

## ARTICLES

# Journalistic Malpractice: Suing Jayson Blair and the *New York Times* for Fraud and Negligence

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### INTRODUCTION

The *New York Times*, the old “Gray Lady”<sup>1</sup> of the newspaper business, has long been the star for which aspiring journalists reach—the storied pinnacle of the news industry.<sup>2</sup> In June 2003, much of that star’s glimmer and glamour vanished when executive editor Howell Raines and managing editor Gerald Boyd resigned their posts amid a much-publicized scandal that not only rocked journalistic circles but also left the newspaper’s readers wondering just how severely they had been duped.<sup>3</sup> The scandal focused on a

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<sup>1</sup> Christopher Hanson, Editorial, *Worst of Times*, BALT. SUN, June 13, 2003, at 13A (noting that the newspaper derived its nickname from “its somber rectitude”).

<sup>2</sup> Jay Bookman, *Credibility Increasingly Under Siege*, ATLANTA J.-CONST., June 8, 2003, at 1E (suggesting that the statement “‘You ought to work for The New York Times’ used to be high praise for a journalist”).

<sup>3</sup> Jacques Steinberg, *Changes at the Times: The Overview*, N.Y. TIMES, June 6, 2003, at A1 (detailing the ouster of the newspaper’s two top managers).

young African-American<sup>4</sup> reporter named Jayson Blair. In a field otherwise defined by the willingness of its aspirants to pay their dues, Blair, a fledgling journalist, filled a key national reporting post that even seasoned veterans coveted.<sup>5</sup>

Blair bypassed the usual journalistic coming-of-age ritual—reporting stints in small and then mid-sized locales—where he would have learned and refined his reporting skills. Instead, Blair landed fresh out of school in the high-stakes world of the nation's leading daily newspaper, covering "significant news events"<sup>6</sup> such as the now-controversial rescue of Private Jessica Lynch in Iraq in 2003<sup>7</sup> and the deadly Washington, D.C. sniper shootings of 2002.<sup>8</sup>

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<sup>4</sup> Some have suggested, perhaps accurately, that Jayson Blair's race was a major factor in the *Times's* decisions both to hire and retain Blair as an employee, despite his frequent mistakes. See generally Ellis Cose, *Race in the Newsroom*, NEWSWEEK, May 26, 2003, at 46 ("[O]nly the most naive soul could believe race played no role in Jayson Blair's ascent."); see also Tim Rutten, *A Sweeping Journalistic Mea Culpa*, L.A. TIMES, May 12, 2003, at E1 ("The least credible and complete portion of the Times'[s] account is its categorical denial that the unusual tolerance and solicitude the paper accorded Blair, who is African American, had anything to do with his race."). This Article does not contend with race-based issues, but concentrates instead on the generally applicable tort principles of fraud and negligence.

<sup>5</sup> Dan Barry et al., *Correcting the Record: Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1 (admitting both the reporter's frequent falsehoods and fabrications and conceding that the newspaper concealed its knowledge of Blair's journalistic shortcomings from the public for more than one year).

<sup>6</sup> See *id.* (describing Blair's ascent "from raw intern to reporter of national news events").

<sup>7</sup> See Jayson Blair, *Family Begins Trip to Rejoin Freed Soldier*, N.Y. TIMES, Apr. 6, 2003, at B6 (providing a factually inaccurate and fraudulent account by Blair about the efforts of Private Jessica Lynch's family to visit Lynch at a hospital in Germany—as noted in a May 11, 2003 amendment to the article in LEXIS, News Library); see also Jayson Blair, *Freed Soldier Is in Better Condition than First Thought, Father Says*, N.Y. TIMES, Apr. 4, 2003, at B10 (providing a plagiarized and fraudulent account of the Lynch family's initial contact with Lynch after her rescue—as noted in a May 11, 2003 amendment to the article in LEXIS, News Library).

<sup>8</sup> See Jayson Blair, *Chief in Sniper Case Considers a Job Change*, N.Y. TIMES, Mar. 22, 2003, at A6 (providing a factually inaccurate and fraudulent account about the job prospects of Charles A. Moose, the former police chief of Montgomery County, Maryland—as acknowledged in a May 11, 2003 amendment to the article in LEXIS, News Library); see also Jayson Blair, *Retracing a Trail: The Investigation; U.S. Sniper Case Seen as a Barrier to a Confession*, N.Y. TIMES, Oct. 30, 2002, at A1 (providing a factually inaccurate account of suspects after their arrest in the sniper shootings—as noted in a May 11, 2003 amendment to the article in LEXIS, News Library).

Millions of people probably read his stories,<sup>9</sup> but there was a problem. Much of Blair's coverage, including that of the Lynch rescue<sup>10</sup> and the sniper shootings,<sup>11</sup> was false, plagiarized, and fabricated.<sup>12</sup>

In a stunning, 7,165-word article on May 11, 2003 written by Dan Barry and his colleagues, the *Times* confessed that its reporter had "committed frequent acts of journalistic fraud," including "widespread fabrication and plagiarism."<sup>13</sup> The newspaper's account included a poignant and direct admission that its twenty-seven-year-old reporter had:

misled readers and *Times* colleagues with dispatches that purported to be from Maryland, Texas and other states, when often he was far away, in New York. He fabricated comments. He concocted scenes. He lifted material from other newspapers and wire services. He selected details from photographs to create the impression he had been somewhere or seen someone, when he had not.<sup>14</sup>

The reporter's misdeeds alone were sufficient to sully the newspaper's hard-earned reputation. Moreover, because the *Times* has acknowledged that "various editors and reporters expressed misgivings about Mr. Blair's reporting skills, maturity and behavior,"<sup>15</sup> such revelations have further undermined the credibility and public confidence in the news organization.<sup>16</sup>

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<sup>9</sup> See James T. Madore, *Times Adds Outlets to Bolster Sales in Metro Area*, NEWSDAY (N.Y.), June 26, 2003, at A53 (reporting that the average daily circulation of the *Times* is 1.1 million copies while its Sunday circulation rises to 1.7 million copies).

<sup>10</sup> See *supra* note 7 (providing examples of articles that Blair authored about Lynch that the *Times* has now corrected in amendments posted on the LEXIS, News Library).

<sup>11</sup> See *supra* note 8 (providing examples of articles that Blair authored about the sniper shootings that the *Times* has now corrected in amendments posted on the LEXIS, News Library).

<sup>12</sup> See Barry et al., *supra* note 5, at A1.

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

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

<sup>15</sup> *Id.* (recounting an e-mail message sent to newsroom managers that read: "We have to stop Jayson from writing for the Times. Right now.")

<sup>16</sup> Editorial, *Lessons: New York Times Scandal Sobering and Humbling*, HOUS. CHRON., June 15, 2003, at Outlook 2 (explaining that trust is the foundation of the news business and writing that "[w]e value readers' trust and recognize it is more easily and

Blair's unorthodox, albeit shortened, career undoubtedly will occupy the dockets of journalism conferences and the pages of media ethics textbooks; it will signify "a calamity for all of American journalism"<sup>17</sup> for years to come.<sup>18</sup> Yet, the real victims of Blair's transgressions and the newspaper's tacit condoning of them—subscribers to the *Times*, as well as those news organizations reliant upon the *Times*'s services<sup>19</sup>—have been lost in the finger-pointing, blame-assessing aftermath of the greatest scandal in the newspaper's fabled history.<sup>20</sup>

Blair and the *Times* misled readers who believed in the reliability of Blair's reporting. These readers embraced the *Times*'s masthead slogan, "All the News That's Fit to Print," as a covenant of truth and accuracy. In turn, they endured a breach of trust unparalleled in modern journalism.<sup>21</sup> Even though the *Times* no longer employs Blair, Raines, or Boyd, the authors of this Article assert that the newspaper's accountability to its readers ended with the publication's admission of malfeasance.

