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Bag Men and the Ghost of Richard Jewell: Some Legal and Ethical Lessons About Implied Defamation, Headlines, and Reporting on Breaking Criminal Activity from *Barhoum v. NYP Holdings*

by

CLAY CALVERT, DANIEL AXELROD, SARAH PAPADELIAS AND LINDA RIEDEMANN

Abstract

This article analyzes and explores the complex issues of libel by implication and defamatory meaning raised in the ongoing libel suit of *Barhoum v. NYP Holdings.* The case pivots on the New York Post’s “BAG MEN” cover that ran on April 18, 2013, and featured a large photo of two men cleared of wrongdoing in connection with the Boston Marathon bombing. This article, which compares and contrasts *Barhoum* to decisions such as *Kaelin v. Globe Communications Corp.* and *Stanton v. Metro Corp.*, also examines the possible impact of the New York Post’s tiny front page disclaimer. Furthermore, this article considers how people actually read and interpret tabloid covers and headlines. Finally, this article compares the New York Post’s coverage at issue in *Barhoum* against ethical

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2. *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036 (9th Cir. 1998); *Stanton v. Metro Corp.*, 438 F.3d 119, 127 (1st Cir. 2006).
principles and journalistic best practices regarding breaking coverage of
criminal cases that might be raised by expert witnesses in the case and that
courts may either consider or ignore. Even if the New York Post escapes
legal liability, the article demonstrates that its brand of reporting was
decidedly unethical.

I. Introduction

On April 15, 2013, bomb blasts at the Boston Marathon killed three
people and injured more than one hundred others. President Barack
Obama called it "an act of terrorism" and "heinous and cowardly." Four
days later, following a massive manhunt, police arrested Dzhokhar
Tsarnaev in connection with the crime.

Prior to Tsarnaev’s capture, however, there was much inaccurate
and/or misleading reportage regarding who may have committed the
crime. For instance, CNN’s John King falsely reported that an arrest had

6. See Brian Stelter, News Media and Social Media Become Part of a Real-Time Manhunt Drama, N.Y. TIMES, Apr. 20, 2013, at A17 (describing “several days of frenzied, sometimes inaccurate, reporting about the bombings”) (emphasis added).
been made. Veteran media critic Rem Rieder characterized the situation as "a major media malfunction," while the *Washington Post*’s Paul Farhi summed it up thusly:

Over and over this week, the news media got it wrong. A suspect in the Boston Marathon bombings had been arrested; in fact, one hadn’t. A Saudi national was in custody in the attacks; in fact, there was no such individual. The two actual suspects had ties to jihadist groups; well, that was not clear at the time, either.

The situation, in fact, grew so bad that on April 17, the FBI released the following statement upbraiding the media:

Contrary to widespread reporting, no arrest has been made in connection with the Boston Marathon attack. Over the past day and a half, there have been a number of press reports based on information from unofficial sources that has been inaccurate. Since these stories often have unintended consequences, we ask the media...to exercise caution and attempt to verify information through appropriate official channels before reporting.

This article examines one high-profile instance of pre-arrest reporting in the bombing investigation that drew “a storm of criticism” and

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7. Rem Rieder, *Race To Be First Becomes Race To Be Wrong*, USA TODAY, Apr. 18, 2013, at 2B.

8. Id.


ultimately spawned the libel suit of Barhoum v. NYP Holdings, Inc.\textsuperscript{12} The now-pending lawsuit, filed in superior court in Suffolk County, Massachusetts, pivots on the April 18, 2013 edition of the \textit{New York Post}.

That edition of the tabloid-sized newspaper features a full-page cover photo of two then-unidentified men, one wearing a black backpack and the other carrying a duffel bag.\textsuperscript{14} Overlaying the photo is a nine-by-two inch “block letter headline containing only the words ‘BAG MEN,’—a reference to previously reported information that the bombs were thought to have been transported in backpacks or duffel bags.”\textsuperscript{15}

A sub-headline, spanning more than sixteen square inches and running down the left side of the cover photo, reads “Feds seek this duo pictured at Boston marathon.”\textsuperscript{16} Finally, in tiny font in the lower left-hand corner of the cover, a small box teases readers to see pages four through seven for more information, and it includes the following text that may, as this article suggests later, prove crucial to the lawsuit’s outcome:

Investigators probing the deadly Boston Marathon bombings are e-mailing law-enforcement agencies photos of these two men seen on surveillance near the finish line, \textit{The Post} has learned. One is carrying a duffel bag and the other has a backpack—which is not visible in a later photo. \textit{There is no direct evidence linking them to the crime}, but authorities want to identify them.\textsuperscript{17}

\begin{itemize}
\item[\textsuperscript{12}] Complaint and Jury Demand, Barhoum v. NYP Holdings, Inc., SUCV. 13-2062 (Mass. June 5, 2013) [hereinafter Complaint], available at \url{http://www.washingtonpost.com/r/20102019/WashingtonPost/2013/06/06/EditorialOpinion/Graphics/nyp_bostonmarathon_06062013.pdf}. The Complaint appends exhibits that include both the cover of the April 18, 2013, edition of the \textit{New York Post} and the accompanying article on pages four and five. The front page cover photo is attached as Exhibit A, while pages four and five are attached as Exhibit B.
\item[\textsuperscript{13}] \textit{Id.} at 1–2.
\item[\textsuperscript{14}] \textit{Id.} at 2 and Exhibit A.
\item[\textsuperscript{15}] \textit{Id.} at 2.
\item[\textsuperscript{16}] \textit{Id.}
\item[\textsuperscript{17}] \textit{Id.} at Exhibit A (emphasis added). As of December 1, 2013, a slightly redacted version of the \textit{New York Post} cover in question was available on the \textit{Washington Post}’s website and an untouched version could be found on the Poynter Institute’s website. \textit{See} Erik Wemple, \textit{New York Post Sued for Libel Over “Bag Men” Story}, WASH. POST (June 6, 2013), \url{http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/06/06/new-york-post-sued-for-libel-over-bag-men-story/} (reporting on the lawsuit and including a copy of the cover of the edition of the \textit{New York Post} that gave rise to the lawsuit, but redacted with a black bar covering the eyes of one of the men); Andrew Beaujon, \textit{A Critical Appreciation of New York Post, Daily News Statements on Journalistic Offenses}, POYNTER (Apr. 18, 2013), \url{http://www.poynter.org/latest-news/mediawire/210772/new-york-post-daily-news-statements-on-journalistic-offenses-a-critical-appreciation/} (reporting on the \textit{New York Post}’s April 18, 2013 edition and including an unredacted version of the cover).
\end{itemize}
On pages four and five of the same edition of the \textit{New York Post} is a story directly relating to the cover imagery and text. A large, all-capitalized headline reading "\textit{FEDS HAVE 2 MEN IN SIGHTS}" spans the top of those pages. The \textit{Barhoum} complaint adds that "[d]irectly beneath the top headline were two more pictures of plaintiffs, one of which is an image with their heads circled in red, with a caption reading: ‘Cops are seeking these two men (above) who were spotted near the site of the Boston blasts.” The cover page headline arguably implied “that the men were suspects or accomplices” and was characterized by one commentator as “all-too-ominous-sounding.” That is because, as Daniel D’Addario of \textit{Salon} writes, the term “bag men” is “common slang for a criminal.” The cover page conjured up, at least for some commentators, memories of the late Richard Jewell, the security guard who was wrongly accused by some media outlets of committing the 1996 bombing in Atlanta’s Centennial Olympic Park. In fact, Jewell sued the \textit{New York Post} for libel in

\begin{itemize}
  \item[18.] Complaint, supra note 12, at 6.
  \item[19.] \textit{Id}.
  \item[20.] Farhi, supra note 9, at C1. See Ken Bensinger & Andrea Chang, \textit{The Boston Bombings Investigation; Social Media Spirals Out of Control}, \textit{L.A. Times}, Apr. 20, 2013, at A14 (asserting that the headline “implied that the two were prime suspects”).
  \item[24.] Al Tompkins of the Poynter Institute wrote that the \textit{New York Post}’s reporting on the “Bag Men” story:

  [R]eminds me a lot of what happened in the days after the Olympic Park bombing in Atlanta in 1996. In that case, a security guard named Richard Jewell was repeatedly characterized by the media as a person of interest. We now know, of course, that he had nothing to do with the bombing. Jewell died in 2007, after he won settlements with NBC and CNN and was still pursuing lawsuits against other media for defamation. We can cause great harm to individuals and to the investigation when we suggest people are suspects and when we show images with red circles around the people, making them appear to be targets.

