PRESS FREEDOM AND PRIVATE PEOPLE: THE LIFE AND TIMES (AND FUTURE) OF CHAPADEAU V. UTICA OBSERVER-DISPATCH

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I. INTRODUCTION: THE ROOTS OF THE GROSS IRRESPONSIBILITY STANDARD IN LIBEL

On a June night in 1971, a high school teacher in Utica, New York, was arrested for heroin possession, and a small revolution in the law of libel in the state of New York was set into motion. Four years later, the teacher's libel case made its way to the Court of Appeals, and a unanimous court, in an ostensibly modest decision by Judge Wachtler, affirmed the Appellate Division's dismissal of the complaint.1 The teacher did not deny that he had been arrested or that police had found heroin and a hypodermic needle in his possession. Instead, Chapadeau complained that the Utica Observer-Dispatch libeled him by saying that he had been at a party in a Utica park where police found drugs and beer and made two other arrests. "The trio was part of a group at a party in Brookwood Park where they were arrested," the newspaper wrote.2

On the basis of that concededly false statement, Chapadeau charged into a public courtroom to defend what remained of his reputation, apparently outraged that he, a lone wolf heroin user, would suffer the indignity of being accused of party attendance. It was a thin case for defamation, and the newspaper moved for summary judgment, only to be denied by the Supreme Court. On appeal, however, the Appellate Division found for the paper, and the case may well have faded into obscurity at that juncture except for a quirk of historical timing. It arrived at the Court of Appeals shortly after the U.S. Supreme Court had decided Gertz v. Robert Welch,

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2 Id. at 197, 341 N.E.2d at 570, 379 N.Y.S.2d at 62.
A. From Sullivan to Gertz to Chapadeau

Over the preceding decade, the Supreme Court had wrestled with the issue of precisely what minimal standards the states had to set in their libel jurisprudence to comply with the First Amendment. In 1964, with *New York Times Co. v. Sullivan*, the Court had transformed the law by holding that the Constitution applied to the tort of libel, and that liability could not be imposed in a case involving a public official unless the plaintiff demonstrated that the defendants had acted with “actual malice”—reckless disregard of the truth. The Court extended that rule to all public figures in *Curtis Publishing Co. v. Butts*. Subsequently, in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, the Court appeared ready to apply the actual malice rule to any libel case involving a publication about a matter of public concern, even when the plaintiff was a private individual. *Gertz* reversed course. It held that while the states could not impose strict liability in cases involving private plaintiffs and matters of public concern, the states were not required by the Constitution to apply the actual malice standard. What remained for the states after *Gertz*, then, was deciding what fault standard to use: negligence, *Sullivan*’s actual malice, or some other test.

Into that legal void wandered plaintiff Chapadeau. What emerged—with no apparent legal roots—was the “gross irresponsibility” standard. No New York case had previously employed such a term, and the Court cites no precedent for it. The Court of Appeals simply pronounced that henceforth in New York, no publisher could be held liable in private-figure, public-concern libel cases unless the publisher “acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” The Court concluded that the Observer-Dispatch had met that standard. The newspaper had consulted two authoritative
sources—the police officer and the police report—and two editors reviewed the article before it went to press. While neither source had told the reporter that Chapadeau was at the party in the park, the Court was untroubled by that fact. "[I]t appears," the Court ruled, "that the publisher exercised reasonable methods to insure accuracy."¹⁰

B. Chapadeau’s Impact: An Overview

Unlike Sullivan, with its sweeping pronouncements about the role of a free press in society and its march through the common law and constitutional principles, complete with provocative concurrences, Chapadeau is a workmanlike, sure-handed, and swift resolution of the immediate matter before the Court. Yet, it too has been a defining legal precedent for New York publishers and broadcasters—and established a libel doctrine that is unique to New York. To look back at the decision now, in light of its impact on New York libel law over more than three decades, is to be struck by the cursory nature of the opinion. Indeed, it left unaddressed two central analytical questions: what would distinguish plain negligence—upon which there could now be no liability—from this newly minted “gross irresponsibility” construct, and how were the courts to determine what topics were of “legitimate public interest”?

Despite Chapadeau’s humble beginnings, a review of the more than sixty New York appellate decisions that have applied Chapadeau, and analyzed whether a publisher or broadcaster acted with gross irresponsibility, suggests that the Chapadeau standard has succeeded in achieving its underlying public policy goal: creating First Amendment “breathing space” by discouraging libel suits—suits that would otherwise saddle publishers and broadcasters with prohibitive legal costs and potential liability, and might ultimately lead to a retreat from aggressive reporting.¹¹ Judging from the trends in the appellate decisions, the number of private-figure libel actions has declined significantly in the past two decades, and suits over trivial or technical errors by the press have become a rarity. But the cases also show that the full articulation of the Chapadeau standard was far from automatic, with the courts struggling to determine how closely they should examine the

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¹⁰ Id. at 200, 341 N.E.2d at 572, 379 N.Y.S.2d at 65.
¹¹ For purposes of this article, the review focused only on cases involving the news media and book publishers. There are a few reported decisions involving other types of defendants, and those are beyond the scope of this article.
conduct of journalists, what factors were relevant, and what precisely the "gross irresponsibility" standard meant. In the end, though, the cases underscore two notable trends that have been present in almost all of the modern First Amendment jurisprudence of the Court of Appeals: a commitment to protecting the autonomy of news organizations, and a sensitivity to the day-to-day realities of how news organizations have traditionally operated, and the conditions under which news reporting is done.

Now, of course, the world of news publishing and broadcasting is being reinvented. The Internet has made potential publishers of everyone; has given plaintiffs and would-be plaintiffs broad access to the marketplace of ideas that was once controlled by the traditional media; has spawned news sites that neither employ nor want editors; and has obscured the line between private concerns and public matters through YouTube, Facebook, and countless personal blogs. Inevitably, these changes raise interesting questions about whether the public policy underpinnings that gave birth to Chapadeau thirty-five years ago in the wake of Sullivan and Gertz have fallen away, and whether it remains the right calibration of the balance between reputational protection and press freedom in the age of the Internet.

II. THE COURT OF APPEALS AND THE CABINING OF LIBEL CLAIMS

Chapadeau v. Utica Observer-Dispatch stands as one in a line of Court of Appeals post-New York Times Co. v. Sullivan decisions in which the Court has decisively shifted the balance away from libel plaintiffs and toward defendants and, in so doing, broadly promoted vigorous press coverage in New York. Lawyers for New York media organizations recently reported that the number of libel cases brought against their organizations has dwindled, and one reason for this is undoubtedly the number of strong defenses that have emerged out of the Court of Appeals libel jurisprudence over the past forty-five years.\(^\text{12}\)

The Sullivan decision was a watershed, not only because of its creation of a constitutional standard to rein in libel claims, but also because of the clear voice it gave to the concern that libel suits were often being used not to remedy reputational harm, but to silence the press. In effect, it served as a not-so-subtle prod to courts across the

country to rethink libel cases, to see them not as just another tort claim adjudicating one individual’s rights, but as a part of a larger mosaic that ultimately shaped the quality and quantity of information that would be available to the public debate.