The purpose of this Article is to take the accountability of Blair and the newspaper one step further—a step beyond the realm of journalism ethics and into the realm of media law. This Article will consider what would happen if courts treated journalism like other professions,<sup>22</sup> such as law and medicine, in which

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quickly lost than gained" and that "[t]he Times'[s] fall—so far and so fast—is ample proof of that").

<sup>17</sup> David S. Broder, Editorial, *The Perils of Press Arrogance*, WASH. POST, June 11, 2003, at A35.

<sup>18</sup> Lucia Moses, *Jayson Blair Returns to School*, EDITOR & PUBLISHER, June 2, 2003, at 5 (quoting a University of California journalism administrator's prediction that "the current scandal 'will be tremendously useful' to education programs").

<sup>19</sup> See Hanson, *supra* note 1, at 13A (describing how "the *Times* so often shapes the news agenda for the network broadcasts and for hundreds of newspapers, large and small").

<sup>20</sup> See Barry et al., *supra* note 5, at A1 (quoting former *Times* reporter Alex S. Jones, who co-authored a book about the newspaper, "To the best of my knowledge, there has never been anything like this at The New York Times").

<sup>21</sup> There have, of course, been other instances of journalistic fabrication, most notably that by former *Washington Post* reporter Janet Cooke. See generally BEN BRADLEE, A GOOD LIFE 435–52 (1995) (describing how Cooke fabricated an eight-year-old heroin addict for a story that helped her earn the Pulitzer Prize for feature writing in 1981).

<sup>22</sup> Some argue that "[j]ournalism is not a 'profession,' like law or engineering, since true professional status requires fixed standards for admission and mastery over a

malefactors face legal accountability to the people they serve. General principles of tort law—fraud and negligence—provide a legal lens through which to view the fabrications and active concealment that Blair and the *Times* perpetrated upon the readers of Blair's work.

Ultimately, the most disturbing irony is that *New York Times Co. v. Sullivan*,<sup>23</sup> the Court's seminal pro-press and pro-First Amendment<sup>24</sup> opinion that bears the *Times*'s name, actually militates against protecting the *Times*.<sup>25</sup> In fact, it suggests that the newspaper should bear liability for Blair's reporting.<sup>26</sup> Why? Because Blair and the newspaper acted with reckless disregard for the truth that rose to actual malice.<sup>27</sup> Blair wrote error-filled and fabricated articles about matters of public concern, the *Times* published such articles, and the *Times* knew and/or entertained serious doubts for more than a year that the young reporter was both unreliable and a deliberate prevaricator.<sup>28</sup>

Accordingly, Part I of this Article briefly examines Blair's fabricated and plagiarized stories, along with efforts of the newspaper's top editors to actively shield the public from the truth while allowing Blair to continue his fraudulent ways. These actions form the bases of the fraud and negligence claims later proposed in Part I. Part II then applies the basic elements of these tort principles to facts that the *Times* concedes, in order to establish a sufficient basis for holding the newspaper civilly liable to

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specialized field of knowledge. Yet many of its members are now paid as professionals." JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 150 (1996).

<sup>23</sup> 376 U.S. 254 (1964).

<sup>24</sup> The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>25</sup> See Barry et al., *supra* note 5, at A1.

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

<sup>27</sup> Actual malice is the publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.*, 376 U.S. at 280.

<sup>28</sup> See Barry et al., *supra* note 5, at A1.

readers.<sup>29</sup> Part III explores and illustrates the harm to the American public arising out of receipt and reliance upon reckless and/or deliberate falsehoods. Finally, the Article concludes by suggesting that readers have earned the right to recover monetary damages for the harms they suffered by reading false and/or plagiarized information that Blair and the *Times* represented as “fit to print.” The conclusion relies upon the U.S. Supreme Court’s own precedent for support.

### I. FABRICATIONS, PLAGIARISM, AND ERRORS: ALL THE NEWS THAT’S UNFIT TO PRINT

Jayson Blair’s freefall from journalistic stardom shocked the *Times*’s loyal readers, but those close to the young reporter knew that he was a “study in carelessness.”<sup>30</sup> In fact, Blair apparently manifested unprincipled work habits even while he was a student at the University of Maryland.<sup>31</sup> Former classmates reported that “Blair wrote questionable articles and manipulated his mentors while on campus in the mid-1990s.”<sup>32</sup> Just like the *Times*’s top editors, school officials at Maryland’s Philip Merrill College of Journalism ignored warnings about Blair’s misdeeds and actually selected Blair for choice internship opportunities.<sup>33</sup>

Maryland alumni who shared the campus newsroom with Blair contend his stories “smacked of the kind of fabrications, plagiarism and unaccountability” that was characteristic of his reporting at the *Times*.<sup>34</sup> It is now apparent that Blair carried those defects with

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<sup>29</sup> The authors assert that the *Times* would be liable to its readers for Blair’s actions under *respondeat superior*, also known as vicarious liability, the tort principle pertaining to an employer’s responsibility for an employee’s actions conducted within the scope of his or her employment. See *infra* Part II.

<sup>30</sup> See Barry et al., *supra* note 5, at A1.

<sup>31</sup> David Folkenflik, *Journalism Alumni Rap UM in Blair Case*, BALT. SUN, June 14, 2003, at 1D (describing a similar pattern of wrongful conduct while Blair was a collegian).

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

<sup>33</sup> See Jill Rosen, *All About the Retrospect*, AM. JOURNALISM REV., June–July 2003, at 32 (tracing Blair’s missteps during the time he spent at University of Maryland’s student newspaper).

<sup>34</sup> See Folkenflik, *supra* note 31, at 1D.

him after he left Maryland.<sup>35</sup> While writing for the *Times*, Blair committed a veritable trifecta of journalistic sins: fabrications, plagiarisms, and falsifications.

As the next three sections of this Part make clear, Blair fabricated and plagiarized dozens of stories and made factual errors in scores of others—an accounting of which the *Times* published on May 11, 2003.<sup>36</sup>

#### A. Fabricated Datelines and Concocted Scenes

Blair regularly fabricated article datelines, which are the locations from which stories allegedly originate.<sup>37</sup> The *New York Times Manual of Style and Usage* requires the dateline to indicate where the “firsthand news gathering” occurs.<sup>38</sup> On at least twenty-nine occasions between November 10, 2002 and April 19, 2003, Blair distorted the datelines on his stories, making it appear that he was reporting from various locations when phone records and other indicia revealed his presence in New York.<sup>39</sup>

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<sup>35</sup> See Peter Johnson, *Media Weigh in on 'Journalistic Fraud,'* USA TODAY, May 12, 2003, at 3D (reporting that Blair’s résumé “indicated he graduated from the University of Maryland when he did not”).

<sup>36</sup> Barry et al., *supra* note 5, at A1.

<sup>37</sup> See generally Daniel C. Hallin, *Where? Cartography, Community and the Cold War*, in READING THE NEWS 109, 111 (Robert K. Manoff & Michael Schudson eds., 1986) (discussing the importance of datelines and writing that “[t]oday we generally take it for granted that news stories will be reported from ‘the scene,’ and the dateline has become mainly a formality, though reference to place still, in some circumstances, plays an important role in establishing the authority of a news story”) (emphasis added).