  Al Tompkins, \textit{Let’s Remember Richard Jewell as We Cover Boston “Suspects,”} \textit{POYNTER} (Apr. 18, 2013), http://www.poynter.org/latest-news/als-morning-meeting/210731/lets-remember-richard-jewell-as-we-cover-boston-suspects. See MacKenzie Carpenter, \textit{Social Media Turns Detective, For Better or For Worse}, \textit{PITT. POST-GAZETTE}, Apr. 19, 2013, at A9 (reporting that “for some it was an all too-similar reminder of Richard Jewell, the security guard present at the
connection with its reporting on his alleged role in the bombing and its description of his prior work history and job performance. The case ultimately settled.

The *New York Post*, however, did not back down this time, issuing the statement: "We stand by our story."27 The newspaper's editor-in-chief, Col Allan, explained that "[w]e did not identify Salaheddin Barhoum and Yassine Zaimi as suspects"28 and pointed out that "[t]he image was emailed to law enforcement agencies . . . seeking information about these men, as our story reported."29 Indeed, as *Salon*’s D’Addario notes, the cover page "comes short of actually calling the two men suspects."30

Who actually emailed the photo to law enforcement agencies is somewhat unclear; it may be that the "[i]nvestigators" referred to on the *New York Post*’s cover page as doing the emailing31 were merely "the Web’s volunteer detectives"32 on Reddit who, the day before the offending edition of the newspaper hit the streets, had suggested the pair may have been the bombers.33 Indeed, the Barhoum complaint notes that "[a]t some Olympic Park bombings in 1996 who was wrongly identified as a person of interest by some media outlets, only later to recover millions of dollars in damages from NBC and CNN"; Mark Morales et al., *Blown Away—Post Falsely Calls Duo Suspects—Who’ll Pay For Mistake?*, N.Y. DAILY NEWS, Apr. 19, 2013, at 7 (asserting that "[t]he fiasco was reminiscent of the ‘trial by media’ endured by Richard Jewell—the security guard wrongly accused of the Centennial Olympic Park bombing at the 1996 Summer Olympics. Jewell was exonerated—but not before being labeled a criminal and pilloried nationwide.").


29. Id.

30. D’Addario, supra note 22.

31. ComplainFt, supra note 12, at Exhibit A.


33. See id. (describing the actions of those on Reddit.com, asserting that “the Backpack Brothers showed the dark side of an audacious effort to crowdsourse a murder investigation,” and reporting that for “the Internet’s amateurs,” “the Backpack Brothers looked like one of their strongest leads . . . . On Thursday, the online crowd’s suspicions were echoed by the New York
time on or prior to April 17, 2013, photographs of plaintiffs began circulating on one or more of these social media internet sites."

On June 5, 2013, the two so-called bag men—a sixteen-year-old, high school sophomore named Salaheddin Barhoum and a twenty-four-year-old named Yassine Zaimi—filed suit against the owner of the *New York Post*, as well as several of the paper’s reporters. Emphasizing that Barhoum and Zaimi “had nothing whatsoever to do with the bombing,” the complaint states three separate causes of action for defamation. It also includes counts for emotional distress, statutory invasion of privacy and false light invasion of privacy.

Perhaps the most interesting cause of action—the one explored in this article—is the first count for libel. Why? Because it alleges defamation based solely on the front page cover of the *New York Post*, regardless and irrespective of the inside article and photos on pages four and five.

Specifically, count one for libel avers that the front page either unambiguously stated or implied that Barhoum and Zaimi were: (1) Involved in causing the Boston Marathon bombing; (2) considered suspects by federal authorities; and (3) sought by federal authorities. Furthermore, the plaintiffs assert that the front page “unambiguously stated and/or implied that federal authorities were circulating their photo in an effort to identify them.” The plaintiffs allege the first three of these statements to be false, and they believe the fourth is false “[o]n the basis of all available

Post. ‘Bag Men,’ the headline read, over a photo of the two”); see also David Montgomery et al., *From Deluge of Evidence, Clues Bubble Up*, WASH. POST, Apr. 21, 2013, at A1 (noting that on Reddit.com “users compiled thousands of photos, studied them for suspicious backpacks and sent their favorite theories spinning out into the wider Internet” and adding that “[i]n addition to being almost universally wrong, the theories developed via social media complicated the official investigation, according to law enforcement officials”).

35. *Id.* at 1–3.
36. *Id.*
37. *Id.* The individually named defendant-reporters are Larry Celona, Brad Hamilton, Jamie Schram, Lorena Mongelli & Kate Kowsh. *Id.* at 3.
38. *Id.* at 1.
39. *Id.* at 10–14.
41. *Id.* at 14–15. *See* MASS. GEN. LAWS ch. 214, § 1B (2012) (providing that “[a] person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”).
42. Complaint, *supra* note 12, at 15.
43. *Id.* at 10–11.
44. *Id.* at 10.
45. *Id.*
information."46 Viewing these assertions collectively, Barhoum and Zaimi ultimately claim that the front page is defamatory per se "because it implied that plaintiffs committed a heinous crime."47

This article examines a trio of issues lurking within the cause of action for cover-page defamation. Initially, Part I analyzes the general problem of defamation by implication48 and in particular, the possible defamatory meaning(s) implied and derived in Barhoum from the combination and juxtaposition of headline, text, and photo on the cover of the April 18, 2013, edition of the New York Post.49 Part I also considers, in light of the 2006 federal appellate court decision in Stanton v. Metro Corp.50 applying Massachusetts's libel principles, whether or not the tiny text on the front page explaining there was no direct evidence linking the "bag men" to the bombing should eliminate possible defamatory implications.

Indeed, the New York Post asserted in an August 2013 responsive pleading that the "Bag Men" headline "was obviously nothing other than a play on words"51 and "was clearly not intended to be taken to mean those pictured were 'bag men' in the ordinary sense of the word,"52 but instead the headline simply "was used to attract the reader's attention to the report that law enforcement officials were trying to identify the individuals who

46. Id. It may prove to be the case that the cover photo actually was not circulated by federal authorities, but was emailed to them and/or to the New York Post by amateur sleuths on social media sites like Reddit.com. Supra notes 32–34 and accompanying text.

47. Complaint, supra note 12, at 11.


[F]alse, defamatory implications are drawn from published words or images in a variety of ways. In some cases, false, defamatory statements are extracted from the publication itself. The defamation in such cases may be an inference from an explicit factual statement, from the publication generally—the "gestalt" of the article, or from an opinion expressed in the publication. Alternatively, the statement identified as false and defamatory may be ascertained by reference to facts omitted from the publication that would otherwise "negate" a libelous inference, or by reference to extraneous facts. In each of these contexts, an implication provides the allegedly false, defamatory meaning on which the libel action is based.

49. Id. infra notes 65–169 and accompanying text.

50. 438 F.3d 119 (1st Cir. 2006).


