of the author's article. Further, the newspaper editorially reviewed the article before publication, thereby employing reasonable methods to ensure accuracy.[290]

The court also concluded that, except for the absence of a crucial affidavit, the reporter was entitled to First Amendment protection. Noting that the author had relied upon information given to him by a traditionally trustworthy source who was a recognized expert in the subject matter of the article, the court held that sufficient care had been taken in advance of publication to satisfy the minimal threshold of First Amendment protection, despite the fact that the defendant author never attempted to confirm his source's information by any other means.[291]

In *Curran v. Philadelphia Newspapers, Inc.*,[292] a former U.S. Attorney brought a libel suit against the defendant newspaper as the result of an article which suggested that the newly appointed U.S. Attorney had stated at a press conference that the plaintiff had been lax on, and maybe even obstructed the investigation of, white collar crime. In fact, the U.S. Attorney had said no such thing; the author of the story, who did not attend the press conference, simply believed that such a statement was made due to assumptions he drew from information relayed to him by a coworker who had attended the press conference.

The court held that the author did not act with actual malice despite the apparent procedural deficiencies in the writing and publication of the article. The court pointed to the following factors: the author had called several parties with knowledge of the facts, although not the plaintiff or new U.S. Attorney, to confirm and add to his story; the author was working under a strict deadline; and the public perception surrounding the plaintiff at the time, as evidenced by various newspaper articles, made plausible the author's assumption that the newly appointed U.S. Attorney had stated that the plaintiff had been easy on white collar crime.[293]

289. *Id.* at 898.
290. *See id.* at 899-900.
291. *See id.* at 900.
292. 546 A.2d 639 (Pa. Super. Ct. 1988).
293. *See id.* at 647; *see also* Woodcock v. Journal Publ'g Co., 646 A.2d 92 (Conn. 1994) (stating repeatedly that negligence in researching and publishing an article is not

Even the cases in which deficient verification procedures led to the satisfaction of the actual malice requirement suggest that the procedures must be grossly inadequate to fail the minimum standards for First Amendment protection. For instance, in *Mazart v. State*,[294] the court found that a university newspaper which published a libelous letter to the editor had been grossly irresponsible in publishing the letter. The newspaper did not have in place any procedures whatsoever to verify the authorship of letters to the editor, not even one as blatantly libelous as the one submitted in *Mazart*. In fact, neither the university nor the newspaper itself had in place any guidelines in connection with the publication and distribution of the newspaper.

The court in *Savitsky v. Shenandoah Valley Publishing Corp.*,[295] also found the defendant newspaper's and defendant author's inept process in confirming allegedly libelous articles to be a sufficient basis to support a finding of actual malice. In *Savitsky*, the author received the libelous information from an unnamed informant who was not known to ever have provided information in the past and of whom no other questions were asked by the author. Moreover, the author did not call the plaintiff or anyone else in an attempt to confirm the story, even though the reporter knew how to contact the plaintiff and had done so in the past. Finally, the reporter was not acting under any time pressure to publish the story, as it was not a "hot news" item. In fact, the story was not published until four days after the events of the story took place and were presumably brought to the newspaper's attention. The court therefore concluded that the publication of the article was marked by clear departures from acceptable journalistic procedures: (1) the utter lack of adequate pre-publication investigation; (2) the use of wholly speculative accusations and accusatory inferences; and (3) the failure to utilize effective editorial review.[296]

The absence of the ordinary processes for editorial judgment geared toward an audience interested in truthful information made it impossible, it appears, for the court to indulge the assumption that editorial judgment had been exercised. The principle underlying the cases seems to be that some minimal measure of judgment must be exercised with respect to the content published. This principle is

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sufficient for a finding of actual malice and the deprivation of First Amendment protection).

294. 441 N.Y.S.2d 600 (Ct. Cl. 1981).

295. 566 A.2d 901 (Pa. 1989).

296. *See id.* at 904 (citing Frisk v. News Co., 523 A.2d 347, 351 (Pa. Super. Ct. 1986)); *see also* Holbrook v. Casazza, 528 A.2d 774 (Conn. 1987) (affirming a finding of actual malice where evidence of ill will towards the allegedly defamed public official was corroborated by the defendant's failure to: (1) read the statutes with which she charged the official in question of having violated; (2) investigate the facts; (3) seek advice from other knowledgeable persons; and (4) publish a retraction after learning that the official was exonerated).

closely tied to the need for procedures that focus at retail on the information to be published.

But is the interest in truth, itself, an element of editorial judgment, a necessary animating purpose and a procedural prerequisite? The answer, surely, is no. Editorial judgment involves publication not only of provable fact but of unprovable fact and opinion. To condition constitutional protection on truth would be to ask the impossible; it would also be to judge the existence of protected editorial judgment by its result, an approach whose weaknesses have already been discussed in Part IV.

Yet truth is an important value in freedom of the press and, indeed, in understanding editorial judgment, as the Supreme Court so eloquently expressed it in *New York Times v. Sullivan*[297] and countless later cases. But truth was not the rub in *Sullivan*; the rub was instead the effort to achieve it. The calculated lie is an abandonment of truth. It is the conscious absence of truth seeking.

So editorial judgment may rest, not on truth, but on good faith aspirations for it. Truth seeking, to give the concept a name, is consistent with the publication of provable or unprovable fact, and with opinion. Truth seeking goes to purpose as measured through both state of mind and process. And it is implicit in the press's role of providing information and opinion upon which we rely in dealing with the "exigencies of our time."

Interestingly, the much-maligned *Audubon*[298] case is a clear illustration of the importance of truth seeking to the process of editorial judgment. The question presented in the case was whether the publication of a false allegation made by one public figure against another should be privileged under the First Amendment notwithstanding the allegation's falsity but also its known falsity at the time of its reporting. The *Audubon* court answered in the affirmative, but with a number of qualifications. The most important for our purposes is that the false allegation be accurately conveyed, and that it be conveyed in such a way that the reader understands the point of the article to be the fact of the allegation, not the truth or possible truth of its contents.[299] An editorial judgment that the allegation itself, though false, is important information for the audience is consistent with the truth-seeking aims of publication by the press. On the other hand, an editorial judgment to publish the allegation in a manner that implies its truth—that suggests that the publication endorses its possible truth in choosing to publish it, and fails to convey to the reader the

297. 376 U.S. 254 (1964).

298. Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977).

299. The Court required that the report of the allegation be "accurate and disinterested." *Id.* at 120. The need for "neutrality" in presentation is illustrated by *Cianci v. New Times Publ'g Co.*, 639 F.2d 54 (2d Cir. 1980).

limited aim of the story—is not protected editorial judgment and is not consistent with the truth seeking aims of the free press guarantee. Such a publication, instead, would be unprotected because made with actual malice; it would be a calculated lie, though in its craftiest form; it would be a conscious rejection of truth seeking as an aim of editorial judgment.