<sup>38</sup> ALLAN M. SIEGAL & WILLIAM G. CONNOLLY, THE NEW YORK TIMES MANUAL OF STYLE AND USAGE 97 (rev. & expanded ed. 1999) (“Because believable firsthand news gathering is the Times’s hallmark, datelines must scrupulously specify when and where the reporting took place.”).

<sup>39</sup> See Jayson Blair, *Officials Link Most Killings to Teenager*, N.Y. TIMES, Nov. 10, 2002, at A22 (Dateline: Washington, D.C.); Jayson Blair, *Statements by Teenager May Muddy Sniper Case*, N.Y. TIMES, Nov. 11, 2002, at A10 (Dateline: Washington, D.C.); Jayson Blair, *Questions Over the Reward for Tips in the Sniper Case*, N.Y. TIMES, Nov. 27, 2002, at A17 (Dateline: Rockville, Md.); Jayson Blair, *Laura Bush Visits the Youngest Sniper Victim*, N.Y. TIMES, Dec. 13, 2002, at A35 (Dateline: Washington, D.C.); Jayson Blair, *Sniper Case Will Be First Test of Virginia Antiterrorism Law*, N.Y. TIMES, Dec. 17, 2002, at A22 (Dateline: Richmond, Va.); Jayson Blair, *Man Who Shot Priest in an Abuse Case Wins Acquittal*, N.Y. TIMES, Dec. 17, 2002, at A28 (Dateline: Baltimore, Md.); Jayson Blair, *Acquittal in Shooting of Priest Splits a City*, N.Y. TIMES, Dec. 18, 2002, at A22 (Dateline: Baltimore, Md.); Jayson Blair, *Teenager’s Role Tangles*

Dateline fabrication is a serious deception and calls into question the veracity of an article's content.<sup>40</sup> At one point, Blair reported on the funeral of Iraqi war casualty Private Brandon Sloan, a service that took place at the church of the private's father, the Reverend Tandy Sloan.<sup>41</sup> Blair described the elder Sloan as "discontented with consoling words."<sup>42</sup> Blair further wrote, "With his head slumped, he said the knots were growing tighter and larger in his stomach as he wondered, tried to find some understanding, of why his only child had to die 6,000 miles away

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*Case Against Older Sniper Suspect*, N.Y. TIMES, Dec. 22, 2002, at A1 (Dateline: Centreville, Va.); Jayson Blair, *Execution Opponent Joins Sniper Case*, N.Y. TIMES, Jan. 2, 2003, at A10 (Dateline: Lexington, Va.); Jayson Blair, *Prints Reportedly Tie Sniper Suspect to Killing*, N.Y. TIMES, Jan. 6, 2003, at A15 (Dateline: Washington, D.C.); Jayson Blair, *Like Sniper Case, Hearing for Youth Is Out of the Ordinary*, N.Y. TIMES, Jan. 18, 2003, at A11 (Dateline: Fairfax, Va.); Jayson Blair, *In Absence of Parents, A Voice for the Accused*, N.Y. TIMES, Jan. 19, 2003, at A16 (Dateline: Fairfax, Va.); Jayson Blair, *Gun Tests Said to Bolster Sniper Case Against Two*, N.Y. TIMES, Jan. 25, 2003, at A13 (Dateline: Washington, D.C.); Jayson Blair, *Peace and Answers Eluding Victims of the Sniper Attacks*, N.Y. TIMES, Feb. 10, 2003, at A1 (Dateline: Washington, D.C.); Jayson Blair, *Making Sniper Suspect Talk Puts Detective in Spotlight*, N.Y. TIMES, Mar. 3, 2003, at A15 (Dateline: Fairfax, Va.); Jayson Blair, *Judge in Sniper Case Bars Cameras from Trial*, N.Y. TIMES, Mar. 4, 2003, at A12 (Dateline: Fairfax, Va.); Jayson Blair, *Sniper Suspect Is Disciplined for Cell Graffiti*, N.Y. TIMES, Mar. 8, 2003, at A15 (Dateline: Fairfax, Va.); Jayson Blair, *Bearing the Worst News, Then Helping the Healing*, N.Y. TIMES, Mar. 22, 2003, at B7 (Dateline: Norfolk, Va.); Jayson Blair, *Chief in Sniper Case Considers a Job Change*, N.Y. TIMES, Mar. 22, 2003, at A6 (Dateline: Gaithersburg, Md.); Jayson Blair, *Watching, and Praying, as a Son's Fate Unfolds*, N.Y. TIMES, Mar. 25, 2003, at B1 (Dateline: Hunt Valley, Md.); Jayson Blair, *Relatives of Missing Soldiers Dread Hearing Worse News*, N.Y. TIMES, Mar. 27, 2003, at B13 (Dateline: Palestine, W. Va.); Jayson Blair, *The Last Stop on the Journey Home*, N.Y. TIMES, Apr. 1, 2003, at B12 (Dateline: Dover, Del.); Jayson Blair, *Freed Soldier Is in Better Condition than First Thought, Father Says*, N.Y. TIMES, Apr. 4, 2003, at B10 (Dateline: Palestine, W. Va.); Jayson Blair with Mark Landler, *Gifts and Offers for Book Deals Arrive at Rescued Private's House as She Has Surgery*, N.Y. TIMES, Apr. 5, 2003, at B6 (Dateline: Palestine, W. Va.); Jayson Blair, *Family Begins Trip to Rejoin Freed Soldier*, N.Y. TIMES, Apr. 6, 2003, at B6 (Dateline: Charleston, W. Va.); Jayson Blair, *For One Pastor, the War Hits Home*, N.Y. TIMES, Apr. 7, 2003, at B1 (Dateline: Cleveland, Ohio); Jayson Blair, *A Couple Separated by War While United in Their Fears*, N.Y. TIMES, Apr. 15, 2003, at A1 (Dateline: Jacksonville, N.C.); Jayson Blair, *In Military Wards, Questions and Fears from the Wounded*, N.Y. TIMES, Apr. 19, 2003, at A1 (Dateline: Bethesda, Md.).

<sup>40</sup> See generally Barry et al., *supra* note 5, at A1.

<sup>41</sup> See Blair, *For One Pastor*, *supra* note 39, at B1.

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



in Iraq.”<sup>43</sup> The dateline of the story read “Cleveland,” but the *Times*’s own investigation revealed that Blair did not attend the church service he described.<sup>44</sup> According to the published correction, the Reverend Sloan “did not recall meeting, seeing, or being interviewed” by Blair.<sup>45</sup> The *Times* further admitted that Blair claimed to stay overnight at a hotel that “ha[s] no record of his stay.”<sup>46</sup>

### B. Plagiarized Facts

If fabricated datelines render Blair’s stories suspect, overtly plagiarized passages demonstrate that Blair’s reporting lacked journalistic integrity and violated cardinal tenets of journalistic practice.<sup>47</sup> The *Times* found in its investigation at least a half-dozen instances in which Blair lifted sentences and quotations from other published sources such as *Associated Press* and *Washington Post*.<sup>48</sup> The article on Private Sloan’s funeral, for example, included “substantial portions” of another writer’s work.<sup>49</sup> Blair copied parts of a March 29, 2003 *Washington Post* article that described the fallen soldier’s father, as well as quotations from the prayer service.<sup>50</sup> The article also incorporated quotations from *Cleveland Plain Dealer* and *New York Daily News*.<sup>51</sup>

### C. Error-Filled Stories

Blair also made factual errors throughout his tenure at the *Times* that led to “nearly [fifty] corrections in four years.”<sup>52</sup> For

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

<sup>44</sup> See Barry et al., *supra* note 5, at A1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See generally *id.*

<sup>48</sup> See Blair, *Peace and Answers*, *supra* note 39, at A1 (Dateline: Washington, D.C.); Blair, *Relatives of Missing Soldiers*, *supra* note 39, at B13 (Dateline: Palestine, W. Va.); Blair, *Freed Soldier*, *supra* note 39, at B10 (Dateline: Palestine, W. Va.); Blair with Landler, *Gifts and Offers*, *supra* note 39, at B6 (Dateline: Palestine, W. Va.); and Blair, *For One Pastor*, *supra* note 39, at B1 (Dateline: Cleveland, Ohio).