52. Id. The defendants acknowledge that "the ordinary sense of the term" is "a person who collects or distributes illicitly obtained money." Id.
were carrying bags, which was undeniably true\textsuperscript{53} and "[t]hose who read the Post are certainly familiar with its tradition of eye-catching headlines";\textsuperscript{54} "the disclaimer in the textbox is unambiguous: '[T]here is no direct evidence linking the[] [plaintiffs] to the crime, but authorities want to identify them.' . . . The article's headline, when read in context as it must be, thus cannot support a defamation claim."\textsuperscript{55}

Next, Part II considers and questions whether courts should allow libel claims to proceed based solely on a tabloid newspaper's cover page (including defamation-by-headline tabloid cases like \textit{Kaelin v. Globe Communications Corp.}\textsuperscript{56}) or whether they should require plaintiffs to prove libel based on the totality of the cover plus any inside article related to it.\textsuperscript{57} Furthermore, Part II considers whether the \textit{New York Post}'s later reporting on its website that Barhoum and Zaimi were not involved in the bombing\textsuperscript{58} should, regardless of Massachusetts' retraction rules in libel lawsuits,\textsuperscript{59} affect possible damages awarded if the case eventually goes to trial and, in turn, if the plaintiffs prevail. That is an important issue because the later

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id. at 13 n.5.}
\item \textsuperscript{55} \textit{Id. at 14.}
\item \textsuperscript{56} 162 F.3d 1036 (9th Cir. 1988).
\item \textsuperscript{57} \textit{Infra} notes 170–254 and accompanying text.
\item \textsuperscript{58} See Josh Margolin, \textit{Two Men Probed in Post Marathon Bombings Cleared by Investigators}, \textit{N.Y. POST} (Apr. 18, 2013), http://www.nypost.com/p/news/national/investigators_determine_marathon_Pu15seYXiiNS1f1yqqbRWILK (reporting in the lead paragraph that "[i]nvestigators have now cleared the two men whose pictures were circulated last night in an email among law enforcement officials"); Lorena Mongelli with Josh Margolin, "Bag" Pair in Feds' E-mails Cleared, \textit{N.Y. POST} (Apr. 18, 2013), http://www.nypost.com/p/news/national/bag_pair_in_feds_emails_cleared_joQRwVqZROOrdr1w1K1107J (reporting in the lead paragraph that "[i]nvestigators have cleared two men whose images were e-mailed among law-enforcement officials as part of the probe into the Boston Marathon bombings and published in \textit{The Post} yesterday"); see Fahrenthold & Dewey, \textit{supra} note 28, at A10 (reporting that the \textit{New York Post}'s "[w]eb site posted a story that said the men had been cleared"); Erik Wemple, \textit{Fallout From 'Bag Men' Cover}, \textit{WASH. POST}, May 1, 2013 (reporting that "[t]he New York Post did publish a story saying that the kids had been 'cleared'").
\item \textsuperscript{59} Massachusetts has a statute under which the retraction of a libelous statement may be used by a defendant to mitigate damages. The statute provides, in relevant part:

\begin{displayquote}
Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein, gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he intends to publish, and the retraction is published, he may prove such publication, and, if the plaintiff does not accept the offer of retraction, the defendant may prove such nonacceptance in mitigation of damages.
\end{displayquote}

\texttt{MASS. GEN. LAWS ch. 231, § 93 (2013)} (emphasis added).
\end{itemize}
\end{footnotesize}
stories reporting that the men had been cleared were not retractions of the original “Bag Men” story.

Part III then moves more broadly in interdisciplinary fashion, to compare how the New York Post’s April 18 reporting (including its cover page) comports with fundamental journalism principles regarding reportage of criminal cases and in particular, the early identification of individuals who may or may not be connected to a crime. This focus on journalism principles may prove important because, as Professor Amy Gajda argues, there is “a growing willingness of courts to police the news judgment of individual journalists, holding them to the ‘best practices’ idealized in professional ethics standards as interpreted by judges and jurors.” Gajda goes so far as to suggest that a “news editor who must make the call about coverage of a particular crime story” and who wants to avoid potential liability must not only make sure the coverage does not violate the letter of the law, but also ensure it does “not violate any of journalism’s highly subjective, ethereal, and aspirational ethics provisions. That editor must also consider the ways in which a lay judge or jury might interpret such ethics provisions.”

Finally, Part IV concludes by suggesting ways in which the New York Post might have better and more accurately reported information about Barhoum and Zaimi, thereby reducing its risk of legal liability. These suggestions, amounting to take-away lessons from the reporting that sparked Barhoum, attempt to balance the public’s unenumerated First Amendment right to know against the reputational interests of individuals like Barhoum and Zaimi.

60. Infra notes 255–335 and accompanying text.


63. Infra notes 336–42 and accompanying text.

64. See Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) asserting that:

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn.

Id. (emphasis added); Zemel v. Rusk, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting) (addressing the peripheral rights of the citizen under the First Amendment” and asserting that “[t]he right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press” (emphasis added); see also Eric B. Easton, Public Importance: Balancing Proprietary Interests and the Right to Know, 21 CARDOZO ARTS & ENT.
II. Defamation by Implication:

Finding Meaning in the Murkiness

This part addresses the ambiguity and complexity of defamation by implication. Initially, Section A uses case law and secondary sources, including journal articles, to review the complicated and unsettled locus of defamation by implication within libel law. Section B then begins to examine the April 18, 2013 cover at issue in Barhoum and the range of ways readers might interpret its meaning. Finally, Section C concludes by analyzing the 2006 ruling by the U.S. Court of Appeals for the First Circuit in the somewhat similar case of Stanton v. Metro Corp. The Stanton case’s outcome, which hinged on principles of Massachusetts law now applicable in Barhoum, could influence whether the size and presentation of the New York Post’s cover-page disclaimer will absolve it of liability.

A. Defamation by Implication

Defamation may occur either “directly or by implication.” Under Massachusetts law, “[w]ords not inherently disparaging may, however, have that effect if viewed contextually, i.e., in the light of attendant circumstances,” and “attendant circumstances may be shown as proof of the defamatory nature of the words.” The Supreme Judicial Court of Massachusetts, in fact, has opined that:

"It is not required that there be direct and explicit language tending to discredit the plaintiff or imputing crime to him. "Words, pictures or signs, singly or in combination, understood as mankind in general would understand them, conveying such an imputation render the publication libelous. ‘An insinuation may be as actionable as a direct statement.'"

While that surely is good news for the Barhoum plaintiffs, it does not answer the more fundamental question: What is defamation by implication? The U.S. Court of Appeals for the Eighth Circuit defines implied

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65. 438 F.3d 119 (1st Cir. 2006).
defamation as either "an artificial juxtaposition of two true statements or the material omission of facts that would render the challenged statement(s) non-defamatory." 70

Although that disjunctive definition seems clear, the principle of defamation by implication is "fraught with subtle complexities." 71 Such cases do not merely fail to follow the broad doctrinal topography of libel carved out over the last fifty years since New York Times Co. v. Sullivan; 72 they occupy what one scholar describes as "a no-man's land" full of statements neither true nor false. 73 Also known as "'libel by implication,' 'libel by omission,' or 'indirect defamation,'" 74 defamation by implication includes "situations where all factual statements in a news story are probably true, but the overall gist of the story is false." 75 Transformed into a crude formula, this last description amounts to:

**True Statement A + True Statement B = False Implication C**

Suggesting how implied defamation occurs either by juxtaposition or omission, the Supreme Court of Iowa recently wrote that:

Defamation by implication arises, not from what is stated, but from what is implied when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct. 76

Although the United States Supreme Court has redrawn the First Amendment-based bounds of libel since Sullivan, 77 truth still weighs heavily on the scales of the libel tort. 78 Indeed, it is axiomatic that "for a

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70. Toney v. WCCO Television, 85 F.3d 383, 387 (8th Cir. 1996) (emphasis added).
74. *Id.*
75. *Id.*
78. *See, e.g.*, Lerman v. Turner, 2013 U.S. Dist. LEXIS 118479, *57 (N.D. Ill. Aug. 21, 2013) (noting that "[t]ruth is an absolute defense to a defamation action" and adding that to prevail on the defense of truth, "defendants need only show that the statement at issue is
statement to be libelous, it must be false" and that, as the Supreme Court of Minnesota recently wrote, "[t]ruth is a complete defense to a defamation action." Yet, cases involving libel by implication present a critical jurisprudential quandary regarding truth. If winning defamation claims depends on proving the publication of false statements that cause reputational harm, how could, as Professor C. Thomas Dienes and media attorney Lee Levine query, "a libel action be predicated on statements that, standing alone, are neither false nor defamatory?" They detail that during the twenty-five-year period following Sullivan, courts were quick to dismiss defamation by implication cases "if the plaintiff failed to prove that the statement was false and made with actual malice." Attorney Nicole LaBarbera aptly summarized the dilemma, however, of dismissing such cases:

Disallowing defamation by implication ignores the reality of human discourse. Communication, rarely composed of transparent assertions, is a nexus of suggestions, cues, allusions, presumptions and intimations. What speech leaves unsaid is often more potent than what it makes explicit: "[I]t is the thought conveyed, not the words, that does the harm." An offending word may be evanescent, but a defamatory implication may linger.