2. *Retail-Level Decisions*

A handful of state cases require a speaker to exercise discretion over the precise content of the publication in order to be accorded editorial judgment protection.[300] *New York Times Co. v. City of New York*,[301] is such a case. In that case, the Human Rights Commission sued to enjoin the *New York Times* from publishing advertisements for employment in South Africa, claiming that by printing such ads the newspaper abetted employers who sought to discriminate on the basis of race. Although the court rejected the plaintiff's claim on non-constitutional grounds, finding that the *Times* did not possess the requisite intent to be found guilty of abetting, the court went on to discuss the constitutional issues raised by the parties.

The court reasoned that the *New York Times'* publication of the advertisements constituted commercial speech and therefore would have been properly enjoined had it been found to have violated anti-discrimination laws. The court relied heavily on *Pittsburgh Press*,[302] specifically quoting the Supreme Court's statement that "[n]either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech."[303] In citing this statement, the court reasoned that the *Times'* wholesale acceptance of the content of the South Africa ads was insufficient to entitle it to full First Amendment protection. The

300. *See, e.g.*, Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc., 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding that a newspaper decision not to publish anti-bind issue ad protected because made pursuant to specific policy of not publishing ads on eve of elections); Glendora v. Kofalt, 616 N.Y.S.2d 138 (Sup. Ct. 1994) (holding that a decision not to carry further programming from producer on access channel, based on prior program content, is protected editorial judgment).

The need for content-specific choices as a precondition of editorial judgment has also begun to arise in the less traditional setting of news data base services. *See, e.g.*, Daniel v. Dow Jones & Co., Inc., 520 N.Y.S.2d 334 (Civ. Ct. 1987); Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). For a discussion of the cases, which are generally consistent in approach with those discussed in this section, see *supra* text accompanying notes 197-99, 279-84.

301. 362 N.Y.S.2d 321 (Sup. Ct. 1974).

302. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

303. *New York Times Co.*, 362 N.Y.S.2d at 326 (quoting *Pittsburgh Press Co.*, 413 U.S. at 387).

Times simply did not engage in a sufficiently specific content-based decision to be found to have exercised any editorial judgment worthy of such protection.

The New Jersey Supreme Court engaged in a similar analysis in *Passaic Daily News v. Blair*.[304] In *Passaic*, the court considered the constitutionality of a New Jersey law prohibiting classified employment columns from being separated on the basis of sex, race, creed, color, national origin, or marital status. Finding the case factually similar to *Pittsburgh Press*, the court concluded that the regulation did not infringe upon the newspaper's editorial freedom because the regulated speech was merely commercial speech. This was so, the court reasoned (quoting the very same passage of the *Pittsburgh Press* opinion cited by the *New York Times Co.* court), because the control exercised by the newspaper over the advertisements was insufficient to entitle it to full First Amendment protection.[305]

Although cases such as *Passaic* and *New York Times Co.* make it clear that some minimal level of decisional process must be exercised over the material published in order to be accorded full First Amendment protection, a number of cases demonstrate that this process need not be immediately evident or transformative of the speech artifact. This is especially true in the area of republication, as courts reason that although the second publication may not alter the extrinsic content of the first publication in any fashion, a content-specific judgment worthy of complete First Amendment protection still has been made by virtue of the publisher's decision to adopt the material as its own.

Such a case is *Montana v. San Jose Mercury News, Inc.*[306] In that case, the defendant newspaper published a souvenir section of the newspaper celebrating the San Francisco 49ers' then-recent Super Bowl victory. As a cover to this special edition, the newspaper published an artist's rendition of the plaintiff Joe Montana, who was at that time the 49ers' quarterback. Two weeks later, the newspaper printed and sold posters featuring the same artist's rendition of Montana. Montana responded by bringing a claim for commercial misappropriation of name and photograph. Montana conceded that the use of his likeness in the souvenir edition was newsworthy and thus protected by the First Amendment, but he objected to the second use of the same likeness.

The court summarily rejected Montana's claim, holding that the posters were entitled to First Amendment protection.[307] The court reasoned that the posters covered a relatively contemporaneous newsworthy event and therefore were protected editorial judgments. More

304. 308 A.2d 649 (N.J. 1973).
305. *See id.* at 656.
306. 40 Cal. Rptr. 2d 639 (Ct. App. 1995).
307. *See id.* at 640-41.

importantly, the poster was subject to First Amendment protection because a photograph originally published in one issue of a periodical as a newsworthy subject may be republished subsequently in another medium as an advertisement for the periodical itself, illustrating the quality and content of the periodical.[308] Thus, the court found that, although not apparent from the speech artifact itself, the newspaper had engaged in a content-specific judgment worthy of complete First Amendment protection.

A similar analysis is employed under the so-called "neutral reportage" doctrine, which some state courts have come to adopt.[309] One such court was a Pennsylvania superior court, which adopted the neutral reportage doctrine in *DiSalle v. P.G. Publishing Co.*[310] In *DiSalle*, a judge and his wife brought a libel action against a newspaper for publication of a private citizen's defamatory charges that the judge had been involved with a fraudulent will. The defendant admitted that it acted with actual malice under the *New York Times Co.* standard but urged the court to adopt the "neutral reportage" doctrine. The court summarized the doctrine as follows:

> A reporter is privileged to publish the serious charges of a responsible, prominent entity . . . involved in a raging controversy and concerning a public official or public figure, irrespective of the publisher's belief as to the falsity of the charges, provided the reporter does not espouse or concur in the charges and reasonably and in good faith believes the report accurately conveys the charges made.[311]

The neutral reportage doctrine essentially acts as an exception to the actual malice doctrine in a small subset of libel cases.[312] The primary articulation of the neutral reportage doctrine is the Second Circuit's opinion in *Edwards v. National Audubon Society, Inc.*[313] The court in *Edwards* argued that such an exception to the actual malice rule is warranted because when a prominent party makes serious charges against a public figure, what is newsworthy about the charges is the fact that they were made. Thus, even if the reporter has serious doubts regarding the truth of the accusations, the First Amendment should protect the editorial judgment to publish the charges (so long as that is all the publisher is understood to have done) because the purpose of their publication is to serve the public's interest in being fully informed of such controversies.[314]

308. *See id.* at 643.

309. *See, e.g.*, Brady v. Cox Enters., Inc., 782 S.W.2d 272 (Tex. Ct. App. 1989).

310. 544 A.2d 1345 (Pa. Super Ct. 1988).

311. *Id.* at 1358.

312. *See id.* at 1359-60.

313. 556 F.2d 113 (2d Cir. 1977).

314. *See id.* at 120.

The *DiSalle* court, which found this reasoning persuasive and ultimately adopted the neutral reportage rule,[315] offered a further explanation of the doctrine:

> [T]he speech which is to be protected by neutral reportage is not the defamatory falsehood itself, but the speech required to convey the information that a certain individual involved in a controversy made a particular charge. Describing the protected speech in this manner helps to explain why, with neutral reportage, the subjective awareness of the republisher that the statement is false becomes irrelevant.[316]

Explained in this way, the neutral reportage doctrine looks very similar to the reasoning set forth in *Montana.* In both cases, the courts found that, although no change was made to the objective speech artifact itself, the newspaper had engaged in a subjective content-specific judgment worthy of full First Amendment protection as an editorial judgment.[317]

3. *The Presence of an Editorial Process*

If editorial judgment involves certain types of choices about materials, it also implies the existence of some process through which the choices are made. Without identifying the precise elements of that process, it is clear from this idea of editorial judgment that in the absence of any process permitting choices to be made, there can be no editorial judgment. An interesting group of cases bears this out.