<sup>49</sup> See Barry et al., *supra* note 5, at A1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Rosen, *supra* note 33, at 34.

example, the *Times* has reported that Blair “embellished certain details” about a soldier’s death notification,<sup>53</sup> wrote that two Maryland prosecutors “participated in discussions” regarding whether state or federal authorities should prosecute the Washington, D.C. sniper even though neither lawyer had done so;<sup>54</sup> misspelled a lawyer’s name along with his firm’s name;<sup>55</sup> and told of a man’s loss of \$400,000 on a marketing plan when that person merely had failed “to collect a licensing fee of some \$200,000 in connection with it.”<sup>56</sup>

Although these factual errors are just four among many,<sup>57</sup> they are emblematic of the sloppy reporting techniques that Blair’s supervisors tacitly condoned. These instances paint a picture of a troubled and maleficent reporter who wrote for one of the nation’s leading newspapers, and whose editors deliberately ignored deficiencies and outright duplicity. As such, the *Times* negligently supervised and retained Blair as an employee, and the facts unambiguously support fraud and negligence actions against Blair and the *Times*.

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<sup>53</sup> Jayson Blair, *For Families of the Dead, a Fateful Knock on the Door*, N.Y. TIMES, Mar. 31, 2003, at B13 (noting in a May 11, 2003 amendment posted in LEXIS, News Library, that while Blair reported that a widow was “standing in the driveway of her parents’ home when two [M]arines arrived with news of her husband’s death,” she was inside the house).

<sup>54</sup> Blair, *Retracing a Trail*, *supra* note 8, at A1 (amended in LEXIS, News Library, on May 11, 2003).

<sup>55</sup> Jayson Blair, *Ideas & Trends; Fighting Words, Whose Icon Is It?*, N.Y. TIMES, Sept. 29, 2002, at D5 (noting that the first name of attorney John F. Delaney is not Jonathan, as Blair had written, and that Delaney “is a lawyer in the New York office of Morrison & Foerster, not Morrison & Forester,” in an amendment posted in LEXIS, News Library, on May 11, 2003).

<sup>56</sup> Jayson Blair, *In a Side Effect of Economic Prosperity, White-Collar Crime Flourishes*, N.Y. TIMES, Mar. 13, 2000, at B1 (amended on May 11, 2003 in LEXIS, News Library).

<sup>57</sup> See Cynthia Cotts, *All the Wrong Moves: A Fraud Grows on West 43rd Street*, VILLAGE VOICE, May 20, 2003, at 34 (“Errors were a recurring theme for Blair. From 1998 to 2000, during his early years as a Times intern, apprentice, and intermediate reporter, he was repeatedly admonished for the number of corrections he generated.”).

## II. THE LAWSUIT: PROVING COUNTS OF FRAUD AND NEGLIGENCE

Steven Roberts, a former reporter at the *Times* and now a professor at George Washington University, observed, "There are no official methods of accountability in journalism—no review boards, no licensing procedures."<sup>58</sup> Consequently, journalists have license to admit their errors—or not—and then move on. Although they may be accountable to the individual targets of their mistakes in defamation law, journalists traditionally have not faced similar liability to the readers and general public they may deceive with false reporting or otherwise undermine by acting negligently.<sup>59</sup>

This Part takes the unconventional approach of exploring whether Blair and the *Times* could, in fact, be held liable for more than defamation. Specifically, it considers whether the actions of Blair and the *Times* constitute torts of fraud and negligence—and determines, without doubt, that they do.

In assessing the tortious harms that the *Times* and Blair inflicted, the authors impute responsibility for Blair's actions to the *Times*—as Blair's employer—in line with the tort principle known alternately as *respondeat superior* and vicarious liability. It dictates that "[t]wo parties may share a relationship which justifies imposing upon the one . . . for the tortious liability of the other."<sup>60</sup> In application, this means that an employer is responsible for an employee's actions that arise within the scope of employment, or "those acts that the employee is employed to do, as well as acts closely related such that they may be characterized as fairly and reasonably incidental to carrying out the objectives of the employment."<sup>61</sup> The authors assert that, in keeping with this standard, the *Times* is legally responsible for the torts that Blair personally inflicted through his reporting, as well as for its own

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<sup>58</sup> Howard Kurtz, *N.Y. Times Uncovers Dozens of Faked Stories by Reporter*, WASH. POST, May 11, 2003, at A1 (suggesting that the *Times* ignored the warning signs that Blair's reporting was problematic).

<sup>59</sup> See generally *id.*

<sup>60</sup> TORT LAW: CASES, MATERIALS, PROBLEMS 959 (Jerry J. Phillips et al. eds., 3d ed. 2002).

<sup>61</sup> TORT LAW AND PRACTICE 511 (Dominick Vetri et al. eds., 2d ed. 2002).

tortious conduct that flowed separately from its treatment of Blair and Blair's work.

Although it is an admittedly novel approach to hold journalists accountable to their readers under these broader principles of tort law, it is nonetheless plausible if journalism falls into line with traditional professional liability standards. This Part will not directly consider the damages associated with the torts that this Part identifies. Instead, a fuller damages discussion will arise in Part III of this Article, as well as in its Conclusion.

#### A. *Fraud*

It is well-settled U.S. Supreme Court precedent that news organizations lack immunity from generally applicable tort liability.<sup>62</sup> Moreover, as one federal appellate court recently concluded, "allowing recovery of damages for common law misrepresentation . . . does not offend the First Amendment."<sup>63</sup> Similarly, a Minnesota appellate court observed in 1998, "There is no inherent conflict or tension with the First Amendment in holding media representatives liable for the tort of fraud."<sup>64</sup> In accord with these principles, this Section demonstrates why the *Times* should be held liable for the generally applicable tort of fraud, both for Blair's actions and for those of the newspaper.

In a business that thrives on carefully chosen words, it is significant that the *Times* frequently used the term "fraud" to describe the atmosphere surrounding Blair's misdeeds.<sup>65</sup> In the May 11, 2003 *Times* article about Blair's actions, the newspaper admitted to "frequent acts of journalistic *fraud*"<sup>66</sup> on the part of its reporter. Furthermore, it suggested that the news organization had to explain "how such *fraud* could have been sustained within the

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<sup>62</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991).

<sup>63</sup> *Veilleux v. NBC*, 206 F.3d 92, 129 (1st Cir. 2000).

<sup>64</sup> *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793 (Minn. App. 1998).

<sup>65</sup> See *Barry et al.*, *supra* note 5, at A1 (referring to Jayson Blair's "deceptive techniques" and "fraud").

<sup>66</sup> *Id.* (emphasis added).

ranks of the Times”<sup>67</sup> in such a way that would affect readers, the general public, and the sources directly involved.