Further complicating analysis of defamation by implication are two other matters—meaning and intent. The traditional rule is that "[w]hether a statement is susceptible to a defamatory meaning is a question of law," with meaning based on what a reasonable person might take away from an article, considering "the context in which the challenged statement is made, viewing it within the communication as a whole." As one federal court recently wrote, "the court must look at the language of the communication, its implications and the context in which it was made, and determine how a substantially true, i.e., that the ‘gist’ or ‘sting’ of the statement is true.”); Gordon v. Boyles, 99 P.3d 75, 81 (Colo. 2004) (opining that “[t]ruth is a complete defense to defamation. However, absolute truth is not required; instead, a defendant need only show substantial truth.”).
reasonable person would interpret the statement.”86 In applying Massachusetts libel law, the U.S. Court of Appeals for the First Circuit has opined that “in deciding whether a statement is susceptible to a defamatory interpretation, the court must gauge the reasonableness of the interpretation based on what a considerable and respectable segment of the community would make of the statement.”87 In brief, these descriptions make it clear that context and reasonableness are key in deciphering meaning. When it comes to defamation by implication, “[a] defamatory implication must be present in the plain and natural meaning of the words used.”88

Under the Massachusetts law applicable in Barhoum, courts must decide whether a communication is reasonably susceptible to conveying defamatory meaning to a reasonable reader and then leave it to juries to decide if the ultimate meaning is defamatory.89 As the Supreme Judicial Court of Massachusetts observed in 2004, “whether a communication is reasonably susceptible of a defamatory meaning, is a question of law for the court,”90 and ‘[w]here the communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury.’”91 Judge Robert D. Sack of the U.S. Court of Appeals for the Second Circuit explains:

If the court determines that a statement is capable of two of more meanings, of which at least one is capable of a defamatory meaning, then, in jurisdictions that do not subscribe to the innocent construction rule, it is for the jury to decide which meaning was in fact understood by recipients of the communication.92

This may be particularly important in Barhoum because, as the U.S. Court of Appeals for the Third Circuit recently wrote, “[i]n defamation-by-implication cases, the alleged defamatory statement has two possible meanings, one that is defamatory and one that is not.”93 Further compounding the problem of meaning in defamation-by-implication cases

87. Stanton v. Metro Corp., 438 F.3d 119, 127 (1st Cir. 2006).
89. Damon v. Moore, 520 F.3d 98, 103–04 (1st Cir. 2008).
91. Id. (quoting Jones v. Taibbi, 512 N.E.2d 260, 264 (Mass. 1987)).
92. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, Slander, and Related Problems at § 2:4.16 (4th ed. 2012). Under the innocent construction rule, which is recognized in Illinois, “even statements that fall into one of the categories of words that are defamatory per se are not actionable per se if they can be reasonably capable of an innocent construction.” Coghlan v. Beck, 984 N.E.2d 132, 146 (Ill. App. Ct. 2013).
IMPLIED DEFAMATION

is the extent to which intent of the communicator/defendant should be relevant in determining meaning.

In cases involving private-figure plaintiffs, Professor Elizabeth Blanks Hindman notes that “the speaker or publisher’s intent is less important. In those cases, the private figure plaintiff must prove that the audience would have reasonably understood the message in its defamatory sense, regardless of the speaker’s intent.”94 By that standard, if a jury thinks readers would interpret a statement in a defamatory manner, the publisher’s intent is irrelevant.95

But several appellate courts, particularly in cases involving public figures and actual malice scenarios, consider intent important. For instance, the U.S. Court of Appeals for the District of Columbia Circuit fashioned the following rule nearly twenty-five years ago in defamation-by-implication cases:

If a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.96

The D.C. Circuit, in fact, is not alone. In 1998, the U.S. Court of Appeals for the Ninth Circuit observed that “all the courts of appeal that have considered cases involving defamation by implication have imposed a similar actual intent requirement.”97 Yet not all courts are on board with this intent requirement, even in public figure cases. In 2011, an Oklahoma appellate court ruled that “subject to the actual malice test in a public official or public figure case, a defendant may be liable for defamation even if the defamatory meaning was not intended but was ‘mistakenly but reasonably’ understood by the recipient of the publication.”98 Significantly for Barhoum, however, neither plaintiff was a public figure when the offending New York Post issue was published, thus rendering it even less

94. Hindman, supra note 73, at 353.
95. Id.
clear whether the *New York Post*’s intended meaning of its front page is relevant.

Ultimately, the U. S. Supreme Court has never directly addressed defamation by implication,99 and “courts across the country cannot agree on what constitutes ‘truth’ and thus offer contradictory rulings.”100 Indeed, as one federal court recently wrote, “some jurisdictions refuse to recognize a claim for a defamatory implication where the statements giving rise to the implication are all true.”101 These courts are “particularly hesitant to recognize such claims where the plaintiff is a public figure and the challenged statement is on a matter of public concern.”102 The bottom line, as assessed by authors Dienes and Levine, is that when it comes to libel by implication, courts have developed “a body of law that is inconsistent, often contradictory, and ultimately unhelpful.”103 It is into this morass of muddled meaning that *Barhoum* now falls.

B. Implied Meaning in *Barhoum*

If a defamatory implication exists in *Barhoum*, it would seem to be of the juxtaposition variety rather than the sins of omission form.104 In particular, the *New York Post*’s front page, as described in the Introduction, juxtaposes four key elements: (1) A banner headline; (2) a secondary headline; (3) a photo of plaintiffs Barhoum and Zaimi; and, (4) a small disclaimer box in the bottom left corner.105 How the trial court, applying a reasonable reader perspective interprets each element, both individually and collectively, may prove crucial to the outcome of the case.

The top of the front page of the April 18, 2013 issue of the *Post* bears a nine-by-two inch headline, “BAG MEN.”106 Barhoum and Zaimi argue that “[t]he term ‘Bag Men’ itself suggested criminality and, in particular, clearly referenced previous reports that investigators believed that the perpetrators transported their bombs in backpacks or duffel bags.”107 They also contend the headline, when viewed in context with the photo, “clearly

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99. Hindman, *supra* note 73, at 351 (observing that “what the Supreme Court cases did not take into account are situations where all factual statements in a news story are probably true, but the overall gist of the story is false”).
100. Id. at 342.
102. Id. at 464 n.9.
105. Complaint, *supra* note 12, at Exhibit A.
106. Id.
107. Id. at 6.
implies that they are the ‘men’ who had bombs in their bags.’”

Furthermore, when viewed in its entirety, the front page implies that Barhoum and Zaimi were considered “suspects” in the bombing by law enforcement and were involved in causing it, the complaint asserts.

Demonstrating the reasonableness of such interpretations will be vital in *Barhoum* because, under Massachusetts law, a plaintiff must prove the message “could damage the plaintiff’s reputation in the community.” In the Bay State, imputation of criminal activity is defamatory. Indeed, the *Barhoum* plaintiffs allege the front page, standing alone, is defamatory because “it implied that plaintiffs committed a heinous crime.”

A threshold question, then, is how reasonable readers might interpret the words “bag men” in the banner headline. As noted earlier, the term today is considered by some to be “common slang for a criminal,” and *Urban Dictionary’s* leading definition of the term describes a bag man as “[s]omeone who transports goods or money between two people in a criminal activity. For example, a thug that comes around to collect extortion money and then brings it to a more senior gang member. Another example would be a lawyer that collects money to bribe a judge.”