In *Misut v. Mooney*,[318] a "contract printer" who had printed and distributed allegedly defamatory material was sued for libel. The defendant's contract printing business consisted of taking handwritten or typewritten copy and printing that copy for distribution in the form of a newspaper. The defendant scrutinized materials it printed for nudity, profanity, and vulgarity and eliminated such elements, but did not otherwise exercise control over the content of the printed material. It did not check sources or seek to determine the truth of the printed information.

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315. Although the *DiSalle* court adopted the neutral reportage doctrine in principle, it found that it did not apply in this case because the party who initially leveled the claims was not a public figure. For a case in which the court refused to adopt the neutral reportage privilege, see *Brady v. Cox Enterprises, Inc.*, 782 S.W.2d 272 (Tex. Ct. App. 1989).
316. *DiSalle*, 544 A.2d at 1361.
317. The purpose of the statement's publication, of course, is transformed in a neutral reportage case, for the newspaper's defense rests on a claim that the paper is reporting the charge made, not making the charge. The neutral reportage doctrine then assumes the unlikely—that the audience is capable of understanding this distinction and the resulting transformation of the statement, though the publisher need not make any effort to bring this subtle (if not ungraspable) distinction to the reader.
318. 475 N.Y.S.2d 233 (Sup. Ct. 1984).

In its consideration of the libel claim against the defendant printer, the *Misut* court engaged in a lengthy discussion of the traditional rule of strict liability for anyone who aids in the publication or production of libelous material. Observing, however, that the Supreme Court had modified the common law rule in its constitutional interpretation in *Gertz v. Robert Welch Inc.*,[319] the court concluded that the "grossly irresponsible" standard must be applied in private libel cases.[320] The court further stated that a printer who does not play a "knowing role" in the publication of libelous material may not be held liable: "the Court does not view the duty of a printer to be inclusive of an obligation to confirm facts, check sources, and to thereby be responsible for the truth of printed statements."[321] If a printer does play a knowing role in the publication of libel, however, it may be held liable if it is found to have acted in a grossly irresponsible manner.[322] The court found that the defendant did not play a "knowing role," and absolved him of liability.

Similarly, in *Osmond v. EWAP, Inc.*,[323] the plaintiff, who played Eddie Haskell on "Leave it to Beaver," sued an adult bookstore for libel due to its carrying of a pornographic movie falsely purporting to star the man who played Eddie Haskell. The court began by setting forth the general rule that a distributor or seller of books and videos is entitled to First Amendment protection. The court reasoned that a party who plays a secondary role in the dissemination of libelous material may avoid liability by showing it had no reason to believe the material to be libelous. Because the bookstore had no reason to believe that the video was libelous, the court entered judgment for EWAP.

At first blush, these two cases do not seem to fit into the frameworks set forth in the other cases discussed in this Part, nor do they fit with the proposition that editorial judgment is partly a function of process. It appears that the speakers in these cases are receiving First Amendment protection not because they engaged in the paradigmatic editorial judgment, but rather because they did *not* engage in any such judgment. The contract printer in *Misut* and the adult bookstore in *Osmond* made speech decisions at the wholesale level, which normally is the hallmark of speech left unprotected. The answer to this apparent inconsistency is that the courts in *Misut* and *Osmond* did not hold that First Amendment editorial judgment occurred, and therefore that the First Amendment barred liability. The

319. 418 U.S. 323 (1974).

320. *See* Ortiz v. Valdescastilla, 478 N.Y.S.2d 895 (App. Div. 1985), *discussed supra* text accompanying notes 288-91.

321. *Misut*, 475 N.Y.S.2d at 235-36.

322. *See id.*

323. 200 Cal. Rptr. 674 (Ct. App. 1984).

courts held, instead, that the absence of any editorial judgment absolved the defendants of liability as a matter of common law doctrine, apparently because they were not publishers or were common carriers and hence not to be treated as involved in publication.[324] The absence of First Amendment protection was therefore irrelevant to the cases.

A final and interesting case addressing the same issue in a different setting is *Herald Telephone v. Fatouros*.[325] In that case, a newspaper agreed to run an advertisement submitted by a political candidate. The newspaper went over the layout of the ad and accepted payment from the candidate, but then hours later informed the candidate that the ad was inflammatory and that it was against the newspaper's policy to run such an ad. The candidate sued to compel the newspaper to run the ad. The court first found that a binding contract had been created between the newspaper and candidate. The court then rejected the newspaper's argument that the exercise of editorial discretion is an implied part of every advertising contract regardless of whether the newspaper actually shows the customer its printing policy guidelines. The court reasoned that a newspaper's editorial control ends once a contract is formed:

> While a newspaper has a right to reject any ad it wishes, this right exists only until a contract is formed. Once the contract is entered into, the newspaper stands in the same position as any other business entity and may reject an ad only if it reserved the right to do so or has an equitable defense to specific performance.[326]

The court therefore treated the act of entering into the contract as the occasion for the exercise of editorial judgment, with all further judgment precluded by principles of contract law once the capacity to make retail level publication decisions was contracted away. Interestingly, the same result was reached in *Cubby, Inc. v. CompuServe Inc.*,[327] in which CompuServe was held to be free of potential liability for defamation because it had contracted away all editorial discretion with respect to its bulletin board and data base service to a separate company.

The *Fatouros* and *CompuServe* cases illustrate the boundaries of editorial judgment and how a publisher's claim to constitutional protection depends on its exercise of judgment and its application of procedures for judging what to publish. When these are contracted away, the publisher—whether a data base service or a more traditional newspaper—contracts away its claim to constitutional protection, as

324. *See* RESTATEMENT (SECOND) OF TORTS § 581 (1977); PROSSER, *supra* note 149; *see also, e.g.*, Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Daniel v. Dow Jones & Co., Inc., 520 N.Y.S.2d 334 (Civ. Ct. 1987).
325. 431 N.E.2d 171 (Ind. Ct. App. 1982).
326. *Id.* at 175 (citations omitted).
327. 776 F. Supp. 135, 137 (S.D.N.Y. 1991), *discussed supra* text accompanying notes 279-84.

well. The constitution's protection attaches not to the status of being a newspaper or news distributor, as such, but rather to the ways in which the newspaper, as a newspaper, engages in *its own* expressive activities.

B. Federal Cases

The process cases in the federal courts follow no particular pattern, but instead reflect a wide variety of settings in which claimed editorial judgments are examined for procedural hallmarks that corroborate the editorial judgment claim. There is no listing of procedural characteristics that must be met; instead the cases reflect a search for sufficient signs of regularity in decision making and purpose to justify First Amendment protection.