The *Times* acknowledged that in one story, for example, Blair attributed comments to a woman<sup>68</sup> “even though she had never spoken to anyone from the *Times*.”<sup>69</sup> The newspaper also conceded that even though Blair depicted a scene of convalescing Marines<sup>70</sup> “so compelling, the words so haunting”<sup>71</sup> that a portion merited a place as the *Times*’s “Quote of the Day,”<sup>72</sup> Blair’s article “was false from its very first word, its uppercase dateline, which told readers that the reporter was in Bethesda[, Maryland,] and had witnessed the scene. He had not.”<sup>73</sup> Part I of this Article described similar deliberate falsehoods that the *Times* published during Blair’s tenure at the newspaper.<sup>74</sup> The *Times* recognized that both Blair and the news organization shared culpability for the breach of readership trust. In fact, the acknowledged abetting of fraud by top editors led to widespread reports that morale within the *Times* plummeted in the days after the Blair story broke.<sup>75</sup>

More importantly, the collective fraud contributed to the downward spiraling of the *Times*’s reputation among its readers—some of whom expressed their anger in letters to the editor.<sup>76</sup> One writer accused the newspaper of “miss[ing] the mark on management’s taking responsibility for the situation.”<sup>77</sup> Another reader asked, “Why did you spoil the special trust you have with

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<sup>67</sup> *Id.* (emphasis added).

<sup>68</sup> Douglas Jehl & Jayson Blair, *Rescue in Iraq and a ‘Big Stir’ in West Virginia*, N.Y. TIMES, Apr. 3, 2003, at A1.

<sup>69</sup> Barry et al., *supra* note 5, at A1.

<sup>70</sup> Blair, *In Military Wards*, *supra* note 39, at A1.

<sup>71</sup> Barry et al., *supra* note 5, at A1.

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

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

<sup>74</sup> *See supra* Part I.

<sup>75</sup> Roger Simon et al., *Unsettled Times: The Stunning Resignations of Its Two Top Editors Leave a Great Newspaper Suddenly Groping for Answers*, U.S. NEWS & WORLD REP., June 16, 2003, at 26 (quoting *Times* publisher Arthur Sulzberger, Jr., “The morale of the newsroom is critical”).

<sup>76</sup> *See infra* notes 77–78 and accompanying text.

<sup>77</sup> John Stark, Letter to the Editor, *Betrayal of Trust: The Jayson Blair Scandal*, N.Y. TIMES, May 13, 2003, at A30.

millions of readers?"<sup>78</sup> Meanwhile, Howell Raines, who later lost his executive editorship, announced a series of safeguards "to prevent any recurrence of journalistic fraud."<sup>79</sup>

Of course, the *Times's* general use of the word "fraud" in its articles is not a legally binding admission of that tort. Fraud is a legal concept, sometimes referred to as fraudulent misrepresentation, and requires five elements:

- 1) The defendant must have made a false statement of fact;
- 2) with knowledge of the falsity or with reckless disregard of the truth or falsity of the statement;
- 3) intending the plaintiff to rely on the statement;
- 4) the plaintiff must have justifiably relied; and
- 5) the plaintiff must have suffered damage as a result.<sup>80</sup>

The first prong the five-part test suggests that a fraud action requires proof that the statement at issue is false.<sup>81</sup> As noted above, the *Times's* own admissions prove the newspaper published information that clearly lacked "fit[ness] to print." Perhaps even more troubling, though, is the *Times's* culpability under the second element of fraud—the so-called "actual malice requirement."<sup>82</sup> It mandates that a party speak with *scienter*—knowledge of a

<sup>78</sup> Stephen Silvia, Letter to the Editor, *Betrayal of Trust: The Jayson Blair Scandal*, N.Y. TIMES, May 13, 2003, at A30.

<sup>79</sup> Tina Kelley, *Times Editor Details Steps to Prevent a Recurrence of Fraud*, N.Y. TIMES, May 13, 2003, at B3 (reporting that management would form a committee to investigate the matters and examine "the paper's systems for managing expense accounts and keeping track of reporters' locations").

<sup>80</sup> KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 266 (1997). Some jurisdictions merge the five elements of fraud identified above into a group of four. For instance, the U.S. Court of Appeals for the Fourth Circuit observed:

To prove fraud under North Carolina law, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation.

*Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 512 (4th Cir. 1999).

<sup>81</sup> See *supra* note 80 and accompanying text.

<sup>82</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not").

statement's falsity<sup>83</sup>—or with reckless disregard of its truth or falsity. Courts have vetted the actual malice prong, particularly in defamation cases.<sup>84</sup> Ironically, the actual malice requirement typically protects the press because it compels a plaintiff to prove that a news organization knew a story was false,<sup>85</sup> entertained serious doubt about the story,<sup>86</sup> or purposefully avoided truth.<sup>87</sup>

The *Times*'s actions satisfy the *scienter* requirement because the publication knowingly failed to publish "All the News That's Fit to Print."<sup>88</sup> The newspaper deliberately and willfully misrepresented news content and accuracy by publishing Blair's decidedly *unfit* stories when it knew of Blair's penchant for falsity and fabrication.<sup>89</sup> As the *Times*'s own publisher, Arthur Sulzberger, Jr., remarked about the situation, "It's an abrogation of the trust between the newspaper and its readers."<sup>90</sup>

The admissions that the May 2003 *Times* article<sup>91</sup> methodically details reveal a pattern of behavior by high-ranking editors that amounts to the reckless disregard that the fraud definition's second prong contemplates. Even though Metropolitan Editor Jonathan Landman regularly reprimanded Blair for the inaccuracies in his stories, nothing came of Landman's efforts.<sup>92</sup> At one point in April 2002, Landman prepared a "sharply worded evaluation" of Blair's performance, but upper-level members of management failed to respond,<sup>93</sup> even though Landman copied his evaluation to Managing Editor Gerald Boyd, and Associate Managing Editor for

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<sup>83</sup> DAN B. DOBBS, THE LAW OF TORTS § 471 (2000) (explaining that the notion of *scienter* in fraud cases dates back to a ruling by Lord Herschell in the nineteenth century case of *Derry v. Peek*, 14 App. Cas. 337 (H.L. 1889)).

<sup>84</sup> See BRUCE W. SANFORD, LIBEL AND PRIVACY § 8.1 (2d ed. 1994) (discussing the actual malice standard in defamation cases).

<sup>85</sup> *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

<sup>86</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (finding reckless disregard when "the defendant in fact entertained serious doubts as to the truth of his publication").

<sup>87</sup> See *Harte-Hanks Communications*, 491 U.S. at 692 (observing that "although failure to investigate will not alone support a finding of actual malice, . . . the purposeful avoidance of the truth is in a different category").

<sup>88</sup> See generally Barry et al., *supra* note 5, at A1.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Barry et al., *supra* note 5, at A1.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

News Administration William Schmidt, and attached a note that stated, "There's big trouble I want you both to be aware of."<sup>94</sup> Landman later warned "that the newspaper had to 'stop Jayson from writing for the Times.'"<sup>95</sup>

Furthermore, when Blair sought reassignment to the sports department, Landman told the sports editor to "be careful" if he let Blair join the staff.<sup>96</sup> Yet shortly after joining the sports department, Blair moved to the national desk on Boyd's "urging,"<sup>97</sup> in order to cover the Washington, D.C. sniper case.<sup>98</sup> This surprised Landman and his colleagues, who recognized the status associated with national correspondents.<sup>99</sup> Landman later recalled the episode, saying, "Nobody was asking my opinion. What I thought was on the record abundantly."<sup>100</sup> Although top managers in the newsroom knew of Blair's misdeeds as a reporter, they continued to grant him choice assignments, often in venues where he "received far less supervision."<sup>101</sup> The continued publication of Blair's stories, despite his direct supervisors' voiced reservations, points to reckless disregard for the truth by key personnel at the newspaper. These officials repeatedly allowed for publication of *unfit* stories in the newspaper despite the famous masthead pledge of accuracy. The top three managers at the newspaper—Sulzberger, Raines, and Boyd—accepted responsibility for the problems by admitting that "our organizational safeguards and our individual responses were insufficient."<sup>102</sup>

For the third and fourth prongs of the fraud definition to apply, the *Times* must have intended for its readers to rely on the information it provided, and then its readers must have *justifiably* relied upon it. At first blush, it seems elementary that people depend on news organizations for information that allows them to

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<sup>94</sup> See *id.*

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

<sup>96</sup> See Kurtz, *supra* note 58, at A1.