In a 1986 law journal article, former U.S. Senator Sam Nunn used the one-word term “bagman” in this same criminal sense. Another law journal notes that bagman is “a term meaning the guy carrying the bribes.” Even more importantly, courts use “bagman” in this criminal context, including Massachusetts’s highest tribunal, thus suggesting that

108. Id. at 6.
109. Id. at 10.
112. Complaint, supra note 12, at 11.
113. D’Addario, supra note 22.
117. See, e.g., United States v. Lanas, 324 F.3d 894, 898 (7th Cir. 2003) (noting that: “Defendant Battista, a political associate of Hendershot, was alleged to be the ‘bagman’—collecting the kickbacks for Hendershot while retaining a portion for himself—with respect to all the named vendors except John and Thomas Herley”) (emphasis added); United States v. Chance, 306 F.3d 356, 366 (6th Cir. 2002) (observing, in the context of a criminal racketeering case, that
judges charged with determining whether the phrase, as a matter of law, is capable of conveying a defamatory meaning might, indeed, conclude it is.

The Oxford English Dictionary ("OED"), which bills itself as "the definitive record of the English language" thanks to its "600,000 words,"\(^{119}\) traces the current, criminally related meaning of the term to old slang used in Australia, New Zealand, and England.\(^{120}\) In those countries, bagman first came to be shorthand for a traveling salesman, while Canada used an early version of it to refer to political fundraisers.\(^ {121}\) Today, England's OED and other major English-language dictionaries offer wording similar to that of Merriam-Webster, which describes a bagman as a "person, who on behalf of another, collects or distributes illicitly gained money; broadly: An intermediary in an illicit or unethical transaction."\(^ {122}\)

The term arguably worked its way deeper into popular culture with the story of whistle-blowing cop Frank Serpico. In the 1960s, New York City police officer Serpico worked alongside many bagmen because his vice squad colleagues extorted criminals and merchants for bribes in a massive racketeering apparatus.\(^ {123}\) Al Pacino made Serpico, who fled New York in 1970 after leaking the story to The New York Times,\(^ {124}\) a celebrity by playing him in a 1973 film.\(^ {125}\) Serpico saw the distrust of his fellow officers grow the longer he failed to acknowledge the implicit meaning of the bags they hauled with them.\(^ {126}\) Yet, he strategically timed when he turned in his colleagues to the newspaper because he had carefully

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"Charles O'Nesti, a long-time friend of Lenny Strollo, was an aide to U.S. Representative James Traficant and had a well-known reputation for being the mob's 'bagman' in Youngstown") (emphasis added).

118. Commonwealth v. Tobin, 467 N.E.2d 826, 838 (1984) (concluding that "[b]ased on the Commonwealth's evidence, a reasonable jury could infer that Reinstein used Tobin as his 'bagman' to solicit and to obtain kickbacks on the Revere high school contract").


121. Id.


124. Id.

125. SERPICO (Paramount Pictures 1973).

126. Kilgannon, supra note 123, at MB1.
considered the full context of his situation (unresponsive city officials), and the implications of the bagmen's actions (officers who wanted Serpico dead).\footnote{127}

For the Barhoum plaintiffs, this now-common meaning imputes criminal activity in a blaring headline. Professor Joseph King Jr. observes that the insatiable need of newspapers to attract readers' attention leads to sensational headlines.\footnote{128} For plaintiffs, King asserts that problems arise due to "the penchant of some passersby to skim only the headlines," thereby snapping to damning conclusions that render the rest of the newspaper's meaning impotent.\footnote{129} This is more than a plaintiff-based argument; it carries judicial recognition. As former Chief Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit observed, "[i]t is beyond any question that the practice of scanning of headlines, without reading the story, is the practice of many readers."\footnote{130}

In Barhoum, however, the New York Post believes its readers are sufficiently savvy to understand the dual meanings of the phrase "bag men" and to correctly judge the men to merely be potential persons of interest in a rapidly unfolding police investigation. The New York Post argues its readers "are certainly familiar with its tradition of eye-catching headlines"\footnote{131} and thus should interpret "BAG MEN" as nothing more than a ploy to garner readers' attention. In that regard, the newspaper embraces the dual meaning of "bag men" as nothing more than an innocent double entendre:

Taken in context, the headline in this case was obviously nothing other than a play on words. It was clearly not intended to be taken to mean that those pictured were "bag men" in the ordinary sense of the term—a person who collects or distributes illicitly obtained money. Rather, the term was used to attract the readers' attention to the report that law enforcement officials were trying to identify the individuals who were carrying the bags, which was undeniably true.\footnote{132}

But the "BAG MEN" headline, of course, is just one element of the four juxtaposed on the New York Post's cover. The full-page photo shows the plaintiffs carrying bags, which they contend, when coupled with the

\footnote{127. Id.}
\footnote{129. Id. at 865.}
\footnote{130. Lavin v. N.Y. News, Inc., 757 F.2d 1416, 1427 (3d Cir. 1985) (Becker, J., dissenting).}
\footnote{131. Defendants' Memorandum of Law, supra note 51, at 13 n.5.}
\footnote{132. Id. at 15.}
words "bag men," "implies that they are the 'men' who had bombs in their bags."133 The secondary headline directs readers' attention to this photo, proclaiming "Feds seek this duo pictured at Boston Marathon."134

Whether or not the cover photo actually was given to the New York Post by law enforcement officials and, in turn, whether or not the New York Post was merely reporting from official government documents, might shield it from liability under the fair-report privilege.135 But fair report is a very different issue—and one beyond the scope of this article—from the allegedly defamatory meaning derived from the totality of the front page.136

What about the final element on the cover, the small textbox in the bottom left corner?137 Might this not eliminate any defamatory implications? The disclaimer states:

Investigators probing the deadly Boston Marathon bombings are e-mailing law enforcement agencies photos of these two men seen on surveillance near the finish line, The Post has learned. One is carrying a duffel bag and the other has a backpack—which is not visible in a later photo. There is no direct evidence linking them to the crime, but authorities want to identify them.138

The New York Post argues these "cautionary terms"139 are "unambiguous"140 and must be "read together"141 with the other cover page elements. The effectiveness of this disclaimer, however, is questioned in the next section of this article.

Ultimately, a jury most likely should decide if the front page conveys a defamatory meaning. The defendant, ironically, admits that the headline "BAG MEN" carries a criminal connotation, but simply argues readers would never and should never perceive it that way.142 As described in Section A, however, it is unclear whether the communicator's intent—in

133. Complaint, supra note 12, at 6.
134. Id.
135. See generally Howell v. Pub'l'g Co., 920 N.E.2d 1, 13 (2010) (observing that "Massachusetts has long recognized a privilege for fair and accurate reports of official actions and statements," and adding that "[t]he fair report privilege establishes a safe harbor for those who report on statements and actions so long as the statements or actions are official and so long as the report about them is fair and accurate").
137. Id. at Exhibit A.
138. Id.
139. Defendants' Memorandum of Law, supra note 51, at 14.
140. Id.
141. Id.
142. Id. at 15.
this case, the New York Post's intent—should make any difference in determining allegedly implied defamatory meaning in private-figure plaintiff cases. The next portion of this article addresses the possible effectiveness and legal significance of the fourth and final element of the New York Post's cover page—the small-box disclaimer—in light of Stanton v. Metro Corp.144

C. Stanton and the Potential Impact of the New York Post's Disclaimer

Regardless of the New York Post’s banner and secondary headlines and irrespective of the accompanying photo of Barhoum and Zaimi, the newspaper argues that the disclaimer box, which stated “there was no direct evidence linking the [plaintiffs] to the crime,” is sufficient to keep readers from drawing defamatory inferences. Yet, a disclaimer alone failed to protect Boston magazine in 2006 in a libel suit filed by sixteen-year-old Stacey Stanton.

In Stanton v. Metro Corp., the Metro Corp. publication, The Boston Globe was scrutinized for its May 2003 cover story headline, “Fast Times at Silver Lake High: Teen Sex in the Suburbs.” Inside the magazine, Stanton is prominently pictured beside an article titled “The Mating Habits of the Suburban High School Teenager,” which discussed teenage promiscuity in the towns surrounding Boston. Stanton was “one of five young people in a photograph that occupies the entire first page of the article and half of the facing page.” While most of her peers are smoking and one holds a plastic cup in a photo that was shot near an exit door, Stanton “simply looks at the camera, smiling faintly.” And, according to the court, “a ‘superhead,’ appearing above the headline in a smaller font, reads: ‘They hook up online. They hook up in real life. With prom season looming, meet your kids—they might know more about sex than you do.'”