The libel cases, of course, often involve inquiry into procedure, but most often the procedure is directed to another goal: state of mind. In the actual malice cases, especially those resting on the Supreme Court's formulation of the test as "reckless disregard for the truth," procedural attributes of the publication judgment are measured to determine, extrinsically, the essentially intrinsic state of mind of the publisher (or editor) as to truth at the time of publication. Thus, in *Harte-Hanks Communications, Inc. v. Connaughton*,[328] the Supreme Court sustained a finding of actual malice which was premised largely on proof of grossly inadequate procedures employed by a newspaper. The claim, however, was that the newspaper's procedural deficiencies were willfully calculated to avoid discovery of the truth, and thus went to subjective intent and state of mind, not to mere sloppiness. The *Connaughton* Court made it clear that "failure to investigate will not alone support a finding of actual malice"[329] and "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."[330]

An altogether different picture is presented in the libel cases governed by the Court's decision in *Gertz v. Robert Welch, Inc.*[331] In the "private figure" libel cases governed by *Gertz*, the constitutional rule is that liability may not be imposed in the absence of fault—most commonly, negligence. The negligence inquiry focuses not on state of mind, but on whether the decision to publish was reasonable in light of the risk of harm from a false and damaging statement. This is a question going directly to the procedures surrounding the ultimate editorial judgment—what and when to publish. But it is not an inquiry going to the procedural hallmarks necessary for a publication decision

328. 491 U.S. 657 (1989).
329. *Id.* at 692 (citing *St. Amant v. Thompson*, 390 U.S. 727 (1968)).
330. *Id.* at 688.
331. 418 U.S. 323 (1974).

to qualify as editorial judgment under the First Amendment. The negligence inquiry addresses instead whether admittedly protected editorial judgment should be privileged from liability when the harm it has caused is great and when the value of the publication it yielded is minimal.[332] The procedural inquiry, in other words, goes to liability only, not to constitutional protection. Editorial judgment deemed negligent remains fully protected—or fully recognized—editorial judgment under the free press guarantee of the First Amendment.

1. *Wholesale v. Retail-Level Decisions*[333]

The different treatment of editorial decisions made at "wholesale," or in categorical terms only, from those made at "retail," or on the basis of a specific judgment about the content being published in light of the audience served and the public function publication serves, has been discussed in some detail in an earlier section.[334] That discussion, which centered on the *Turner* decision and the *Hurley* case, focused principally on the purposes served by categorical types of editorial choices. Here the question, while related and overlapping, goes instead to the process characteristics of categorical or wholesale-level choices of material, such as choices of cable operators or even the more traditional common carriers. The process question, in turn, goes to objective benchmarks of genre—does a given choice fit the descriptive elements of the genre of news and editorial judgments about news—rather than to the related yet distinct question of the purpose being served by the judgments.

Technique considerations grounded in the definitional elements of a *genre* have begun to take on increasing importance in relation to the variety of claims of First Amendment protection based on "editorial judgment."[335] The essence of these claims is that the selection of material to be published is itself an exercise of freedom of expression, including freedom of the press, even though the materials from which selection judgments are made represent the creative efforts of others,

332. *See* Murchison et al, *supra* note 34.

333. This section draws heavily on a small part of an article previously published by Bezanson, *Quality*, *supra* note 108, at 335-342.

334. *See supra* Part VI.B.1.

335. Among the more recent types of claims resting, ultimately, on genre-like considerations, are those arising from distribution of news by on-line data base or news service providers. Two recent and quite interesting cases, discussed in detail in text accompanying notes 197-99 and 279-84 *supra*, are *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), and *Daniel v. Dow Jones & Co., Inc.*, 520 N.Y.S.2d 334 (Civ. Ct. 1987). In both cases the courts refused to treat the data base services as fitting in the genre of newspaper or news publisher, instead treating them as mere distributors, like news vendors, because neither data base provider exercised any form of content-based editorial control or judgment.

not the selecting publisher. The Court has tended in recent cases to group all such claims under the heading of "editorial judgment," but then to treat different types of judgments differently for purposes of the First Amendment.[336] A jurisprudence of editorial judgment resting on the definitional elements of a genre of decisions about speech is thus emerging.

The Court's journey into the genre of editorial judgment began many years ago. In *CBS, Inc. v. Democratic National Committee*[337] and *Miami Herald Publishing Co. v. Tornillo*,[338] the Court endorsed a broad and seemingly unequivocal claim that "editing is what editors are for,"[339] thus suggesting that if editing or editorial-type judgments were genuinely at stake those judgments would not be second guessed for their quality—whether for their quality of writing or quality of news, entertainment, or the like. Editorial judgment, then, is the bounding idea protecting against intrusion into the purely qualitative or aesthetic within the genre of news, for example.[340] This position required the Court to define what it meant by "editorial" judgment.

In *Sullivan*[341] and *Gertz*[342] the Court disqualified the calculated lie—a form of self-interested, personally-motivated judgment[343]—and, with private plaintiffs, the negligent falsehood[344]—a form of con-

336. For example, the Court has treated the thematic selection of participants in a parade as a form of editorial judgment, drawing on press cases for support by analogy. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). Notably, the Court stated that editorial judgments concerning the publication of speech by others must be based on a specific decision that the republished material fits the publisher's intended message—in other words that a decision specific to the republished material is necessary, unlike the carriage or transmission choices (or non-choices) of a common carrier. As the Court stated:

> Respondents contend . . . that admission of [the Irish-American Gay, Lesbian and Bisexual Group, GLIB] to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely 'a conduit' for the speech of participants in the parade 'rather than itself a speaker.' [Citing Brief.] But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, 'is more than a passive receptacle or conduit for news. . . .'

Id. at 575.

337. 412 U.S. 94 (1973).
338. 418 U.S. 241 (1974).
339. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).
340. For a discussion of genre as a criterion designed to limit judicial inquiry into the quality of expression, see Bezanson, *Quality*, *supra* note 108.
341. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
342. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
343. *See* St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968); *New York Times Co.*, 376 U.S. at 279-80.
344. *Gertz*, 418 U.S. at 347.

structive self-interestedness—from the category of editorial judgment. In other cases the Court has suggested that decisions that are governed strictly by personal interest, not general audience interest, are not editorial judgments.[345] *Dun & Bradstreet*,[346] among other cases, suggests this view, coupled with the securities cases discussed earlier.[347] More recently the Court has examined the concept of editorial judgment in settings other than conventional print news, such as cable, and has implied that editorial judgment must be made at the specific, or retail, rather than the general, or wholesale, level, with a view to an audience.[348] A requirement of particularized choice can be viewed as a technical attribute necessary to a decision's genre qualification as news.