Even prior to *Sullivan*, the intertwining of the libel tort and the constitutional guarantee had been recognized by the New York Court of Appeals. In *Julian v. American Business Consultants, Inc.*, the Court upheld a defense verdict in a case involving the now notorious publication, *Red Channels*, which spent the McCarthy years tracking down purported Communists in academia, education, and elsewhere. Joe Julian, an actor accused by *Red Channels* of having Communist leanings, sued for libel. Viewed today from the distance of fifty-five years, much of the majority’s opinion reads as a reminder of how the Cold War mentality shaped both public sentiment and judicial opinion. Judge Fuld’s dissent—filled with deep suspicion about *Red Channels* and its poisonous writings—seems prescient in hindsight. But the majority, in upholding the magazine’s defense that its statements constituted “fair comment” and not libelous assertions of facts, nonetheless embraced the central concern of *Sullivan*: that in constructing the rules of libel, courts cannot ignore their implication for First Amendment rights.

“We may not brush aside constitutional rights by setting up a double standard for comment. Any invasion of the freedom of the press justifies a concern about the inviolability of that great right,” Judge Burke wrote for the majority. It also recognized that in advancing the broad social goal of a robust free press by imposing limits on libel claims, courts necessarily extracted a price from individual plaintiffs, whose right of recovery would be curtailed: “Safeguarding and protecting the individual liberty of freedom of speech for all is for the general good, though it may work a private injury.”

The driving public policy concern behind *Sullivan* was that the law of libel should provide “breathing space” to the press. Where publishers fear that any error or unintended implication will lead to libel claims and litigation, the inevitable result will be a press that self-censors, avoids writing about the powerful and litigious, and

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14 Id. at 20, 137 N.E.2d at 18, 155 N.Y.S.2d at 19 (Fuld, J., dissenting).
15 Id. at 7, 137 N.E.2d at 5, 155 N.Y.S.2d at 7 (majority opinion).
16 Id.
17 Id. at 11, 137 N.E.2d at 7, 155 N.Y.S.2d at 11.
18 N.Y. Times Co. v. Sullivan, 376 U.S. at 271, 272 (citations omitted).
trims back aggressive reporting aimed at investigating complex subjects. That concern has repeatedly illuminated the libel decisions of the New York Court of Appeals. Perhaps foremost among them is the Court's work on the opinion doctrine. It is fundamental to the law of libel that a claim must be premised on a statement of alleged fact, not an expression of opinion. In *Immuno AG v. Moor-Jankowski*, Judge Kaye relied on the state constitution's guarantee of freedom of speech to establish an analytical framework that was more protective of press freedom than the standards articulated by the U.S. Supreme Court. The *Immuno* Court fashioned a test that required the courts to broadly consider not just the words of the statement, but also the context in which they appeared. *Immuno* became the linchpin in a second decision, *600 West 115th Street Corp. v. Von Gutfeld*, where the Court found that the accusation of criminality made about a developer by an angry citizen at a public meeting should be construed as opinion, not fact, in light of all the circumstances of that communication.

Those decisions on opinion tracked the Court's earlier jurisprudence on libel by implication. The Court of Appeals has rejected attempts by plaintiffs to have the courts engage in fine-parsing of statements, looking for possible derogatory implication in sentences ripped from their context. As the Court has put it, judges are not to "strain to place a particular interpretation on the published words," but instead should read the publication "in the same manner that others would naturally do," taking into account the whole scope of the publication and the "apparent object of the writer." In *James v. Gannett Co.*, in which a belly dancer asserted that a newspaper article made her sound like a prostitute when it quoted her as saying, among other things, "[m]en is my business," the Court made clear that the courts would not condone selective or technical reading: "We reject plaintiff's attempt to pick at two sentences from a feature article and impute to them a libelous connotation that the whole article, let alone the specific sentences,

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20 Id. at 248–50, 567 N.E.2d at 1277–78, 566 N.Y.S.2d at 913–14.
23 Id. at 418–419, 353 N.E.2d at 837, 386 N.Y.S.2d at 873–874.
will not bear.”

Similarly, the Court has bolstered the critical defense of “fair report,” which allows publishers to report on court testimony, pleadings, and other official documents without verifying that the underlying allegations contained in them are true. In *Holy Spirit Ass’n for the Unification of World Christianity v. New York Times Co.*, the Court recognized that the defense should not turn on whether the news organization rendered strict, literal quoting of the governmental document at issue:

Our conclusion today rests upon the realization that newspaper accounts of legislative or other official proceedings must be accorded some degree of liberalality. When determining whether an article constitutes a “fair and true” report, the language used therein should not be dissected and analyzed with a lexicographer’s precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected on the basis of precise denotive meanings which may literally, although not contextually, be ascribed to the words used.

*Chapadeau* likewise stands as one of the significant decisions in New York’s First Amendment jurisprudence. More directly than the decisions discussed above, *Chapadeau*, like *Sullivan*, is crafted to ensure that publishers are not forced to work under the shadow of the threat of litigation, concerned that innocent errors will lead to liability. Because the two central legal issues embedded in the *Chapadeau* analysis—legitimate public concern and gross irresponsibility—inevitably implicate editorial decision-making about what stories to cover and how to cover them, the *Chapadeau* line of cases offers a particularly rich insight into the New York judiciary’s understanding of both newsroom operations and freedom of the press.

__24__ Id. at 421, 353 N.E.2d at 839, 386 N.Y.S.2d at 875.


III. THE EVOLUTION OF THE CHAPADEAU STANDARD

A. The Origins of the "Gross Irresponsibility" Test

It would be fair to say that Chapadeau v. Utica Observer-Dispatch, Inc. is a tree with no apparent roots. While tort law has historically measured fault with a variety of terms—negligence, gross negligence, recklessness—a word search of New York law shows the term “gross irresponsibility” had never been used as a legal standard in any context, in any New York case, prior to Chapadeau. The decision itself cites no precedent for the standard. While landmark decisions are often the end result of incremental jurisprudence—tracing a line of cases and then extending the law slightly more, or looking to decisions in a related sphere and suddenly adopting them to another area of inquiry—Chapadeau does no such thing. Other than acknowledging the legal void created by Gertz v. Robert Welch Inc.’s cabining of Rosenbloom v. Metromedia, Inc., the Chapadeau Court stands mute on how it came to formulate and adopt the “gross irresponsibility” standard. Nor did Chapadeau ignite a legal transformation beyond New York. A decade and a half after Chapadeau, in reviewing how state courts around the country had responded to Gertz, the California Supreme Court declared the New York standard “unique.” The California court found that thirty-three states had adopted a negligence standard, and only three had applied Sullivan’s actual malice standard in cases involving private figures, even when the publication involved a topic of legitimate public interest. California became the thirty-fourth. Only New York has “gross irresponsibility,” or any formulation like it.