Beneath the article on its first page, a disclaimer in small italicized type, included the following language:

143. Supra notes 94–98 and accompanying text.
144. 438 F.3d 119 (1st Cir. 2006).
146. Stanton v. Metro Corp., 438 F.3d 119 (1st Cir. 2006).
147. Id. at 122.
148. Id.
149. Id.
150. Id.
151. Id.
152. Stanton, 438 F.3d at 125.
The photos on these pages are from an award-winning five-year project on teen sexuality taken by photojournalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story. The names of the teenagers interviewed for this story have been changed.153

Stanton sued for defamation, asserting that the "juxtaposition of [her] photograph and text describing suburban teenage promiscuity . . . insinuated that [she] was engaged in activity described in the article."154 The district court dismissed Stanton's claim because it found that the publication, with the disclaimer, was not defamatory.155

The U.S. Court of Appeals for the First Circuit, however, reversed. Applying Massachusetts libel law, the appellate court held the disclaimer did not absolve the magazine of liability for the defamatory conclusions readers might draw in associating Stanton with sexual promiscuity.156 It reasoned that "we cannot assume . . . that placing a disclaimer on the first page of an article itself ensures that a reasonable reader will see it."157 Furthermore, the court found that reasonable readers who do see the disclaimer still might draw the wrong impression about Stanton because they would not notice the qualifying language located at the very end of the disclaimer.158

In Stanton, the disclaimer's "words are rendered in the smallest font on the page."159 Similarly, the disclaimer in Barhoum is set forth in the smallest type on the cover.160 And as in Stanton, the pivotal disclaimer

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153. Id. at 122.
154. Id. at 123.
155. Id.
156. Id. at 125–28.
157. Id. at 125.
158. Stanton, 438 F.3d at 126. The appellate court explained:

Nor can we say that any reasonable reader who notices the disclaimer would necessarily read the crucial second sentence, i.e., "the individuals pictured are unrelated to the people or events described in this story." It is at least conceivable that a reader might take the first sentence of the disclaimer, which states that "the photos on these pages are from an award-winning five-year project on teen sexuality by the photojournalist Dan Habib," as a satisfactory explanation of the photographs and therefore stop reading the disclaimer before the second sentence. Such a reader would thus remain under the impression that the teenagers depicted in the photograph have some connection to the accompanying story.

Id.
159. Id. at 122.
160. Complaint, supra note 12, at Exhibit A.
language—that there is no direct evidence linking the photographed individuals to the crime—does not come until the last sentence in Barhoum.161

In Stanton, the court affirmed that a story’s full context matters (i.e., all of its words and photo elements).162 But the court notably added that consideration must be given to “the nature of the publication in general”163 and “the placement of the disclaimer in the article in general,” especially if “a reasonable reader could fail to notice it.”164 Moreover, it emphasized that “the non-defamatory character of a statement will rarely depend solely on the presence of qualifying language,”165 adding another blow to the New York Post’s disclaimer argument.

Viewed in this light, the New York Post’s argument that it is expected to playfully concoct attention-grabbing headlines as a tabloid newspaper works against it.166 Given the placement and size of its disclaimer, and the fact that readers’ eyes gravitate to the tabloid’s sensational covers, it is reasonable to conclude that readers may “[read] only the headline of the article or [read] the article itself so hastily or imperfectly as not to recognize its full significance.”167 Thus, if the court in Barhoum follows Stanton, it may deem insufficient the New York Post’s “cautionary terms,”168 which similarly appeared in tiny type in the final sentence.

The trial court judge in Barhoum thus might reasonably consider whether a person who saw the front page of the April 18, 2013 New York Post at a sidewalk newsstand or grocery store checkout aisle would even notice the disclaimer, given that his or her eyes reasonably would be drawn to the large “BAG MEN” headline and the full-page photograph of Barhoum and Zaimi. With the banner headline’s not-so-subtle tone of criminality and the accompanying subhead’s cry that the “feds seek this duo,”169 might not someone walking by the newsstand reasonably be left with the impression that Barhoum and Zaimi were leading suspects in the bombing?

Ultimately, as Part I has illustrated, defamation by implication is a confusing and convoluted area of defamation law. Yet Barhoum provides an opportunity for Massachusetts courts to add some clarity on key points.

161. Id.
162. Stanton, 438 F.3d at 1125.
163. Id. at 128.
164. Id.
165. Id. at 126.
166. Defendants’ Memorandum of Law, supra note 51, at 13 n.5.
167. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 563, cmt. D (1977)).
169. Complaint, supra note 12, at Exhibit A.
such as: (a) Whether the intent of the communicator makes a difference in the meaning determination; (b) how reasonable readers derive meaning from the cover pages of tabloids (and which elements are important on tabloid covers); and (c) the affect of small-sized disclaimers on meaning when balanced against large-sized headlines and full-page photos. The next part of this article takes a closer look at both tabloid cover and headline cases, as well as the effect, if any, of the New York Post’s later reportage on mitigating damages, should it be held liable for libel.

III. Defamation by Tabloid Cover Page and Headline: From Kato Kaelin to Salaheddin Barhoum

Part II considers whether the Barhoum plaintiffs should be allowed to prevail for defamation based solely on the cover of the New York Post’s April 18, 2013, edition, regardless of the inside text and photos. Initially, Section A explores Kaelin v. Globe Communications Corp.,\(^\text{170}\) in which a federal appellate court held the defendant liable for defamation based on a tabloid’s cover headline. It then reviews scholarly literature regarding how, independent of a story’s content, readers may discern discrete meanings from headlines. Finally, Section B queries how damages might be affected, per Massachusetts’s retraction rules, if Barhoum and Zaimi win. Specifically, this section examines the New York Post’s contention that its subsequent online reportage sufficed to clear the plaintiffs of wrongdoing and correct the public record.\(^\text{171}\)

A. Kaelin and the Defamatory Power of Headlines

“COPS THINK KATO DID IT.”\(^\text{172}\) That headline blazed across the National Examiner’s cover one week after a jury acquitted O.J. Simpson of double murder in the deaths of Ron Goldman and Nicole Brown Simpson.\(^\text{173}\) Brian “Kato” Kaelin, Simpson’s friend and houseguest, promptly sued the Examiner’s owner, Globe Communications Corp., for defamation after the supermarket tabloid rejected his request for a retraction.\(^\text{174}\) Ultimately, the U.S. Court of Appeals for the Ninth Circuit ruled in Kaelin’s favor\(^\text{175}\) despite the Examiner’s argument that the cover’s secondary headline and a related story, buried seventeen pages deep inside the tabloid, clarified that authorities might charge Kaelin with perjury, not

\(^{170}\) Kaelin v. Globe Commc’ns Corp., 162 F.3d 1036 (9th Cir. 1988).
\(^{171}\) Defendants’ Memorandum of Law, supra note 51, at 3.
\(^{172}\) Kaelin, 162 F.3d at 1038.
\(^{173}\) Id. at 1037.
\(^{174}\) Id. at 1038.
\(^{175}\) Id. at 1042.
murder.176 Somewhat akin to former President Bill Clinton’s memorable deposition answer regarding the nature of his relationship with Monica Lewinsky—"it depends on what the meaning of the word ‘is’ is"—Kaelin boiled down to what the meaning of "it" was.