<sup>97</sup> *Id.*

<sup>98</sup> See Barry et al., *supra* note 5, at A1.

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

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Kelley, *supra* note 79, at B3.



make informed decisions. Indeed, communications scholars have confirmed this; University of Washington Professor W. Lance Bennett said that most use reporting “to gather information that may help them in thinking about politics and taking more effective political action.”<sup>103</sup> Moreover, readers look for information “that may be useful in everyday life.”<sup>104</sup> They also follow “interesting dramas that develop around crime stories . . . and political scandals.”<sup>105</sup> In short, news justifiably informs readers’ choices, and news organizations recognize this reality. According to Bennett, “news organizations understand that people have such broader uses for the news and adjust their coverage accordingly.”<sup>106</sup>

Without question, the *Times*’s readers justifiably have relied upon the masthead pledge and have presumed accuracy and truthfulness in the *Times*’s reporting. Why else would the *Times* reach millions of readers each week?<sup>107</sup> The consumers rightfully expect truthful information that will help them make informed decisions. As is discussed more fully in Part III of this Article, the readers relied upon Blair’s reporting, for example, in assessing the Washington, D.C. sniper saga and in formulating beliefs about the conflict in Iraq. These constituted two tremendously important news cycles during the *Times*’s reign of falsehoods.

Finally, the fifth prong of the fraud definition requires measurable damages. Here, Blair and the *Times* allowed readers to harbor false information from which to consider issues of public interest. The readers, in turn, developed opinions and beliefs and took actions based on that false information. As Part III makes clear, the damages resulting from the action of Blair and the *Times* necessarily must move beyond the traditional pecuniary harms most often associated with fraud and embrace the special considerations of a misled public. The Conclusion demonstrates that the Supreme Court, in fact, recognizes this brand of harm.

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<sup>103</sup> W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 230 (4th ed. 2001).

<sup>104</sup> *Id.* (citing examples such as “news of airline fare wars, weather forecasts, inflation reports, [and] home mortgage rates”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See supra* note 9.

### B. Negligence

Courts often apply the concept of negligence to regulate journalistic conduct. In fact, more than thirty states have adopted negligence as the standard of fault in defamation<sup>108</sup> actions involving private-figure plaintiffs.<sup>109</sup> In the defamation context, “the negligence test permits recovery on a showing that . . . the defendant knew, or in the exercise of reasonable care should have known, that the statement was false or would create a false impression in some material respect.”<sup>110</sup>

Although the negligence case against Jayson Blair and the *Times* proposed in this Article pivots on the falsity and false impressions that Blair created and the *Times* disseminated, this Article does not make a case for defamation. Rather, it considers the violations of negligence principles by Blair and the *Times* in a broader context.

A lawsuit based on a negligence theory “requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate cause of the injuries suffered by the plaintiff.”<sup>111</sup> To pursue a negligence cause of action, a plaintiff must provide evidence to satisfy a four-pronged test: “1) the existence of a legal duty owed to the plaintiff by the defendant; 2) breach of that duty; 3) injury to the plaintiff; and 4) actual and proximate causation.”<sup>112</sup> The authors discuss the first two prongs within this section, but consider the third and

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<sup>108</sup> Defamation, including its written form known as libel and its spoken form known as slander, may be “defined as false statements of fact disseminated about a person that result in damage to that person’s reputation.” PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 83 (2002).

<sup>109</sup> ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 6.1 (3d ed. 2000).

<sup>110</sup> *Id.* § 6.2.1.

<sup>111</sup> *Benedek v. PLC Santa Monica, LLC*, 104 Cal. App. 4th 1351, 1356 (Cal. Ct. App. 2002) (stating the test for negligence under California law).

<sup>112</sup> *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1271 (D. Colo. 2002) (stating the elements of negligence under Colorado law); *see also James v. Meow Media, Inc.*, 300 F.3d 683, 689 (6th Cir. 2002) (providing that negligence under Kentucky law requires the plaintiff to “establish that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, and that the *defendant’s breach* was the proximate cause of the plaintiff’s damages”).

fourth prongs in Part III, as a component of that Part's broader damages discussion.

In considering the application of the negligence test's first prong—the demonstration of a legal duty that a plaintiff owes a defendant—it is helpful to consider a commentary on negligence by the Supreme Court of Kansas. The court opined, “The whole theory of negligence presupposes some uniform standard of behavior for the protection of others from harm. The norm usually is the conduct of the reasonably careful person under the circumstances.”<sup>113</sup> The *Restatement (Second) of Torts* provides, in relevant part, that “[t]he defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession.”<sup>114</sup> It adds that the “[c]ustoms and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though a custom is not controlling.”<sup>115</sup>

What, then, are the uniform standards of behavior for reasonable people working as journalists and editors? Is it customary for journalists, editors, and newspapers to create, convey, and publish falsehoods, fabrications, and plagiarisms? The answer is an emphatic and resounding no. In fact, the ordinary U.S. journalism practices and standards are quite the opposite.

Regarding falsehoods, Bill Kovach, chairperson of the Committee of Concerned Journalists, and Tom Rosenstiel, director of the Project for Excellence in Journalism write that “[j]ournalism's first obligation is to the truth,” a fundamental part of “a largely unwritten code of principles and values to fulfill the function of providing news” that “news professionals have

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<sup>113</sup> *Gobin v. Globe Publ'g Co.*, 216 Kan. 223, 232 (1975). The reasonably prudent person in negligence law sometimes is “given identity as a member of a class,” and “courts will often speak of the prudent physician, engineer, ship captain, plumber, or dog owner.” DOBBS, *supra* note 83, at 278. For purposes of this argument, the two classes are journalists and newspaper editors.

<sup>114</sup> RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977).

<sup>115</sup> *Id.*

developed” and to which “[e]veryone agrees.”<sup>116</sup> They note that the “disinterested pursuit of truth” is the “first principle of journalism.”<sup>117</sup>

The *Times* and Blair repeatedly violated the principle of truth, thus satisfying the requirement of a breach of duty under the negligence test’s second prong. The *Times* has admitted that it published Blair’s articles even though he wrote “falsely about emotionally charged moments in recent history.”<sup>118</sup> As such, the *Times* lacked ordinary care and caution in its pursuit of truth, as its columnist William Safire indicates:

Apparently this [twenty-seven]-year-old was given too many second chances by editors eager for this ambitious black journalist to succeed. As he moved to more responsible assignments, some editors failed to pass along assessments of his past shortcomings while others felt the need to protect the confidentiality of his troubles.<sup>119</sup>

Safire’s comments make clear that other goals took precedence over the pursuit of truth. Safire also reveals that the *Times*’s editors failed to pass along crucial information about Blair’s problems to others at the newspaper. Even more telling, in its massive *mea culpa* over the Blair fiasco, the *Times* wrote that “Mr. Blair repeatedly violated the cardinal tenet of journalism, which is simply truth.”<sup>120</sup> The same article also exposes the negligent supervision that allowed Blair and the *Times* to violate this cardinal tenet of journalism.<sup>121</sup> The May 11, 2003 article articulated, “His mistakes became so routine, his behavior so unprofessional, that by April 2002, Jonathan Landman, the metropolitan editor, dashed off a two-sentence e-mail message to newsroom administrators that read: ‘We have to stop Jayson from writing for the *Times*. Right now.’”<sup>122</sup> This statement makes clear that the *Times* actually knew

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<sup>116</sup> BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 37 (2001).