While such considerations of genre and technique seem clearly to underlie the Court's approach to editorial judgment claims, the Court is deeply divided on the precise meaning and scope of the concept when it is called into play, for example, with respect to entertainment or other non-news selections,[349] or when it arises in new technological settings, such as a cable operator's channel selections or the configuration and function of a web site on the Internet.[350] The divisions emerged clearly in the *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[351] case, decided in 1996. One of the provisions at issue in the *Denver* case granted cable operators editorial discretion over "indecent" material broadcast over the public access channels on the operator's cable system.[352] Before 1992, when the statutory provision was enacted, cable operators had exercised no editorial discretion, having usually given up their control over public

345. *See, e.g.*, Lowe v. SEC, 472 U.S. 181 (1985); Dun & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749 (1985).
346. Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).
347. *See e.g.*, SEC v. Wall St. Publishing Inst., Inc., 851 F.2d 365 (D.C. Cir. 1988); Lowe v. SEC, 472 U.S. 181 (1985); Wainwright Secs., Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977).
348. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).
349. *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).
350. A web site is a menu through which a person on the internet can pass to reach other programs or materials. It is much like a channel switch operated by a cable operator. The First Amendment status of the switch is at the center of the internet case recently decided, in which portions of the Communications Decency Act of 1996, Title V of the Telecommunications Act of 1996, were declared unconstitutional. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *prob. juris. noted*, 519 U.S. 727 (1996), *aff'd*, 521 U.S. 844 (1997).
351. 518 U.S. 727 (1996).
352. *See* Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, § 10(c), 47 U.S.C. §§ 532(h), 532(j); 47 C.F.R. § 76.702 (1995).

channels in the franchising process.[353] The statute thus conferred editorial power where it had not existed.

The Supreme Court in its 1994 *Turner Broadcasting*[354] decision had expressly recognized that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment,"[355] for they "'exercis[e] editorial discretion over which stations or programs to include in [their] repertoire.'"[356] The extent of First Amendment protection was limited in *Turner*, however, thus permitting greater government regulation of cable operators' editorial judgments under an intermediate standard of scrutiny.[357] One reason for this qualified protection, the *Turner* Court implied, is that a cable operator's *channel* selections are abstracted from the specific material being broadcast,[358] and such wholesale judgments are not entitled to the same degree of First Amendment respect as the particularized, retail-level judgments at the specific program level, which are much closer to the model of editorial judgment applied by the Court in the setting of editorial judgments about news by newspaper editors.[359]

The Court's recognition of a cable operator's First Amendment freedom to make channel judgments, however, made the Court's invalidation of the statute conferring such authority in the *Denver* case quite surprising.[360] But the result reflected the deep divisions on the Court about the application of a technical genre analysis, and even about the genre to be judged. Thus the plurality in *Denver*, led by Justice Breyer, appeared to recognize no rightful claim of editorial freedom in the cable operators' authority (whether statutory in origin or not) to judge material under a decency heading.[361] Justice Breyer stopped short even of the *Turner* Court, which had recognized only a qualified freedom of editorial judgment in cable operator decisions.[362]

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353. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 733-35 (1996).
354. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (Turner I).
355. *Id.* at 636.
356. *Id.* (quoting City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986)).
357. *See id.* at 662.
358. *See id.* at 644.
359. *See id.* at 655-56; *compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), *and* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), *with* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
360. The decision has generated much academic commentary. A very different view of the decision, grounded on a nonretrogression analysis, is discussed (and roundly criticized) in a wonderful article by John C. Jeffries, Jr., and Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1231-34 (1998).
361. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
362. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (Turner I). The reasons for this conclusion were not made clear, and could rest as much on waiver (the

Justice Kennedy, in contrast, took the view that the public access channels had been sold to the municipalities at the time of franchising, and thus had become public property to be treated as a public forum. Indeed, the street and park analogy was expressly invoked.[363] The idea that the public access channels were public fora, of course, cut the cable operator out of any claim of editorial judgment under the First Amendment with respect to the material broadcast, as control of the forum would be strictly limited under the First Amendment, and would be a governmental responsibility, not a private editorial one.[364] For Justice Kennedy the principal First Amendment actor was the program producer, not the cable operator with a claimed power to select among producers.

Justice Thomas, joined in a dissent by Chief Justice Rehnquist and Justice Scalia, took a position at the other extreme.[365] A cable operator's judgments about material to be broadcast and channels to be carried, he concluded, were as fully protected by the First Amendment as the decisions of a newspaper editor about the selection or contents of a news story.[366] Indeed, under this view the speech claims of a program producer seeking access to a cable system or resisting editorial supervision of what is published are clearly subordinate to the constitutionally secured authority of the cable operator; such claims, in fact, are not First Amendment claims at all.[367]

The *Turner* and *Denver* cases thus disclose the full range of views about whether editorial judgment as a genre of speech activity has any bearing on a cable operator's program and channel selection decisions, and if so whether it is entitled to full or only qualified First Amendment protection. The differences so reflected are, generally speaking, differences in judgment about the definition of editorial judgment as a genre or species, and the importance of certain elements to its constitutional protection. In the *Turner* and *Denver* cases the critical elements were two: the degree of particularity with which the selection choice was made; and the basis upon which the selection judgments rested—whether they were based on audience desire and operator profit, on the one hand, or public need, on the other.

Two other cases, neither decided by the Supreme Court, identify additional elements of editorial judgment as a genre of speech act. In

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cable operator had given up any right to make a claim of editorial authority at the time of the original franchise agreement) as on a rejection of the *Turner* language. *See Denver Area Educ.*, 518 U.S. 727.

363. *See id.* at 792.

364. *See id.* at 793-94.

365. *See id.* at 813.

366. *See id.*

367. *See id*; *see also* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Daniel v. Dow Jones & Co., Inc., 520 N.Y.S.2d 334 (Civ. Ct. 1987).

SEC v. Wall Street Publishing Institute, Inc.,[368] the SEC sought to enjoin *Stock Market Magazine*, a trade newspaper, from publishing stories that featured selected companies without disclosing the fact that the companies had paid the publisher to have them published.[369] The articles focused on specific companies (usually in glowing terms), and were allegedly solicited by the companies, which paid for the expenses incurred in visiting the company and "writing" the articles. Indeed, the articles were largely written by company employees and, with few if any changes, simply republished in the news magazine as the magazine's own.[370]

In holding that an injunction *could*[371] constitutionally issue against the feature stories, the court drew a sharp distinction between republication for hire, a form of advertisement at best, and editorial judgment based on the publisher's independent selection of material with a view to the audience's needs, pursuant to a process directed to such a determination.