Although Kaelin is not binding in Barhoum because it arose in the Ninth Circuit, it offers Massachusetts courts guidance. Specifically, Kaelin provides potential answers to a threshold question—whether the entirety of a publication’s content should be a deciding factor in defamation-by-implication cases or whether a cause of action based on a tabloid’s cover, as is the first count in Barhoum, might succeed. Lower courts divide on that question, but in Kaelin, the appellate court held that "headlines are not irrelevant, extraneous, or liability-free zones."178

The cover of the Examiner’s October 10, 1995, edition followed the large headline “COPS THINK KATO DID IT” with the smaller phrase “. . . he fears they want him for perjury, says pal.”179 The tabloid’s editor claimed “IT” referred merely to allegations of perjury.180 Yet, the Ninth Circuit opined that “[e]ven assuming that such a reading is reasonably possible, it is not the only reading that is reasonably construed because the headline could logically insinuate that Kaelin was a murder suspect. As the Ninth Circuit wrote in 2002 in another case involving a false impression created by a cover page, "the accuracy and truth of the Boston Globe article discussing the suspicion that Kaelin had perjured himself did not cure the false impression conveyed by the cover headline, which implied he was suspected of murder."181

Although the Boston Globe argued that the publication as a whole, including the story tucked inside, eliminated a defamatory interpretation,182 the Ninth Circuit remanded the case.183 In doing so, it asked a jury to

176. Id. at 1041.
178. Kaelin, 162 F.3d at 1040.
179. Id. at 1037.
180. Id. at 1040.
181. Id.
182. Solano v. Playgirl, Inc., 292 F.3d 1078, 1083 (9th Cir. 2002). In Solano, the plaintiff argued, in the context of a false light claim, that “Playgirl’s use of his photograph along with suggestive headlines on the cover conveyed the false message that Solano voluntarily posed nude for the magazine and, in doing so, implicitly endorsed the magazine and its sexually explicit content.” Id. at 1082. Citing Kaelin favorably at several points, the Ninth Circuit ruled for the plaintiff, holding that “a jury reasonably could conclude that the Playgirl cover conveyed the message that Solano was not the wholesome person he claimed to be, that he was willing to—or was ‘washed up’ and had to—sell himself naked to a women’s sex magazine.” Id. at 1084.
183. Kaelin, 162 F.3d at 1041.
184. Id. at 1043.
consider that the article’s location inside a tabloid, including its proximity to the headline, plays a vital role in the potential conclusions to which readers might jump.\textsuperscript{185} The court reasoned that “a reasonable juror could conclude that the Kaelin article was too far removed from the cover headline to have the salutary effect that [the] Boston Globe claims.”\textsuperscript{186} The case ultimately settled in 1999 for an undisclosed amount.\textsuperscript{187}

*Kaelin*, however, can be parsed differently so as not to support the *Barhoum* plaintiffs. For instance, will it matter that the *New York Post* placed its story only four pages away from the cover headline, while the *Examiner* nestled its Kaelin story much further back, seventeen pages inside? In other words, should the distance that separates the cover page from an accompanying article inside matter in determining whether the two must or should be read together? Additionally, the *New York Post’s* cover set forth the precise pages on which readers could locate the full article,\textsuperscript{188} but in *Kaelin* the *Examiner’s* cover did not tease where the story appeared. Whether such factual differences are important or even relevant, of course, remains to be seen.

Although the *New York Post’s* argument does not pivot solely on its story’s close proximity to the front page headline, that fact may lead the court to apply Massachusetts precedents involving libelous newspaper headlines. Precedent consistently holds that a defamatory meaning must be determined by examining the publication as a whole,\textsuperscript{189} including “all the words used and the headlines.”\textsuperscript{190} Yet generally, as Professor Kenneth Creech observes, “courts have taken a dim view of misleading headlines because often it is only the headlines that are read.”\textsuperscript{191}

Thus, as in *Kaelin*, the *Barhoum* court faces a decades-old debate over whether (and how well) the information inside a story, as well as that story’s placement, negate a potentially defamatory headline. Even in 1926, a Kansas court observed “it is the practice of some newspapers to deliberately put poison in a headline and follow it with a weak antidote in

\begin{itemize}
  \item \textsuperscript{185} *Id.* at 1041.
  \item \textsuperscript{186} *Id.*
  \item \textsuperscript{187} *Kato Settles Tabloid Libel Suit*, SAN JOSE MERCURY NEWS, Oct. 10, 1999, at 2A.
  \item \textsuperscript{188} Complaint, supra note 12, at Exhibit A.
  \item \textsuperscript{189} Howell v. Enter. Publ’g Co., 72 Mass. App. Ct. 739, 743 (2008); see also Foley v. Lowell Sun Publ’g Co., 404 Mass. 9, 11 (1989) (noting that defamatory meaning must be drawn from the publication in its totality, so the “court must consider all the words used, not merely a particular phrase or sentence”) (quoting Myers v. Boston Mag. Co., 380 Mass. 336, 341–342 (1980)).
  \item \textsuperscript{191} KENNETH C. CREECH, ELECTRONIC MEDIA LAW & REGULATION 254 (6th ed. 2014).
\end{itemize}
the body of the article."\textsuperscript{192} For some courts, the headline need only be a fair index of an accurate inside article,\textsuperscript{193} with one court recently noting in a case involving the \textit{New York Post} that "[a] newspaper need not choose the most delicate word available in constructing its headline; \textit{it is permitted some drama in grabbing its reader’s attention}, so long as the headline remains a \textit{fair index} of what is accurately reported below."\textsuperscript{194}

The fact that the \textit{New York Post}, like the \textit{Examiner} in \textit{Kaelin}, is a tabloid makes \textit{Barhoum} more complicated. In short, if the \textit{Post} has built a lurid and sensational reputation since it became a "tabloid" in the 1940s,\textsuperscript{195} do its readers view its headlines more skeptically and dismissively than those of more reputable papers, such as the \textit{Boston Globe} or the \textit{New York Times}?

A cross-disciplinary review of scholarly research in areas such as psycholinguistics and human communication is instructive\textsuperscript{196} to determine the strength of the \textit{New York Post}’s claim that readers would recognize its hyperbolic headlines and discount them.\textsuperscript{197} For instance, a study by Harvard Professor Daniel Wegner and his colleagues arguably rebuts the \textit{New York Post}’s assertion.\textsuperscript{198} Wegner performed experiments to determine if journalists can create powerful innuendo effects via headlines simply by stating that a political candidate did \textit{not} do something.\textsuperscript{199} They determined that "just as a mere indictment is sometimes sufficient to lead a jury to regard a defendant as guilty . . . simple questioning of a candidate’s connection with untoward activities can have damaging effects on the candidate’s public image."\textsuperscript{200}

In short, "denying a person’s criminal actions can be more damaging than avoiding the issue entirely."\textsuperscript{201} Furthermore, a reporter’s statement of

\begin{itemize}
  \item [193. ] See Corso v. NYP Holdings, Inc., No. 109820/05, 2007 N.Y. Misc. LEXIS 6661, *7 (N.Y. Sup. Ct. Aug. 30, 2007) (opining, in yet another case involving a \textit{New York Post} headline, that "[i]f the headline is a fair index of an accurate article, it does not give rise to a cause of action").
  \item [195. ] Guy Reel, \textit{A Dirty Dozen: Twelve of the “Best” Tabloids of all Time}, 2010 AM. JOURNALISM 138, 142 (Spring 2010).
  \item [196. ] \textit{Infra} notes 198–219 and accompanying text.
  \item [197. ] Defendants’ Memorandum of Law, supra note 51, at 13 n.5.
  \item [199. ] Id. at 822–23.
  \item [200. ] Id. at 825.
  \item [201. ] Id. at 826.
\end{itemize}
innuendo (even to qualify that a piece of information isn’t true) potentially "asserts as new"202 that "the innuendo is relevant, sensible, and plausible or else the journalist wouldn’t need to qualify the statement."203 Thus, applying Wegner’s findings204 to Barhoum, the New York Post’s headline and front page disclaimer (stating that the plaintiffs were not bombing suspects)205 could have a powerful and paradoxical innuendo effect of implanting the opposite notion.206

Furthermore, other research207 has shown that any reader can construe a defamatory meaning from a newspaper headline because even "skilled newspaper readers spend most of their time scanning the headlines rather than reading the stories."208 Put another way, all readers glimpsing at headlines are subject to their "lexical, syntactic, and phonological ambiguity,"209 given the complexity of the English language. And when readers encounter ambiguous headlines, psychological research indicates that they are likely to pick the single, most "plausible" interpretation of information regardless of a newspaper’s intended meaning.210