In the immediate aftermath of Chapadeau, any lower court trying to figure out what “gross irresponsibility” meant was left with only Chapadeau as a guide. Courts could be reasonably certain that it was not grossly irresponsible to mistakenly link one arrest to

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28 Chapadeau, 38 N.Y.2d at 198–9, 341 N.E.2d at 571, 379 N.Y.S.2d at 62–64.


30 Id. at 424–25, n.30.

31 Id. at 425.
another if the police were contacted, and a police report was reviewed. But beyond that parochial factual situation, Chapadeau offered few clues as to what precisely “gross irresponsibility” means. The term was not defined, but in the sentence introducing the concept, the Court used the phrase “without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.”

But the Court could not have meant that to be synonymous with “gross irresponsibility.” At best, that is a definition of ordinary negligence. At worst, the standard could be read to imply a higher duty of care, benchmarked as it is to the conduct of “responsible parties” rather than to the classic benchmark for negligence: “reasonable [person[s]] of ordinary prudence.” Neither of those views can be squared with the rest of the opinion. By interposing the idea not merely of irresponsibility, but gross irresponsibility, the Court manifestly meant a carelessness that exceeded negligence.

Later in the decision, the Court took another run at the standard. The reporter had relied on two sources—the police record and an interview with a police officer—and neither had said that Chapadeau was associated with the two arrestees from the party in the park. The plaintiff argued that it would be appropriate to impose liability where a reporter either (a) misunderstood not one, but two sources, or (b) worse, had simply made up the defamatory fact. Certainly in the world of negligence, that should suffice. But the Court rejected that position and looked not at the outcome of the reporting, but at the process. It reasoned that the reporting and editing process employed by the paper—having the reporter check with two sources and having two editors review the story pre-publication—“is hardly indicative of gross irresponsibility. Rather it appears that the publisher exercised reasonable methods to insure accuracy.” Tellingly, the Court made no attempt, through citation to the factual record or expert testimony, to establish industry standards for reporting on an arrest.

32 Chapadeau, 38 N.Y.2d at 200, 341 N.E.2d at 571–72, 379 N.Y.S.2d at 65.
33 Id. at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.
35 Chapadeau, 38 N.Y.2d at 200, 341 N.E.2d at 571, 379 N.Y.S.2d at 65.
36 Id. at 200, 341 N.E.2d at 571–72, 379 N.Y.S.2d at 64–65.
37 Id. at 200, 341 N.E.2d at 572, 379 N.Y.S.2d at 65.
On its face, the "reasonable methods" standard is highly protective of press defendants. It focuses not on what actually transpired in the reporting—whether the reporter should have gotten the story right, or whether the reporter should have at least doubted what he was writing based on what he had been told—but more abstractly on the quantum of reporting and editing that was done. Assuming that most of what appears each day in a newspaper is accurate, and therefore that the day-to-day methods employed by the newspaper are reasonable processes for ensuring accuracy, under a "reasonable methods" test there should be no liability as long as the newspaper cleaves to its customary reporting and editing processes, irrespective of what the reporting actually turned up.

Had the decision ended at that point, there would be little doubt that the "reasonable methods" approach was the proper elaboration of the "gross irresponsibility" test. But the Court, in the final substantive paragraph of the decision, shifted directions once again. It recast the erroneous report not as a failure in the reporting, but as a typographical error. "The mere fact that the word trio was mistakenly substituted for the word duo should not, of itself, result in liability. A limited number of typographical errors, as this appears to be, are inevitable," the Court concluded.38

It may be easy to see how the typing of the number three, rather than the number two, could be chalked up to typographic bungling. It is decidedly less easy to treat writing "trio" rather than "duo" as a mere typing problem. And if *Chapadeau* were really a case about mistyping rather than reporting, why would the Court have spent any time at all focusing on how the reporter sourced the story? Were the lower courts really to come away from *Chapadeau* knowing nothing more than how to decide typographical error cases under the "gross irresponsibility" standard?

In short, from the perspective of First Amendment advocates, *Chapadeau* was an important but faltering step. Its articulation of a seemingly high standard for the imposition of liability bore immense promise, but its failure to give clear meaning to the standard left in doubt where the law was going, and what level of protection it ultimately would provide.

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38 *Id.*
B. Gross Irresponsibility in the Wake of Chapadeau

Over the next decade, the Court of Appeals revisited gross irresponsibility five times. In three of the cases, the Court found for the publishers, and in a fourth, the procedurally complex Karaduman v. Newsday, Inc., it rendered a split decision, finding a question of fact on gross irresponsibility for one defendant, a publisher, over a three-judge dissent, but concluding there was no liability as to the remaining defendants, individual journalists. In the fifth case, Hogan v. Herald Co., the Court adopted the opinion of the Fourth Department and held, over a dissent by Chief Judge Cooke, that the issue of gross irresponsibility in that case could not be decided on summary judgment.

The Fourth Department’s Hogan decision, written by Judge Richard D. Simons prior to his appointment to the Court of Appeals, brought into sharp focus one of the lingering questions left open by Chapadeau. Chapadeau seemed to say that courts should look only at the methods employed in the reporting and editing. If the right sources were contacted, and appropriate editing was part of the publishing process, there would be no finding of gross irresponsibility. But did the Court really mean that what actually happened in the interaction between the reporter and the source—what was asked and what was said—had no legal significance? Hogan was a pronounced, if temporary, step away from the focus on methods alone.

Hogan arose from a political tempest in the Town of Cicero involving the Town Supervisor, Girard M. Hogan, and a Town Councilman named Roehm, who happened to be running against...
Hogan in the 1979 supervisor’s race. When Supervisor Hogan removed Roehm from his duties as the town board’s liaison to the police department, Roehm claimed that his removal was somehow linked to the fact that Hogan’s eighteen-year-old son, Michael, had been arrested. The *Syracuse Herald-Journal*, picking up on the political bickering, reported that the younger Hogan had been “arrested on a criminal mischief charge” after a car was vandalized in a parking lot. The story went on to quote police officials as saying that Supervisor Hogan had called the department several times after the arrest, and then noted that Michael Hogan said the whole matter had been “taken care of.”

In fact, there had never been an arrest. While an appearance ticket had been issued, the police never served it after receiving new evidence that young Hogan had not been involved in the incident. The son sued the paper for libel.