> [S]o long as a consideration is defined in accordance with the material used in the publication, the very definition of consideration will necessarily constitute the line between the sphere of permitted regulation—disclosure of the omitted fact [of "for hire" publication]—and wholly protected speech. The crucial factor that distinguishes the feature articles from the balance of the magazine—and which constitutionally justifies regulation—is not the glowing terms used to describe the companies featured.... Rather, permissibility of the disclosure requirement must necessarily turn solely on whether consideration was paid to the magazine for publication of the article—and not on the content of the publication. Were the government to show, for example, direct cash payments to Brown, the Managing Editor, such transactions might well be distinguishable from writers' fees because the payments might be tantamount to payments to the publisher to *carry* the article. *Requiring disclosure of such payments would not interfere with either editorial judgments concerning the content of the feature articles or news gathering practices.*
>
> ... [The] Term 'bought and paid for' suggests, particularly in light of the constitutional difficulties we have described, a crisp transaction sharply distinguished from normal journalistic editing or news gathering practices.[372]

Similar distinctions between independent editorial judgments and "mere use" of material originated by others are reflected in the copyright field when claims of fair use arise in the news setting. For example, in *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,[373] the Second Circuit declined to treat a *Wall Street Journal* financial column's use of a substantial quotation from a commercial financial

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368. 851 F.2d 365 (D.C. Cir. 1988).
369. *See id.* at 367.
370. *See id.*
371. The issues arose on appeal prior to full trial, and therefore the court did not decide whether in the particular case an injunction would be enforceable, but rather that under certain circumstances an injunction could be issued to require disclosure even against a "newspaper." *Id.* at 376.
372. *Id.* at 375-76 (emphasis added).
373. 558 F.2d 91 (2d Cir. 1977).

newsletter to be a fair use in news reporting.[374] The *Journal* financial column consisted almost entirely of the quotation. In light of this, the *Journal* could not be said to have added anything to the copyrighted passage that would qualify the use as news, a judgment based implicitly—and necessarily—on the absence of any independent judgment made about the material to be published in the column which would transform it from the work of another into the product of the process of editorial judgment about news.[375] News, in short, consists of more than quoting another writing; it rests on process and presentation that manifests an independent view of the publisher, who is deciding what to publish and how to publish it for purposes of serving the needs of the audience.[376]

In these and other cases decided over the past twenty or so years, the Court has sketched the important elements comprising editorial judgment: public-regarding decisions about material to be selected; arrived at independently by a publisher through a process of reason; accompanied by procedures that manifest a dedication to truth; and applied with respect to current information judged to be of importance to the public or some segment of it.[377] Implicit in these elements, and especially in the first and the last, is the requirement that the judgment be based on a particularized decision about the material.

The *Turner* and *Denver* decisions are not inconsistent with this. They suggest, at the very least, that the less particularized and more wholesale the level at which choice is made, the less significance the First Amendment will attach to the decision as an exercise of freedom of speech or of the press. And the *Wainwright* and *Wall Street Publishing Institute* cases suggest that where independent judgment is completely lacking, regardless of the level of particularity—where no procedural benchmarks of choice can be found—no First Amendment value will be attached to the publication, for there is no act of selection deserving protection as expression. Selection judgments claimed to be exercises of editorial judgment, but which can not satisfy the elemental, or technical, requirements of the genre, will not be afforded First Amendment protection.

Finally, it is worth repeating the point, made at the beginning of this discussion, that the purpose and process inquiries often overlap and are best viewed as complimenting one another, with purpose as the central and ultimate standard. Thus, a choice of material that is categorical and involves no judgment as to content or message or audi-

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374. *See id.* at 96-97.

375. *See id.*

376. *See id.*; Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

377. For a more thorough discussion of editorial judgment and press freedom, see Bezanson, *Institutional Speech*, *supra* note 8, at 806-815.

ence or need, cannot be described as animated by the independent and public regarding purpose characteristic of editorial judgment. The very same choice can likewise be described as deficient in the procedural prerequisite of audience-oriented and particularized selection judgment that typifies editorial judgment under the First Amendment. At some point, the Court is suggesting, the gatekeeping function passes from that of "editor" into that of "common carrier." And the common carrier's "choice" of material to distribute, whether it be an e-mail message on the Internet, a news service link,[378] a conversation over a phone, or perhaps a programming channel carried on a cable system, is actually the antithesis of independent choice and, thus, of editorial judgment.

2. *Other Federal Process Cases*

In certain situations courts use the procedural shortcomings of the editorial process to conclude that a certain activity is not speech at all, and accordingly not protected by the First Amendment. Essentially, these courts are concluding that an individual or entity claiming First Amendment protection is insufficiently clothed with the attributes of a First Amendment speaker, *as to the speech at issue*, to invoke constitutional protection. On occasion, this finding is based on the conclusion that the individual or entity claiming First Amendment protection had not engaged in the process of editorial judgment.

For example, in *IDK, Inc. v. County of Clark*,[379] it was held that an escort service may not claim First Amendment protection in the face of an extensive regulatory scheme. The First Amendment claim was rejected largely on the basis that "escort services do not control the content of expression or ensure that any expression occurs."[380] Further, "[t]hey exercise no editorial judgment over the messages their employees convey and do not insist that they convey any."[381] Another example is the case of *Chicago Acorn v. Metropolitan Pier and Exposition Authority*.[382] There the Seventh Circuit rejected a claim that managers of municipal property may restrict expressive activity on that property on the basis of the municipality's role as proprietor and manager. The opinion acknowledged that "[w]henever the government is in the business of speech, whether it is producing television programs or operating a museum . . . the exercise of editorial judgment is inescapable."[383] Yet, on these facts, the court refused to rec-

378. *See, e.g.*, Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Daniel v. Dow Jones & Co., Inc., 520 N.Y.S.2d 334 (Civ. Ct. 1987).
379. 836 F.2d 1185 (9th Cir. 1988).
380. *Id.* at 1195.
381. *Id.* at 1195-96.
382. 150 F.3d 695 (7th Cir. 1998).
383. *Id.* at 701.

ognize the presence of a sufficient editorial process to support the municipality's First Amendment defense. The court wrote in its opinion, "Navy Pier is not a producer of speech; it is a renter of premises to speakers. It need not make any editorial judgments about the content of the speech in its meeting rooms."[384] Accordingly, deficiencies in the *process* of editorial judgment, which may simply mean an *absence of the process*, may operate as an exclusionary factor, limiting the applicability of the First Amendment to those activities which are truly expressive in nature.

A final group of federal and state cases bearing on process arises in the newsgathering setting, at stages that precede the publication decision. Here the process question is whether the challenged activity—undercover reporting through fraud or deceit, breaking and entering, and the like—is a step in the process of publication that editorial judgment embraces. As a general matter the cases, only a few of which are discussed for purposes of illustration here, fall into two groups: (i) those involving investigative acts that qualify as a step in the editorial process, even though illegal, and thus receive First Amendment protection (not absolute); and (ii) those acts that may have yielded information for later editorial judgment and publication but which, when done, bear no connection with a publication and thus cannot be said to be a step in the editorial judgment process of selecting, gathering, editing, publishing, and distributing.

In the first group are the many newsgathering cases involving privilege claims,[385] or those in which claims of access to information by the press or immunity from prosecution for press newsgathering behavior that violates civil or criminal law[386] have been made. In *Food Lion Inc. v. Capital Cities/ABC, Inc.*,[387] for example, ABC challenged the application of trespass and other civil causes of action against it because of claimed fraud and deception by ABC employees working on a story.[388] While the courts entertaining the claims did not hold that the First Amendment foreclosed liability against ABC for the tortious acts, ABC's newsgathering was still respected as activity falling within the umbrella of protection for a free press because it was a step in the process leading to publication and was engaged in with publication in mind. The First Amendment, however, did not re-

384. *Id.*

385. *See* Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987).

386. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997); Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997); Le Mistral, Inc. v. CBS, 402 N.Y.S.2d 815 (App. Div. 1978); *see also* Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998) [hereinafter Bezanson, *Means and Ends*].