<sup>117</sup> *Id.* at 42.

<sup>118</sup> Barry et al., *supra* note 5, at A1.

<sup>119</sup> William Safire, *Huge Black Eye*, N.Y. TIMES, May 12, 2003, at A25.

<sup>120</sup> Barry et al., *supra* note 5, at A1.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

about Blair's propensity for violating truth, yet continued his employment for more than one full year<sup>123</sup> after newsroom administrators learned of his problems.

Still, the evidence goes further to support a setting that allowed for the dissemination of falsehoods. In October and November 2002, "public officials and colleagues were beginning to challenge Blair's reporting."<sup>124</sup> Yet the *Times* continued to print Blair's pieces and admitted that "a failure of communication among senior editors"<sup>125</sup> allowed Blair and the newspaper to spew out further false information to an unsuspecting public. Moreover, Blair "attracted in-house attention by logging nearly [fifty] corrections in four years."<sup>126</sup> Despite this attention and the enormous number of errors, the *Times* continued to publish the work of a man whose "mistakes and sloppy reporting"<sup>127</sup> dated back to his days at the University of Maryland's student newspaper. In sum, both Blair and the *Times* clearly violated ordinary care and caution in the standard journalistic practice of truth-telling.

The actions of Blair and the *Times* concerning fabrications also fulfill the negligence test's second prong. Professor Louis Alvin Day of Louisiana State University writes that "the fabrication of stories or quotes" is "unpardonable in the practice of journalism."<sup>128</sup> The *Times*, however, admits that it supervised and retained an employee who continually violated the ordinary, reasonable, and well-accepted practice of non-fabrication. As the *Times* wrote, Blair "fabricated comments. He concocted scenes."<sup>129</sup>

Finally, the plagiarism perpetrated by Blair, and the *Times*'s "frighteningly porous management structure" that permitted Blair's practice, also satisfy the requirements of the negligence test's

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<sup>123</sup> Blair resigned in May 2003, and Landman wrote his e-mail in April 2002. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Rosen, *supra* note 33, at 34.

<sup>127</sup> *Id.* at 33.

<sup>128</sup> LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES* 92 (4th ed. 2003).

<sup>129</sup> Barry et al., *supra* note 5, at A1.

second prong.<sup>130</sup> It is clear that the ordinary practice, standard, and custom of journalism is *not* to publish plagiarized material. As Professor Clifford Christians and his colleagues write, “[P]lagiarism is unacceptable in news. It is a convention of reporters personally, the policy of newspapers and news magazines, and of radio and television news, as well.”<sup>131</sup> The Society of Professional Journalists, for instance, admonishes journalists in its ethics code to “[n]ever plagiarize.”<sup>132</sup>

Of particular help here is the *Times*'s own code of conduct, *Ethical Journalism: Code of Conduct for the News and Editorial Departments*.<sup>133</sup> This document includes a section called “Our Duty to Our Readers” in which the newspaper establishes its own duty of care, in accord with that of the general practices and customs of journalism.<sup>134</sup> That section provides, in relevant part, that “[s]taff members who *plagiarize* or who knowingly or recklessly provide false information for publication betray our fundamental pact with our readers. We will not tolerate such behavior.”<sup>135</sup>

Yet as this Article demonstrates, the *Times* violated its own code and standards concerning the publishing of plagiarism, concomitant with those of reasonably prudent journalists and editors. It tolerated Blair's behavior by permitting him to report and publish his stories, even though it knew, or should have known in the exercise of reasonable care, that he would plagiarize.

In sum, the *Times*'s failure to adhere to ordinary practices of journalism—specifically truth-telling, non-fabrication, and non-plagiarism—proximately and actually caused harm to the newspaper's readers and to the general public. The four-pronged

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<sup>130</sup> Rem Rieder, *The Jayson Blair Affair*, AM. JOURNALISM REV., June 1, 2003, at 6. Rieder notes that the *Times*'s management structure “allowed a truth-challenged journalist to not only survive but thrive, despite a blinding array of warning lights.” *Id.*

<sup>131</sup> CLIFFORD CHRISTIANS ET AL., MEDIA ETHICS: CASES AND MORAL REASONING 73 (6th ed. 2001) (emphasis added).

<sup>132</sup> CODE OF ETHICS (Soc'y of Prof'l Journalists 2002), available at [http://www.spj.org/ethics\\_code.asp](http://www.spj.org/ethics_code.asp) (last visited Nov. 12, 2003).

<sup>133</sup> ETHICAL JOURNALISM: CODE OF CONDUCT FOR THE NEWS AND EDITORIAL DEPARTMENTS (N.Y. Times 2003).

<sup>134</sup> *Id.* at 7.

<sup>135</sup> *Id.* (emphasis added).

negligence test articulated above provides a general scheme under which to consider whether negligence occurred. Without question, Blair and the *Times* possessed clear duties of the brand the first prong articulates, and the parties fulfilled the test's second prong by breaching these duties. One can categorize these breaches under three headings:

- (1) *General negligence* in printing Blair's false, fabricated and plagiarized material;
- (2) *Negligent supervision* of Blair, which allowed the repeated publication of such material; and
- (3) *Negligent retention* of Blair, when the *Times* retained Blair as an employee, despite his shortcomings

Blair and the *Times* owed duties of care to the *Times*'s readers and to the general public. Therefore, it was incumbent upon the *Times* to prevent the reasonably foreseeable harm tied to the dissemination of misinformation, the creation of misguided and inaccurate perceptions about matters of public and political concern, and the public's subsequent actions based upon those perceptions. As such, the newspaper's editors and journalists failed in their duties to act as reasonably prudent newspaper editors and journalists, thereby engaging in negligence. Quite simply, the *Times* knew or should have known in the exercise of ordinary care that Blair's articles would contain falsities fabrications and plagiarisms that would affect readers' beliefs, opinions, and actions on matters affecting public policy and safety.

### III. DAMAGING DEMOCRACY: THE CASE FOR INJURY AND HARM CAUSED BY BLAIR AND THE *TIMES*

Perhaps the most difficult element to prove in a suit against the *Times* and Blair—the aspect that the authors' own colleagues most vociferously questioned when the authors first proposed this Article—is damages. Why? First, the fraud and negligence caused no physical injury. Unlike when a patient sues a doctor for malpractice because that doctor fails to remove a sponge or a surgical instrument, the evidence of injury and harm is not so

obvious in relation to Blair's reporting and the *Times*'s subsequent publication of the young writer's stories. Second, it would be hard to measure precisely the out-of-pocket or other monetary losses—so-called “special” damages<sup>136</sup>—other than the money that readers paid for their copies of the *Times*. Nevertheless, readers induced by the fit-to-print representation should have the chance to recover money spent for news that fell below that standard. The harms argued here may not reach the brand of physical injury typical of negligence actions or in cases of fraud, but each reflects public and legal policy principles that directly affect democratic self-governance and thereby merit public recognition.