The Fourth Department held that the plaintiff was a private figure and applied the *Chapadeau* standard. In reporting the story, the newspaper’s reporter had interviewed Councilman Roehm, the chief of police, Supervisor Hogan, Hogan’s son, and the town justice. Significantly, the police chief told the reporter that Michael Hogan had been arrested, that his father had called several times, and that the town justice had said that the case was to be heard later that month.

On its face, that evidence would seem to clear the *Chapadeau* bar by a wide margin if *Chapadeau* intended only that a newspaper had to use “reasonable methods to insure accuracy.” Who better than the police chief to know whether an arrest was made? Who better than the town justice to know whether a case was pending in his court? And, unlike the reporter in *Chapadeau*, the reporter in *Hogan* could easily point to the source of his information.

But the Fourth Department found the evidence insufficient to support the newspaper’s summary judgment motion. In opposing

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46 Hogan, 84 A.D.2d at 472, 446 N.Y.S.2d at 838.
47 Id.
48 Id.
49 Id. at 473, 446 N.Y.S.2d at 838–39.
50 Id. at 472, 446 N.Y.S.2d at 838.
51 Id. at 470–472, 446 N.Y.S.2d at 836–38.
52 Id. at 475–76, 446 N.Y.S.2d at 840.
53 Id. at 473, 446 N.Y.S.2d at 839.
54 Id.
56 *Hogan*, 84 A.D.2d at 471–72, 446 N.Y.S.2d at 838.
the motion, plaintiff had submitted an affidavit from his father, who averred that he had told the reporter there was no arrest, had urged him to check the public records, and had theorized that Roehm and the police chief were motivated by "political vindictiveness." The court found the father's allegations "sufficient to raise a question of fact as to whether the publication is privileged because defendants failed to exercise the care ordinarily followed by responsible parties in the news industry." The court was troubled by the reporter's apparently casual questioning of the Town Justice and his acceptance of the Judge's ambiguous response to his question, his failure to credit the flat denial of the charges by plaintiff's father before publication, or at least investigate it further, and the ready accessibility to him of the means to determine the truth of Roehm's claim of arrest.

The Fourth Department's approach played out more like a negligence case than one employing a higher "gross irresponsibility" standard, whatever that term was to mean. And the Hogan court clearly gave a more searching review of the reporter's conduct in newsgathering than did the Court of Appeals in Chapadeau, where no mention is made of how the interview with the Utica police official went, or how the police log was reviewed, or what it said. But, in light of the ambiguities contained in Chapadeau's articulation of a standard, it was hardly surprising that the lower courts would struggle to discern the appropriate scope and type of review.

The Court of Appeals affirmed in Hogan on the basis of the Fourth Department's opinion. In a brief dissent, however, Chief Judge Cooke questioned why the reporter's newsgathering efforts did not meet the Chapadeau standard. He found no issue of gross irresponsibility where the reporter had faithfully recorded what two reliable sources—the police chief and the town justice—had told him, irrespective of whether there were contradictory facts presented during the newsgathering by the plaintiff's father.

The potential analytical perils of the Hogan approach are apparent. It invites courts to second-guess the reporting that is

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57 Id. at 474, 446 N.Y.S.2d at 839.
58 Id. at 476, 446 N.Y.S.2d at 840.
59 Id. at 476, 446 N.Y.S.2d at 840-41.
60 Chapadeau, 38 N.Y.2d at 200, 341 N.E.2d at 571-72, 379 N.Y.S.2d at 65.
61 Hogan, 58 N.Y.2d at 632, 444 N.E.2d at 1002, 458 N.Y.S.2d at 538.
62 Id. at 633, 444 N.E.2d at 1002-03, 458 N.Y.S.2d at 538-39 (Cooke, C.J., dissenting).
63 Id.
done on a story, and make decisions about what a reporter should have believed, and should have discounted. If the idea behind *Sullivan* and *Chapadeau* is to create breathing space for the press, by permitting a certain amount of factual error as a means of assuring that the press will not operate under the constant fear of possible litigation, *Hogan* moves New York’s jurisprudence away from that idea. At the same time, though, *Hogan* hones in on an issue that was inevitable after *Chapadeau*, and had surfaced in *Karaduman*: what should the role of doubt be in the “gross irresponsibility” analysis? The *Hogan* court posited that the reporter, upon receiving contradictory versions of whether an arrest was made, might have had an obligation to do further reporting. That contrasts with *Chapadeau*’s interest in finding out only whether the right sources had been contacted.

C. Gaeta v. New York News Inc.: Chapadeau Revisited

Two years after *Hogan*, the Court of Appeals handed down its most significant “gross irresponsibility” decision, *Gaeta v. New York News Inc.* which set up a framework for resolving the conceptual questions left by the ambiguities of *Chapadeau*, and the seeming shift in direction presented by *Hogan*. *Gaeta*, written by Judge Kaye, arose from a five-part series by the *Daily News* investigating a statewide scandal in the treatment of mental health patients who had been released from state hospitals. One of the articles recounted the travails of a patient named George Nies. It said that Nies had suffered a nervous breakdown after a “messy divorce” and the suicide of his son, who killed himself because his mother (Nies’s wife) dated other men. The wife, plaintiff Catherine Gaeta, was not identified in the article, but she sued New York News, the publisher of the *Daily News*, asserting that the account contained multiple errors: her ex-husband’s problems were the result of alcoholism, not a nervous breakdown, she did not engage in extramarital dating, the divorce was not messy, and her son’s death

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65 *Hogan*, 84 A.D.2d at 476, 446 N.Y.S.2d at 840–41. Because the case was decided at the summary judgment stage, it would ultimately be for a jury to decide whether the reporting had been adequate.


67 *Id.* at 346, 465 N.E.2d at 803, 477 N.Y.S.2d at 83.

68 *Id.*
was not caused by suicide, but by a drug overdose long after the father’s mental problems surfaced.\textsuperscript{69}

The record showed that much of the information at issue had come from Nies’s sister, who the reporter believed was also Nies’s guardian.\textsuperscript{70} The reporter attempted to interview Nies’s psychiatrists, but was told that they could not speak to her because of patient confidentiality.\textsuperscript{71} She also visited the adult home where Nies resided and was able to confirm many of the details provided by the sister about her brother’s treatment.\textsuperscript{72} Because the story focused on Nies’s care, the reporter did not attempt to verify the sister’s account of Nies’s personal life, including the details about his former wife.\textsuperscript{73}

The \textit{Gaeta} record on the reporter’s work appears to be significantly thinner than the facts presented in either \textit{Chapadeau} or \textit{Hogan}. On the facts central to the defamation claim, the reporter had a single source and made no effort to confirm the sister’s account.\textsuperscript{74} Indeed, the sister admitted to the reporter that she herself was conveying second-hand information: the account of the divorce and suicide had been given to her by Nies’s psychiatrist.\textsuperscript{75}