387. 964 F. Supp. 956 (M.D.N.C. 1997).

388. *See id.* at 958.

quire absolute immunity for illegal conduct of the press in the course of newsgathering, and indeed the First Amendment might well be disserved by any form of special immunity.[389]

In the second category are cases involving newsgathering activities undertaken without a view to publication and, often, independently of any publisher. Perhaps the best known case of this kind is *New York Times Co. v. United States*,[390] which involved publication of the Pentagon Papers. The Pentagon Papers had been received by the *Times* from a source who had acted independently of the *Times* and had engaged in illegal activity in obtaining and disclosing the materials to the *Times*. The Supreme Court drew a careful—and in the case of Justice White a very sharp—line between the *Times'* freedom to publish the information in the absence of a clear and present danger being proven by the government, on the one hand, and the source's liability for trespass, theft, espionage, or treason for stealing and disclosing the materials, on the other hand.[391] The *Times'* decision to publish the materials in its possession was, the Court said, protected as the exercise of editorial judgment by the newspaper. The source's actions, however, were not related in any way to editorial judgment, and application of criminal or civil sanctions against the source would raise no First Amendment problems at all.[392]

The same reasoning has been applied in various journalist privilege settings. In *Von Bulow v. Von Bulow*,[393] for example, a claim of journalist's privilege against disclosure of documents, including investigative reports, notes taken at a trial, and a manuscript, was denied on the ground that, at the time the documents were produced, the party claiming privilege was not acting in the capacity of a journalist nor gathering the information for publication as news. The question for the court was "whether one who gathers information initially for a purpose other than traditional journalistic endeavors and who later decides to author a book using such information may then invoke the First Amendment to shield the production of the information and the manuscript."[394] The answer, according to the court, rests on the existence of an editorial process of which the conduct was a part, and a purpose to which the process was directed. The court held that "the individual claiming the [journalist's First Amendment] privilege must demonstrate . . . the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent

389. *See id.*; *see also* Bezanson, *Means and Ends*, *supra* note 386 at 909.

390. 403 U.S. 713 (1971).

391. *See id.* at 733-34.

392. *See id.* at 740.

393. 811 F.2d 136 (2d Cir. 1987).

394. *Id.* at 142.

existed at the inception of the newsgathering process."[395] The person need not, of course, be a journalist in a formal sense,[396] but the importance of the requisite intent or purpose of public dissemination is that it allows the newsgathering steps, themselves, to be conceived of as a necessary part of the press's publication process, and thus intimately linked to editorial judgments about likely importance and relevance which have necessarily been made as part of the decision to gather the information.[397]

C. Conclusion

The question of process and purpose are intimately bound together. If purpose is the signal that editorial judgment is directed toward ends specifically recognized in the free press guarantee of the First Amendment, process represents the physical and organizational attributes that commonly accompany those editorial decisions. Thus, process is best seen, perhaps, not as a separate criterion of editorial judgment, but as a form of corroborating proof that it has occurred in ways that the First Amendment protects under the mantle of freedom of the press. Process looks, for example, to independence, a central quality of purpose, too. Is the editorial choice unencumbered by forces that would make judgments oriented to audience and public need impossible? Process looks to habits of verification and objectivity in the context of nonfiction publication. Was attention paid to seeking and achieving factual accuracy in the content and presentation of the information? Process concerns bear also on whether decisions were made and steps were undertaken as part of a process leading to publication, animated by the anticipation of publication of material protected as the product of editorial judgment. Were decisions about investigative process and newsgathering undertaken as part of an iterative series of editorial judgments leading to publication as "news"? Were the steps undertaken to gather, process, and prepare informa-

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395. *Id.* at 144.

396. In an interesting state case the Indiana Court of Appeals held that a journalist who was acting in the capacity of a political activist at the time information was acquired could not claim a journalist's privilege because the information was not acquired in the course of newsgathering for publication, but rather in a private political capacity. *See* Northside Sanitary Landfill, Inc. v. Bradley, 462 N.E.2d 1321 (Ind. Ct. App. 1984).

397. *See* Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 476 (10th Cir. 1977) (holding shield law available to non-journalist whose activities were part of a process leading to intended publication (of a documentary film) to the public about an important current subject); Management Info. Techs., Inc. v. Alyeska Pipeline Serv. Co., 151 F.R.D. 471, 476 (D.D.C. 1993) (holding journalist's passing of documents to private party does not exceed journalist's privilege as long as the passing of documents was part of journalist's work and was "in furtherance of the constitutionally protected activity").

tion for publication, and to distribute it to an audience, consistent with the publication of information by the "press"?

These are not always easy questions, as many of the cases discussed in this Part illustrate. But they are important questions, as they serve efficiently to exclude from claimed protection under the free press guarantee actions and publications that may qualify for some form of constitutional protection, but not for protection as the product of editorial judgment by the press. The simple sale of space to another for the publication of expression over which the seller exercises no judgment does not, for reasons grounded in purpose and process, qualify for protection under the free press guarantee. A breaking and entering unaccompanied by any publication-related purpose should receive no First Amendment protection even if it turns out to have yielded unanticipated information subsequently published by the press.[398]

The process criteria serve two important functions in defining editorial judgment protected by the free press guarantee. First, they supply extrinsic evidence of purpose, corroborating claims by publishers that the judgments they have made are entitled to the specific protections accorded to publications by the press. Second, the process criteria serve to bring into harmony and perhaps some measure of intellectual coherence the many and broad-ranging settings in which free press claims have arisen: newsgathering; fact-checking and accuracy; employment practices; and distribution decisions. The process cases suggest that claims of free press protection in these settings will be recognized to the extent—and only to the extent—that the challenged practices can be clearly linked to the unfolding process of making choices that will lead to publication to the public by the press.

VII. JUDGING THE EDITORIAL ENTERPRISE: SOME CONCLUSIONS

What, then, can be said by way of conclusion about the developing law of editorial judgment? Two points seem of greatest importance at this relatively early juncture in the law formation process. The first point is that while the law seems at first glance to be developing in a number of different ways, on further reflection the various approaches seem to be but different prisms through which to examine a single question: Was the challenged publication decision animated by the purposes that underlie the free press guarantee—the independent choice of current information and opinion of value to the public? The

398. Of course, even breaking and entering engaged in by the press for purposes of obtaining information to be published is unlikely to be immunized from liability by the Free Press guarantee. But some First Amendment scrutiny may be applied in such a case. *See* Bezanson, *Means and Ends*, *supra* note 386.

second point is that some form of inquiry into editorial judgment is inevitable, at least so long as the free press guarantee is given credit for privileging in a special or strong way certain publications—those we call the press, journalism, or those that exercise what we call editorial judgment—or so long as we insist that the First Amendment protects speech and press, but not all forms of animate or inanimate, intentional or accidental, communicative stimuli. Given this, editorial judgment is as good a way to think about definitional boundaries as any.