The authors of this Article argue that there is real damage to readers of the *Times*, as well as to the general public that relies on information the *Times* conveys to other news outlets that print its copy—even if damages prove difficult to quantify.<sup>137</sup> For example, readers experienced emotional embarrassment and mental anguish when they recognized that they had been duped by a paper claiming to release only news that was fit to print, when in fact the paper actively concealed the unfitness of Blair's news for more than a year.<sup>138</sup>

But the harm of a misinformed and misguided public on matters directly affecting democratic self-governance is even more egregious. Readers presumably formed beliefs and opinions that they otherwise would not have held or reached if the *Times* had conveyed accurate and non-fabricated information. In other words, readers developed notions about their safety in Washington, D.C. and about the rescue in Iraq of Private Lynch, for example, on fabrications and lies that Blair and the *Times* perpetrated. One cannot underestimate the harm of a misinformed and misguided public on matters directly affecting democratic self-governance.

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<sup>136</sup> See ABRAHAM, *supra* note 80, at 207 (defining special damages in tort law as “out-of-pocket” and “tangible” losses such as lost wages and health-care expenses).

<sup>137</sup> See, e.g., Steve Silberman, *Letter from the Editor*, DESERT SUN (Palm Springs, Cal.), May 18, 2003, at B5; see also *P-I Published 8 Stories by N.Y. Times Reporter Accused of Fraud*, SEATTLE POST-INTELLIGENCER, May 14, 2003, at A2.

<sup>138</sup> See DOBBS, *supra* note 83, at 258 (observing that in the negligence context, for example, the “actual harm requirement does not itself exclude the possibility that some purely emotional harms could be actionable against a negligent defendant”).



Indeed, the U.S. Supreme Court has confirmed this, as this section will elucidate.

Jayson Blair's reporting often pertained to matters of political concern, and the U.S. Supreme Court noted that "that political speech is at the core of that protected by the First Amendment."<sup>139</sup> Blair's stories ranged from those related to the war in Iraq, to the actions that government officials took to protect people during the Washington, D.C. sniper crisis. At first, then, it would seem that the *Times* deserves high-level protection because of the political implications of the topics involved.

Yet the U.S. Supreme Court has made it abundantly clear that when an entity knowingly publishes false speech or recklessly disregards whether speech is false, then the speech merits no First Amendment protection—even if it involves a public official or an issue of public concern. This is the lesson from *New York Times Co. v. Sullivan*,<sup>140</sup> in which the Court adopted the actual malice standard to protect the press when reporting on matters affecting government policy. The Court held in *Sullivan* that even false speech about government officials and matters of official conduct deserves protection *unless* it is published "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>141</sup> Indeed, the Court has written that reckless disregard for the truth on the part of media defendants is concomitant with "a high degree of awareness of their probable falsity."<sup>142</sup> The Court also noted that reckless disregard for the truth exists when "the defendant in fact entertained serious doubts as to the truth of his publication."<sup>143</sup> The May 2003 *Times* article gives ample evidence that the *Times*'s editors entertained serious doubts about Blair's reporting and sensed that much of his reporting was probably false or fabricated.<sup>144</sup> Yet they let him continue writing.<sup>145</sup>

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<sup>139</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 752 (1997).

<sup>140</sup> 376 U.S. 254 (1964).

<sup>141</sup> *Id.* at 279–80.

<sup>142</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>143</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>144</sup> See Barry et al., *supra* note 5, at A1.

<sup>145</sup> *Id.*

Consequently, clear damages result from the *Times*'s fraud and negligence. Such tainted action polluted the marketplace of ideas<sup>146</sup> by harming readers' beliefs, opinions, and subsequent actions. It misguided their voting decisions,<sup>147</sup> and affected issues such as their comfort with their government officials and their government's pursuit of war. *Times* reporters have categorized Blair's writing as "emotionally charged"<sup>148</sup> on such matters, and there is little doubt that false information conveyed in such context swayed opinions, beliefs, and actions. As a matter of public policy, and in accordance with the concurring opinion of Justice Byron White in *Dun & Bradstreet v. Greenmoss Builder, Inc.*, "it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation."<sup>149</sup>

The *Times* and Blair inflicted injury and should face damages; we should allow jurors to assign a monetary value commensurate with these intangible harms. At the very least, the *New York Times* should be forced to disgorge any and all profits from those days, subsequent to the Landman e-mail of April 2002, on which it published articles written by Blair containing factual errors, fabrications, or plagiarized content. The *Times*, after all, is a lucrative for-profit business. It should not profit from selling articles that it knew or should have known to contain errors fabrications or plagiarisms.

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<sup>146</sup> See generally KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 24-26 (5th ed., 2002 update ed.) (discussing the marketplace of ideas metaphor, including its goals, origins, and strengths and weaknesses).

<sup>147</sup> This is a key point in First Amendment jurisprudence. Philosopher-educator Alexander Meiklejohn, often associated with the theory of democratic self-governance, believed that the First Amendment primarily facilitated "the voting of wise decisions" among an informed populace. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 270 (1995) (citing Meiklejohn). As Meiklejohn wrote, "The principle of the freedom of speech springs from the necessities of the program of self-government." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960).

<sup>148</sup> Barry et al., *supra* note 5, at A1.

<sup>149</sup> 472 U.S. 749, 773 (1985) (White, J., concurring).

## CONCLUSION

This Article has proposed legal remedies for the readers of the *New York Times* to recover against the publication and Jayson Blair based on causes of action for fraud, general negligence, negligent supervision, and negligent retention. Although the specific causes of action are well established, their use in this context clearly is unconventional. That said, courts regularly hold professionals and their businesses accountable for their mistakes.<sup>150</sup>

Without legal liability, only marketplace accountability protects *Times* consumers.<sup>151</sup> Readers who object to fraudulent and negligent reportage may take action by canceling their subscriptions and refraining from future newspaper purchases. Yet such action only punishes the *Times* and fails to compensate readers for the harm they suffered to their beliefs, opinions, and actions on matters of public concern. Subjects of defamatory statements must not remain the only parties who can recover for falsehoods and fabrications. Readers also should have the opportunity to recover, and language of the U.S. Supreme Court supports this proposition. The Court has noted that “[f]alse statements of fact *harm* both the subject of the falsehood *and the readers of the statement.*”<sup>152</sup> The Court has added that a state has a valid interest in “safeguarding its populace from falsehoods.”<sup>153</sup> This reinforces Part III’s argument that Blair and the *Times* caused harm when they acted recklessly and knew or should have known that falsehoods littered Blair’s reporting.

The Court also has held that there is “no constitutional value in false statements of fact.”<sup>154</sup> Moreover, the Court has made clear that a news organization can face legal accountability for publishing false statements about matters of public concern when it

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<sup>150</sup> Lawyers, for instance, can be held liable for malpractice. See generally DOBBS, *supra* note 83, at 1385 (discussing lawyer malpractice).

<sup>151</sup> See generally Theodore L. Glasser, *Press Responsibility and First Amendment Values*, in RESPONSIBLE JOURNALISM 81, 82 (Deni Elliott ed., 1986) (observing that the press is “wedded to a marketplace model of press accountability”).

<sup>152</sup> Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (emphasis added).

<sup>153</sup> *Id.* at 777.

<sup>154</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

recklessly disregards whether those statements are false.<sup>155</sup> This Article has argued that Blair and the *Times* committed both fraud and negligence—including such reckless disregard for the truth—by promulgating falsehoods, fabrications, and plagiarisms. This means that the First Amendment will not protect Blair and the *Times*. Furthermore, the Court has indicated that fraud and negligence are generally applicable torts and that “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”<sup>156</sup> The legal remedies proposed here merely await application in a court of law; the authors of this Article argue that it is now time to put them to the test.

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<sup>155</sup> See *supra* note 140 and accompanying text.

<sup>156</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).