Yet, the Court of Appeals concluded unanimously that the plaintiff had failed to raise a triable issue on gross irresponsibly.\textsuperscript{76} The Court found that the reporter had “no reason to doubt” the sister’s information and “good reason to believe it was accurate.”\textsuperscript{77} The Court cited a host of factors to support its conclusion: the sister appeared to be the man’s legal guardian, she had previously furnished accurate information to prosecutors investigating nursing homes, the facts had “inherent plausibility,” and there was no reason to suspect that the sister had ill will toward the former wife.\textsuperscript{78}

The most obvious take-away from \textit{Gaeta} was that the Court was reaffirming its commitment to creating breathing space for publishers who were writing about issues of public concern. Had

\textsuperscript{69} Id. at 346, 465 N.E.2d at 804, 477 N.Y.S.2d at 84.
\textsuperscript{70} Id. at 347, 465 N.E.2d at 804, 477 N.Y.S.2d at 84.
\textsuperscript{71} Id. at 348, 465 N.E.2d at 804, 477 N.Y.S.2d at 84.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 347–48, 465 N.E.2d at 804, 477 N.Y.S.2d at 84.
\textsuperscript{75} Id. at 347, 465 N.E.2d at 804, 477 N.Y.S.2d at 84.
\textsuperscript{76} Id. at 351, 465 N.E.2d at 806, 477 N.Y.S.2d at 86.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
the Court approached the facts in a more Hogan-like way, it would have been easy to second-guess the reporter’s decision to rely solely on second-hand information, as well as his failure to make any inquiry at all as to whether the allegations about the ex-wife’s tawdry and harmful conduct were true, not even so much as seeking the ex-wife’s comments. Instead, Gaeta cabin’d the kind of close judicial scrutiny of the reporter’s questioning and the answers received that had been embraced in Hogan.

While the Court continued to articulate the applicable legal standard in the “ordinary care” language of negligence, it was clearly employing a more lenient test to analyze the reporter’s conduct. 79 It is telling that, as in Chapadeau, there is no reference in Gaeta to any expert opinion on the standards for reporting in the news industry, and no discussion of the accepted industry standards in American journalism for verifying information. 80 In fact, the Court was satisfied to decide the case on the basis of a defense attorney’s affidavit that attached deposition testimony, rather than requiring affidavits of the reporter or others with personal knowledge. 81

In the end, Gaeta required only an apparently-credible source, and the absence of reason to doubt the source or her information. In essence, Gaeta fused Chapadeau’s focus on whether the reporter employed reasonable methods to insure accuracy, with a decidedly less-searching version of Hogan’s analysis of whether the reporter should have entertained doubts.

Importantly, the Court made clear that the “gross irresponsibility” analysis did not turn on the reporter’s subjective state of mind, as Sullivan does, but instead was satisfied by “wholly objective proof.” 82 The “gross irresponsibility” standard could be met, at least in theory, even where the reporter personally disbelieves the source—in other words, had actual malice. 83 Conversely, the fact that the reporter truly believed a source, while

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79 Id. at 348–49, 465 N.E.2d at 805, 477 N.Y.S.2d at 85.
80 Id. at 348–351, 465 N.E.2d at 805–07, 477 N.Y.S.2d at 85–87.
81 Id. at 350, 465 N.E.2d at 806, 477 N.Y.S.2d at 86.
82 Id. at 351, 465 N.E.2d at 806, 477 N.Y.S.2d at 86. The lower courts, however, have not always been consistent in limiting the analysis to an objective test, despite Gaeta’s direction. See, e.g., Mitchell v. Herald Co., 137 A.D.2d 213, 217, 529 N.Y.S.2d 602, 605 (App. Div. 4th Dep’t 1988) (holding that gross irresponsibility could be found where a reporter was “aware of the probable falsity of the reports”).
83 See Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 104 (2d Cir. 2000). This quirk in the law raises the theoretical possibility that some publisher defendants in cases involving public figures would be better off forgoing the Sullivan standard, and having the case decided under Chapadeau instead.
perhaps important to the reporter’s editor, should not be decisive to the judge in a Chapadeau libel suit.

D. The Evolution of the Public Concern Standard

In Chapadeau, the Court of Appeals largely ducked the second major theoretical question in its analysis: what test should be used to calibrate “legitimate public concern.” To the judges, the arrest of a public school teacher on a serious drug charge required no close legal analysis. “The article at issue here concerned the arrest of a public school teacher for unlawful possession of a hypodermic needle and felony possession of heroin,” Judge Wachtler wrote. “Thus stated it becomes abundantly clear that the challenged communication falls within the sphere of legitimate public concern. Chapadeau’s occupation, one highly influential with the youth of the community, coupled with the oft-cited menace of heroin addiction makes further expatiation unnecessary.”

Since then, in its cases deciding what constitutes a matter of legitimate public concern, the Court of Appeals has spoken with clear and consistent deference to the autonomy of editors to determine the content of the news media. Judge Kaye’s decision in Gaeta set the tone and bounds of the Court’s analysis:

Determining what editorial content is of legitimate public interest and concern is a function for editors. While not conclusive, “a commercial enterprise’s allocation of its resources to specific matters and its editorial determination of what is ‘newsworthy,’ may be powerful evidence of the hold those subjects have on the public’s attention.” The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable.

Showing a particular sensitivity for the day-to-day workings of American journalism, the decision goes on to reject the argument, accepted below, that a personal anecdote about an individual

85 Id. at 200, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.
86 Id.
patient should be treated differently for libel purposes than the report on the broader social problem. “[T]he familiar journalistic technique of featuring the experiences of a single individual, as exemplifying in human terms the plight of many, [does not] change the character of the article,” Judge Kaye wrote.\(^8^8\)

Five years later, the Court turned away a plaintiff’s attempt to finely parse the contents of a book, and establish that some sections were not of legitimate public concern. At issue in *Weiner v. Doubleday & Co.* was the book “Nurcracker: Money, Madness, Murder: A Family Album” by noted journalist Shana Alexander, an account of the notorious murder of a Utah millionaire by his daughter and grandson.\(^8^9\) The plaintiff was a psychiatrist who had treated the daughter, Frances Schreuder, and objected to his portrayal in the book—in particular, the implications flowing from a declaration by one of Ms. Schreuder’s friends that “Frances always slept with her shrinks.”\(^9^0\) While the plaintiff did not dispute that the book’s overall subject matter was of legitimate public concern, he saw reportage on his relationship with the daughter as “a detour... into the realm of mere gossip and prurient interest,” as the Court put it.\(^9^1\)

The Court was unwilling to make such a judgment. “This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse,” the Court said.\(^9^2\) The Court noted that a theme of the book was the failure of those around Ms. Schreuder to address her mental problems adequately, and thus her “relationship with plaintiff is not so remote from that subject as to constitute a clear abuse of editorial discretion.”\(^9^3\) The Court’s refusal to segment the work into public and private flowed directly from *Gaeta*, which had held that the statements at issue “can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences.”\(^9^4\)

The Court returned to the theme of editorial discretion in

\(^{8^8}\) *Id.*, at 349–50, 465 N.E.2d at 805, 477 N.Y.S.2d at 85. The “character” of the article was the plight of the former patients, a subject of “true public importance.” *Id.* at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85.