I have identified four models or approaches around which to group the cases: intent; content; purpose; and process. But the fact is that beneath each of these models lies the question of purpose. Intent goes to the proven corruption of purpose, which disqualifies even the most established members of the press from the protection accorded editorial judgment under the First Amendment. Beneath the intent inquiry is an assumption about the frame of mind that should aminate the selection process: impersonal, independent, and reasoned.

Content analysis represents an effort to identify editorial judgment through the content of the publication that results from it. Content analysis thus judges genre by end result, a treacherous enough undertaking in the expressly genre-related fields of copyright and trademark protection,[399] and a deeply problematic venture in the news setting. News is not the accidental occurrence of content—or information or events or opinion—and therefore cannot effectively or accurately be judged by content alone.

Thus the conclusion, reached here, that content analysis is potentially faulty, and in any event should be seen only as an imperfect overlay on a more fundamental inquiry into purpose: where purpose clearly qualifies a publication under the First Amendment free press guarantee, content analysis may, in limited settings such as plagiarism or fiction or history, for example, justify its disqualification.

Finally, process, like content, truly pertains to purpose, asking only what procedural benchmarks qualifying editorial judgments would possess in order to allow the conclusion that those judgments were exercised in service of—or were animated by—the purposes of a free press: publication of independently selected information and opinion to a public audience, based on a reasoned or experienced judgment about value and need to the audience.

This brings us to the second point, which is whether an inquiry into the meaning of editorial judgment, and especially an inquiry grounded in the purposes that are served by such judgments, is appropriate for courts when interpreting and applying the First Amendment. Perhaps all that can or need be said at this point is that some

399. *See* Bezanson, *Quality of First Amendment Speech*, *supra* note 108, at 348-51.

form of boundary must be drawn, and that one based on purpose in relation to the values served by an independent, public-regarding, free press, and formed around the judgment process employed rather than the publication that results, is as good as any, and perhaps better than all, of the alternatives. Indeed, it can be persuasively argued that the Constitution requires such a limitation, for editorial judgment has specific meaning under the press clause, and judgments about other forms of expression, be they entertainment, art, or cartoons, must claim protection under the free speech guarantee rather than the press guarantee.[400]

The First Amendment uses the phrase "freedom of the press," and while the definitional nuances of the term "press" are murky and, unless the most protective presumption is indulged, dangerous, the fact remains that "press" publications do not include fiction, or works of history, or works of poetry, or a comedian's skit, to name but a few examples. It's not that these other forms of expression, be they individual or institutional in origin, aren't protected under the First Amendment. Rather, the point is that their protection is grounded in different considerations of principle and constitutional policy than those that apply to the protection of current information and opinion published as "news," broadly defined, and as an end product of editorial—i.e. reasoned, public-regarding, independent—judgment.

The restriction of press protection to news, and the related idea of editorial freedom, flowed naturally from the English history of resistance to the stamp and its predecessors, treason and libel.[401] The English struggle, ongoing at the time of the First Amendment's ratification, was a struggle for independent sources of information on politics and political economy, which would be provided by a cheap, unstamped newspaper or pamphlet made widely available to the general citizenry.[402] The need was not for high culture, art, fiction, or philosophy, but instead for a break in the stranglehold of taxes and other legal devices through which the Crown controlled distribution of and access to, as well as the political "slant" of, current information about government politics, the economy, and foreign affairs.[403] Information about these matters had been the province of the elite. What

400. For discussion of the various forms of expression—such as art, advertising, political expression, collective expression—and the differing grounds upon which their First Amendment protection is based, see Bezanson, *Institutional Speech*, *supra* note 8 and Bezanson, *Quality of First Amendment Speech*, *supra* note 108.

401. *See* BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9; LEVY, *supra* note 9; FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776 (1952); David A. Anderson, *supra* note 5; Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985).

402. *See* COLLET, *supra* note 163; BEZANSON, TAXES ON KNOWLEDGE IN AMERICA, *supra* note 9; SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, *supra* note 401.

403. *See* COLLET, *supra* note 163, at 42-46.

information was generally distributed was carefully (though often ineffectively) controlled by the Crown and Parliament through the device of the stamp and other taxes, which brought the press to heal and forced its submission to the political parties in power.[404]

Freedom of the press, then, and editorial judgment too, were ideas centered in broad distribution of information, independently judged, on subjects we now call "news"—the events and issues and crises of the day upon which people rely for their daily affairs and political knowledge. As Justice Brennan expressed it in *New York Times Co. v. Sullivan*, the First Amendment was intended to foster "uninhibited, robust, and wide-open"[405] expression on matters "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[406]

Editorial judgment as a narrow species of selection judgment is thus definitional of the core idea of freedom of the press. Its special protection is constitutionally justified, if not required, because the Constitution's protection centers on activity that reflects independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes. These are the attributes of the quality of mind that characterize judgments about publication of news by individuals and groups dedicated to the purposes of a free press. The conferral of special First Amendment protection, therefore, is definitional; it goes to the nature of choices made, not the specific information published, and to the type of information made subject to judgment, and not to the decisions made about including or excluding any of its specifics.

Indeed, the conferral of special protection for editorial judgment is not unlike the special solicitude the Supreme Court has always paid to "political" speech. Like political speech, editorial judgment, in the free press setting, is a genre of speech, and thus a basis for distinction that goes, surely, to the general content of resulting expression, but not to its particulars or to its point of view. As the Supreme Court tells us in the libel setting, the press is free to be irresponsible and grossly negligent; it may not, however, be calculatedly indifferent to the truth as it is known by the publisher, for to be so would violate the very admonition and central purpose of free editorial judgment, the protection of fiercely independent selection of material that will inform a self-governing citizenry.[407] Editorial judgment is like art: its value lies not simply in its product, but in its intention and aspiration.

It must finally be said, at the risk of stating the obvious, that conferring special free press protection on editorial judgment does not

404. *See* authorities cited *supra* note 401.
405. Thornhill v. Alabama, 310 U.S. 88 (1940).
406. 376 U.S. 254, 270 (1964).
407. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276, 280-81 (1964).

compel its exercise by anyone; it just safeguards it if a speaker claims that a speech act (or selection judgment) is of that character. It does not dispose of alternative grounds upon which the speech may be protected under the First Amendment. It is thus like the special protection afforded religious belief and expression. Religiosity is not compelled, but if expressed it is sheltered. Likewise, one can choose to speak by words, for example, or conduct, which is afforded less constitutional protection. The difference in protection does not coerce use of words, but instead simply allows the individual a free choice of means, knowing the consequences.

The press can't be described well in institutional terms. Its product can't easily be distinguished by its content alone. No single set of procedures or benchmarks, narrowly defined, can adequately capture the specificity yet generosity of the idea of a free press. Instead, what marks the press off as distinct is the process of judgment that accompanies expression, or publication, and the cant of that judgment, its orientation to a public and to needed information and to fact and to fierce independence. If I am right in this, then I think I am warranted also in concluding that purpose is the key to freedom of the press, that editorial judgment is the prism through which the purpose inquiry should be focused, and that as imperfect as the currently developing law of editorial judgment is, that law is both inevitable and, in its focus on purpose, fundamentally correct.