\(^{9^0}\) *Id.*, at 591–92, 549 N.E.2d at 454–55, 550 N.Y.S.2d at 252–53.

\(^{9^1}\) *Id.*, at 595, 549 N.E.2d at 457, 550 N.Y.S.2d at 255.

\(^{9^2}\) *Id.* (citing *Gaeta*, 62 N.Y.2d at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85).

\(^{9^3}\) *Id.*

\(^{9^4}\) *Gaeta*, 62 N.Y.2d at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85.
Huggins v. Moore.95 There a New York Daily News gossip item about the divorce of a Broadway actress had led to a libel suit by her ex-husband.96 In an opinion by Judge Levine, the Court found that the article fell within the bounds of legitimate public concern.97 “[O]ur cases establish that a matter may be of public concern even though it is a ‘human interest’ portrayal of events in the lives of persons who are not themselves public figures, so long as some theme of legitimate public concern can reasonably be drawn from their experience.”98 While the Court continued to hold out the possibility that there could be a finding of abuse of editorial discretion, it held that the “public concern” test would be met as long as the statements at issue “reasonably related to matters warranting public exposition.”99 The Appellate Division had found that the divorce involved only “private affairs,” but the Court of Appeals saw the gossip page piece as shedding light on the topic of economic spousal abuse.100 The decision, when coupled with Gaeta and Weiner, left no doubt that virtually any subject covered in a mainstream newspaper or newscast would fall within the scope of Chapadeau. The one significant carve-out in Huggins—for publications directed only at a limited, private audience—would never come into play with the traditional media.101 Not surprisingly, Chapadeau decisions holding that a publication is not a matter of legitimate public concern are “extremely rare.”102 The sole published New York appellate decision in the last twenty-five years is the First Department’s pre-Huggins decision in Krauss v. Globe International, Inc., where a supermarket tabloid published a story about a liaison between a prostitute and the ex-husband of a television celebrity.103 The Appellate Division was unmoved by the tabloid’s attempt to portray the story as relevant to the public debate over family values, but it is unclear whether Krauss remains

96 Id. at 299, 726 N.E.2d at 458, 704 N.Y.S.2d at 906.
97 Id. at 304–05, 726 N.E.2d at 462, 704 N.Y.S.2d at 910.
98 Id. at 303, 726 N.E.2d at 460–61, 704 N.Y.S.2d 908–09.
99 Id. at 303–04, 726 N.E.2d at 460–61, 704 N.Y.S.2d 908–09 (citations omitted).
100 Id. at 304–05, 726 N.E.2d at 461–62, 704 N.Y.S.2d at 909–10.
102 Albert v. Lokens, 239 F.3d 256, 269 (2d Cir. 2001).
good law in the wake of Huggins. \textsuperscript{104}

**IV. CHAPADEAU TODAY AND TOMORROW**

That the *Chapadeau v. Utica Observer-Dispatch, Inc.* standard has now been institutionalized as a legal device to broadly protect the press from libel suits is beyond dispute. In the first decade after *Chapadeau*, there were twenty-nine Appellate Division decisions addressing gross irresponsibility in cases involving publishers or the news media. \textsuperscript{105} While none of the decisions concluded that

\textsuperscript{104} *Id.* at 193–94, 674 N.Y.S.2d at 664–65; *Albert*, 239 F.2d at 269 n.11 ("The continued viability of *Krauss's* holding . . . is in doubt . . ."). The *Krauss* holding on public concern had been central to the Appellate Division's overturned decision in *Huggins*. *Huggins v. Moore*, 253 A.D.2d 297, 310–13, 689 N.Y.S.2d 21, 32–34 (App. Div. 1st Dep't 1999).

defendants had acted with gross irresponsibility, fourteen of them found a triable issue of fact on the issue.\textsuperscript{106} Compare that to the most recent period (1999–2009), in which the “gross irresponsibility” issue was before Appellate Division panels on only thirteen occasions.\textsuperscript{107} The courts found no gross irresponsibility in eleven of the cases.\textsuperscript{108} In the twelfth, Porcari v. Gannett Satellite Information Network, Inc., the Second Department found a triable issue of fact where a reporter writing about attorney sanctions confused two lawyers with the same name.\textsuperscript{109} In the other case, Morsette v. The Final Call, the First Department issued the rare decision upholding a finding of gross irresponsibility against a publication on egregious facts: the official newspaper of the Nation of Islam had intentionally altered a photograph to portray a woman in a different light.\textsuperscript{110} A review of the more than sixty appellate decisions addressing gross

\textsuperscript{106} Buthy, 115 A.D.2d at 983, 497 N.Y.S.2d at 547 (denying defendant’s motion for summary judgment); Rossein, 113 A.D.2d at 827, 493 N.Y.S.2d at 582–83; Ocean State Seafood, Inc., 112 A.D.2d at 665–66, 492 N.Y.S.2d at 179; New Testament Missionary Fellowship, 112 A.D.2d at 56–58, 491 N.Y.S.2d at 627–28; Zucker, 111 A.D.2d at 327, 489 N.Y.S.2d at 310; Hawks, 109 A.D.2d at 575, 486 N.Y.S.2d at 466; Gaeta, 95 A.D.2d at 327, 466 N.Y.S.2d at 328–29; Simonsen, 87 A.D.2d at 711, 448 N.Y.S.2d at 859 (denying plaintiff’s motion for partial summary judgment); Hogan, 84 A.D.2d at 476, 446 N.Y.S.2d at 840–41; Karaduman, 71 A.D.2d at 415, 422 N.Y.S.2d at 429; Greenberg, 69 A.D.2d at 711, 419 N.Y.S.2d at 998; Goldman, 58 A.D.2d at 769, 396 N.Y.S.2d at 400; Bolam, 52 A.D.2d at 762, 382 N.Y.S.2d at 762; Commercial Programming Unlimited, 50 A.D.2d at 355, 378 N.Y.S.2d at 73.


\textsuperscript{109} Porcari, 50 A.D.3d at 993, 856 N.Y.S.2d at 217.

\textsuperscript{110} Morsette, 309 A.D.2d at 250–53, 764 N.Y.S.2d at 417–19.
irresponsibility in the thirty-five years since *Chapadeau* shows only two other decisions affirming “gross irresponsibility” findings.¹¹¹

Using the number of appellate decisions as an indicator, it seems clear that the number of libel suits involving *Chapadeau* factual scenarios (private individuals, matters of public concern) is down substantially. There were only three Appellate Division decisions addressing *Chapadeau* between 2004 and 2010.¹¹² That compares to 1985 when there were eight such decisions in a single year.¹¹³ Looking back on the cases brought in the years right after *Chapadeau*, one is struck by the trivial or technical errors that plaintiffs tried to turn into lawsuits: a reporter’s description of a defendant’s agreement to an adjournment in contemplation of dismissal as a guilty plea;¹¹⁴ a newspaper’s passing reference to someone who was charged with assault as “knife-wielding”;¹¹⁵ a newspaper article that based an erroneous description of the plaintiff’s work on false information provided by the plaintiff himself;¹¹⁶ a news report that mistakenly stated that a man convicted of drug possession was convicted on a drug sale count;¹¹⁷ and *Chapadeau* itself. That trend appears to be in steep decline.

Over time, the contours of the *Chapadeau* standard have become well-settled. Given the decision’s lack of jurisprudential foundation, the courts might have decided, upon reflection, that it should be considered a case about typographical error, as the final paragraphs of *Chapadeau* suggest, or the more robust review of reportorial


¹¹² See supra note 107. A similar trend seems to emerge in the federal decisions from the courts in the Second Circuit. There have been no reported decisions adjudicating gross irresponsibility in a media case from the Circuit Courts of Appeals or any district court in the circuit since 2001.

¹¹³ See supra note 105. Concededly, a decline in the number of appellate decisions is an imperfect measure of the volume of litigation. It could reflect an increase in the number of early settlements, a greater unwillingness by parties to appeal, or fewer appeal-worthy Supreme Court decisions. However, the overwhelming success of defendants on appeal would suggest, at a minimum, that few plaintiffs are prevailing before Supreme Court, which in itself would be a testament to *Chapadeau’s* value as a First Amendment safeguard. The trend in appellate decisions mirrors anecdotal evidence suggesting that suits are on the decline. See Koblin, supra note 12.


conduct advanced by Hogan could have carried the day. Instead, starting with Gaeta, the courts have consolidated their interpretation of Chapadeau around a deferential and objective "reasonable methods, no reason to doubt" analysis. In Balderman v. American Broadcasting Cos., for example, the Fourth Department reviewed a libel case arising from the ranking of physicians. The court concluded that it did not matter that the reporter declined to credit "other knowledgeable and reliable sources" who were interviewed and who questioned the rankings—a choice that the court saw as protected editorial judgment. Nor did the "editorial slant" or bias of the journalists matter. Instead, the court looked to whether the reporting methods were reasonably calculated to produce an accurate report. There is no requirement under Chapadeau that "authors and publishers must demonstrate that they independently ascertained the veracity of their source materials." The courts have made clear, at the same time, that the burden for what editors and journalists have to do to insure accuracy is quite low—and at times nonexistent—when there is "no reason to doubt."

It is worth noting as well that the courts have shown no interest in requiring publishers to demonstrate what the industry-accepted standard of care is, as they would in professional malpractice cases and other types of tort, despite the reference in Chapadeau to the "standards of information gathering and dissemination ordinarily followed." The courts repeatedly rely on their own sense of

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120 Id. at 75, 738 N.Y.S.2d at 469.
121 Id.
122 Id. at 74, 76, 738 N.Y.S.2d at 468–69.
125 Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571,
whether a person or document would be a likely and credible source to consult in reporting a story. And it is now firmly established that the courts give nearly absolute discretion to editors to decide what is a matter of legitimate public concern for purposes of that portion of the Chapadeau analysis.

The Chapadeau standard is far from perfect. There is a case to be made that Sullivan should apply in "public concern" cases, as it does in New Jersey, 126 because the same policy considerations are at play, and there is a fully-elaborated body of law to guide litigants and courts after more than forty-five years of decisions from across the country.

Further, Chapadeau can be difficult to apply in certain factual scenarios. It is best at accommodating cases that might be deemed, for lack of a better term, "somebody else's error" lawsuits. Chapadeau and Gaeta are perfect examples. The reporters went out and tracked down information and reported it faithfully, only to learn later that the source was mistaken and the information was wrong. 127

The Chapadeau test is less useful in addressing those cases that involve pure journalistic error where the journalists published the wrong information because they, and not their sources, were mistaken about the facts. Perhaps the most prevalent of these cases are those involving mistaken identity, such as Kuan Sing Enterprises, Inc. v. T.W. Wang, Inc., where a newspaper confused similarly named Chinese restaurants; 128 Hawks v. Record Printing and Publishing Co., where one jailhouse employee was named as a lawsuit defendant when the defendant was actually another employee with the same last name; 129 D'Agrosa v. Newsday, Inc., where a reporter, relying on the phone book, identified a dentist as a physician involved in a bungled operation; 130 and Porcari v. Gannett Satellite Information Network, Inc. 131 Unlike the cases

379 N.Y.S.2d 61, 64 (1975).
131 Porcari v. Gannett Satellite Info. Network, Inc., 50 A.D.3d 993, 993, 856 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 2008) (reporter misidentified lawyer who was sanctioned, confusing him with an attorney with the same name); see supra note 109 and accompanying text.
where the source is mistaken and a court can consider the reporting methods used for covering the story, these cases ask courts to consider when an unvarnished miscue by a journalist or editor should be deemed grossly irresponsible. How does a court determine whether there was—objectively—reason to doubt? What newsgathering method is truly involved in such cases? What distinguishes the merely negligent (and therefore not actionable) from the grossly irresponsible? Indeed, most of the mistaken-identity cases appear to involve nothing more than garden-variety carelessness or understandable confusion, something that should not result in liability under *Chapadeau*.

But whatever its flaws, *Chapadeau* must be deemed a success in achieving its First Amendment purposes: serving as a protective barrier to press liability in order to create breathing space for reporting on matters of public concern. If appellate decisions are any indication, the number of private-figure libel suits is down dramatically, and findings of press liability are exceedingly rare. From the standpoint of the press, the decision by the Court of Appeals to set a high standard for private-figure plaintiffs—and to resist *Gertz*’s invitation to go with a negligence standard—was a significant step for press freedom. *Sullivan*, in combination with other factors, has helped make libel suits by public figures an infrequent occurrence.\(^{132}\) Suits by private individuals, who happen to end up in the news, frequently provide a more daunting task for the libel defense bar where, as is the typical case, negligence is the standard.\(^{133}\) Thanks to the broad construction of “matter of legitimate public concern,” virtually all of private-figure suits in New York are decided under the *Chapadeau* standard.\(^{134}\)

In comparing *Sullivan* and *Chapadeau*, there is much to commend about the “gross irresponsibility” standard. Because *Chapadeau* poses an objective test, while *Sullivan* focuses on the subjective state of mind of the journalist, *Chapadeau* more readily lends itself to early resolution by motion—and early resolution of meritless libel suits has itself been seen as an important tool for protecting the rights of the press.\(^{135}\) As a practical matter, it also

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\(^{132}\) Koblin, *supra* note 12. In the four year period between 2006 and 2009, for instance, there were only thirteen trials in the United States involving public-figure or public-official plaintiffs, seven of which won verdicts. [MEDIA LAW RESOURCE CENTER, MLRC 2010 REPORT ON TRIALS AND DAMAGES 30 (2010) [hereinafter MLRC 2010 REPORT].

\(^{133}\) Even then, the number of private-figure trials remains relatively low across the nation: eighteen from 2006 to 2009. MLRC 2010 REPORT, *supra* note 132, at 30.

\(^{134}\) See *supra* Part III.D.

means that journalists should not be subjected to broad inquiry in Chapadeau cases about their reportorial decision-making, their motivation for pursuing a particular story, their subjective evaluation of interviewees, and their relationships with sources—all of which are regularly viewed as germane in an “actual malice” inquiry.136 To allow plaintiffs to use the courts, with their state-sanctioned power to penalize and to sanction, as a vehicle for probing into such subjects in and of itself raises concerns about the intrusion of the government into press autonomy.

It seems likely as well that the Chapadeau standard is more readily grasped by the triers of fact than Sullivan. At a very basic level, it focuses on whether journalists behaved carefully or responsibly in their pursuit of information, while Sullivan eschews a judgment about whether the journalists acted prudently, and instead focuses on whether they had actual doubt about the truth of what they were reporting. In that way, Chapadeau comports more closely to traditional thinking about the allocation of liability, and creates what many would consider the appropriate incentives for reporters investigating stories. Understanding Sullivan requires a longer view, seeing that its sustaining value lies in the way it creates an overall culture of press freedom, even when a defense verdict in a particular case—for instance, where a damaging error was made and the reporting is inadequate, but the reporter was certain the story was correct—may seem unfair. In practice, of

(D.C. Cir. 1996). The burden of defending a baseless defamation action is itself a threat to the First Amendment, so “it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted.” Id.; Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545, 416 N.E.2d 557, 563, 435 N.Y.S.2d 556, 562–63 (1980) (summary judgment is appropriate in libel cases because “[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.” (citations omitted)); Gaeta v. N.Y. News Inc., 62 N.Y.2d 340, 350–51, 465 N.E.2d 802, 806, 477 N.Y.S.2d 82, 86 (1984) (while public-figure cases may not be appropriate for resolution on summary judgment, Chapadeau’s objective standard lends itself to disposition on motion); Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y., 101 A.D.2d 175, 180–81, 475 N.Y.S.2d 383, 387–88 (App. Div. 1st Dep’t 1984) (departing from normal rule and allowing second summary judgment in light of “crippling financial burden” and chilling effect of libel suits if a plaintiff is permitted to continue a “meritless action upon purely procedural grounds”). For a discussion of the difference between actual malice and gross irresponsibility, see Khan v. N.Y. Times Co., 269 A.D.2d 74, 76–77, 710 N.Y.S.2d 41, 43–44 (App. Div. 1st Dep’t 2000).

course, professional journalists do not write and report to the *Sullivan* standard, doing the minimum so they can say they lacked actual malice, any more than they write to the *Chapadeau* standard. And it is the desire to be accurate, rather than the desire to avoid legal consequences, that dictates how journalists do their jobs.

The dramatic change in media technology raises provocative questions about the underpinnings of both *Sullivan* and *Chapadeau*. One reason the Supreme Court concluded that public figures should have a heavier burden in libel suits was that they, unlike private citizens, had easier access to major media outlets, and therefore were able to defend their reputations in the marketplace of ideas without recourse to the courts.¹³⁷ Now, of course, we live in a time when everyone has direct access to the public forum through blogs, personal websites, Facebook, Twitter, and other technologies, and the mainstream media outlets no longer serve as powerful gatekeepers, overseeing what information enters the marketplace. In a world where there is no barrier to access to the informational marketplace, and there remains value in having reputational harm dealt with through more communication rather than more litigation, one could argue that *Sullivan* should be extended to private-party plaintiffs, at least in cases dealing with issues of public concern.

Similarly, both principal legal concepts in *Chapadeau* were premised on a traditional view of news media operations as places where editors oversaw the actions of reporters and made decisions about issues of public interest. *Chapadeau* placed significance on the fact that the reporter’s work was checked by two editors in finding no gross irresponsibility; *Gaeta* spoke forcefully to the right of editors, rather than judges, to decide what the public wanted and needed to know.¹³⁸ It will be interesting to see whether the Court of Appeals is pressed by plaintiffs in web-based libel cases to reappraise the standards for public concern where the decision to publish rested not with a professional news editor at a mainstream publication, but with a single blogger. Conversely, a blogger

¹³⁷ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 304–05 (1964) (Goldberg, J., concurring); Yiamouyiannis v. Consumers Union of U.S., Inc., 619 F.2d 932, 937–38 (2d Cir. 1980) (noting that *Sullivan* and later decisions were premised in part on public figures’ greater access to channels of effective communication).

defendant might credibly argue that in an Internet-saturated world, where the line between the private and the public grows increasingly invisible, little if anything should fall beyond the definition of “legitimate public concern.”139 By the same token, to the extent that gross irresponsibility is at least illuminated by the norms of industry practice, should the blogger defendant’s conduct be judged by the accepted practices of other bloggers?

In the end, the Chapadeau standard is likely to be durable enough to withstand technological change. The Court of Appeals, in formulating the legal tests for both public concern and gross irresponsibility, has built in sufficient elasticity to permit the concepts to adapt to new realities, without eroding their philosophical underpinnings. The Court in Chapadeau was right to give news reporters the freedom to make excusable mistakes without fear of liability, and it was right in Gaeta to curtail second-guessing by judges of news judgments about what the public should be concerned about. Whatever fine-tuning may result from new facts in new situations, those basic principles should continue to illuminate the decisions. The history of the past thirty-five years has been that the Chapadeau standard has worked, advancing press freedom and the policy choices implicit in the Supreme Court’s landmark decision in Sullivan.

V. CONCLUSION

The Chapadeau test stands as a distinctive New York doctrine. Despite its uncertain roots and ambiguous beginnings, it has evolved into an important element in New York’s First Amendment protection, thanks to a series of later decisions that showed a savvy understanding of American journalism and a respect for press autonomy. While technological changes in communications media may cast new light on the legal concepts central to the Chapadeau line of cases, it remains a viable framework for resolving libel cases brought by private-figure plaintiffs with due regard for the First Amendment principles that are at stake.

139 See supra Part III.D.