Once again, this finding works against the New York Post because the newspaper readily acknowledges that its readers were likely to discern multiple meanings from the paper’s April 18, 2013 cover.211 But to Barhoum and Zaimi, the most plausible reading of the New York Post’s cover is that the two men are potential bombers.212 Just as significant for the plaintiffs is the scholarly finding that a reader is more likely to believe a defamatory headline when it is paired with a nondefamatory news story.213

Professor Steve Pasternack came to that conclusion after specifically designing an experiment to test whether courts should consider headlines and their accompanying stories in libel actions or if headlines alone should be weighed in such cases.214 Specifically, Pasternack paired non-

202. Id. at 823.
203. Id.
204. Id. at 824–32.
205. Complaint, supra note 12, at Exhibit A.
207. See Daniel Dor, On Newspaper Headlines as Relevance Optimizers, 35 J. PRAGMATICS 695 (2003).
208. Id. at 696–97 (emphasis in original).
211. Defendants’ Memorandum of Law, supra note 51, at 15.
212. Complaint, supra note 12, at 6, Exhibit A.
214. Id.
defamatory stories with defamatory headlines (and vice versa) and tested what readers believed after viewing the combinations. He demonstrated that a story's plausibility strongly influences whether readers also find a headline to be credible (even if the headline and the story have different meanings).

As Pasternack put it, the "result [of the study], in conjunction with reader habits of scanning headlines only, suggests courts might consider potentially libelous headlines separate from the accompanying article." In the same vein, communications scholar Elly Ifantidou determined that readers view headlines as having separate meanings from the stories to which they are attached, and often readers only desire to (or only have time to) read headlines. That is why Ifantidou thinks courts should view headlines as "autonomous meaningful constructions." Thus, when coupled with the decision in Kaelin, the work of Ifantidou and the aforementioned scholars may provide grounds for the trial court to employ an à la carte approach in valuing the individual journalistic elements in Barhoum.

B. Mitigating Damages: Follow-up Reporting Versus Retractions

The New York Post argues that its online news update, published after the "BAG MEN" print edition, was sufficient to exculpate Barhoum and Zaimi of any connection to the Boston bombing investigation. As in most states, Massachusetts provides an avenue for defendants to mitigate damages in defamation cases via retractions. In Barhoum, however, the Post did not formally retract its story about the plaintiffs. This section thus ponders whether the New York Post's follow-up reporting did, indeed, perform much the same function.

At 5:43 PM on April 18, 2013—the same day readers passing a newspaper rack would see the New York Post's blaring "BAG MEN" headline atop a picture of Barhoum and Zaimi—the newspaper posted a
166-word online update about the men. The short online story vindicated the plaintiffs, and the newspaper posted it with the headline, “UPDATE: Two men probed in Boston Marathon bombings cleared by investigators.”

In addition, the New York Post included a hyperlink of that news update’s headline above the 4 AM online version of the Barhoum and Zaimi story by police reporter Larry Celona. The New York Post’s online news update began:

Investigators have no cleared the two men whose pictures were circulated last night in an email among law enforcement officials, sources told The Post today. Authorities deemed neither had any information or role in Monday’s attacks at the Boston Marathon.

The pictures, which were distributed yesterday evening in an attempt to identify them, show the two men standing with a backpack and duffel bag near the finish line, where a pair of bombs killed three and maimed.

The remainder of the story quoted anonymous sources for the proposition that law enforcement officials were searching for new suspects. Nowhere, however, in the online follow-up story or in the New York Post’s motion to dismiss the Barhoum case, did the newspaper acknowledge that it was the news outlet that controversially broke the story and circulated the plaintiffs’ photos to its readers.

That fact matters because a retraction recants or disavows previous reporting. Typically, the New York Post prominently places its
corrections and retractions in or near its "Page Six" section (the newspaper's "powerful" gossip pages). Although the New York Post's corrections and retractions typically range from one or two sentences to a paragraph, they help clear the record by restating the paper's error, plus they often explain how the error occurred. Occasionally, the New York Post's corrections and retractions include apologies or express remorse, such as "[t]he Post sincerely regrets the error."

The New York Post circulates approximately 300,000 print copies and has roughly 200,000 digital subscribers. It is hardly a given, however, that either the Post's digital subscribers or other Internet users went to the Post's site and saw its online follow-up story. The operative question thus remains: Did the newspaper's web update reasonably meet the same objective as retracting the erroneous reporting seen in the nearly 300,000 paper copies? To begin to address this question, one must examine the Bay State's retraction statute.

Although retractions do not preclude all liability in Massachusetts, they do provide a means to potentially mitigate damages in libel claims. The statute provides, in relevant part, that a defendant can potentially mitigate libel damages by giving written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he intends to publish . . . [and] if the plaintiff does not accept

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237. But it should be noted that the section actually runs twelve or more pages inside the newspaper. Silverman, supra note 235.

238. Supra note 234.

239. Id.

240. Silverman, supra note 235.


243. Id.
the offer of retraction, the defendant may prove such non-acceptance in mitigation of damages.\textsuperscript{244}

Nonetheless, because Massachusetts provides few details on what a proper retraction entails, it is unclear whether a follow-up story in this instance would satisfy the statute. Other states, such as Michigan, require that a retraction “be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel.”\textsuperscript{245} Although the Massachusetts retraction statute is silent on the size and location of an retraction, a 105-year-old decision by the Supreme Judicial Court of that state provides that “[t]he publication of a retraction, complete in character and conspicuous in position, might be found to have a material effect in diminishing the mischief caused by the libel, and thus substantially reduce the damages sustained by the person libeled.”\textsuperscript{246}

At least one Massachusetts case suggests that a follow-up story is no substitute for a retraction when it comes to potentially mitigating defamation damages.\textsuperscript{247} In \textit{Sanford v. Boston Herald-Traveler Corp.},\textsuperscript{248} the Supreme Judicial Court of Massachusetts held that a follow-up publication to a libelous article in a newspaper was not a retraction under the Massachusetts statute.\textsuperscript{249} The \textit{Boston Herald}’s follow-up story, however, was published ten months after the original article.\textsuperscript{250} In \textit{Barhoum}, the newspaper’s subsequent story clearing the plaintiffs was published on the same day. Thus, it is possible that the immediacy of the follow-up coverage strengthens the \textit{New York Post}’s argument.

A court might, however, consider the permanence of information within the current media landscape when analyzing defamation cases and retraction issues. Positive online reputations are a challenge to maintain in a digital age when prospective employers routinely conduct internet searches of job applicants to disqualify them from interviews,\textsuperscript{251} and

\textsuperscript{244} Id.
\textsuperscript{245} MICH. COMP. LAWS § 600.2911 (2013); see also FLA. STAT. § 770.02 (2013) (defining “a full and fair correction, apology, or retraction . . . in the case of a newspaper or periodical” as one that has been “published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared and in as conspicuous place and type as said original article”).
\textsuperscript{246} Ellis v. Brockton Publ’g Co., 84 N.E. 1018, 1020 (Mass. 1908) (emphasis added).
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id. at 157.
\textsuperscript{251} See Scott Goldstein, \textit{Should Employers Google Employees?}, NJBIZ (May 5, 2008), http://www.njbiz.com/article/20080505/NJBIZ01/305059980/Should-Employers-Google-Employees? (noting that employers have added a new step of “Googling” potential employees as part of the interview process); see Kimberly Atkins, \textit{Digital Dirt-Digging: Potential Employers Using the
multiple websites offer an array of background reports that instantly aggregate a trove of public records.\(^{252}\) Thus, in some cases, follow-up stories (and even retractions that may not be seen by an erroneous story’s original readers) are not necessarily enough to lessen the lasting, negative imprint that inaccurate reporting can leave online.\(^{253}\)

As for the Barhoum plaintiffs, they face similar challenges in managing their reputations in an online world where search results will link their names to the Boston bombings in perpetuity. In the end, one more important query thus remains if the Massachusetts courts weigh the power of the New York Post’s online follow-up story to mitigate the plaintiffs’ damages in Barhoum: Should they elevate the New York Post’s online update to the status of a retraction, and, in so doing, lessen the tabloid’s liability for damages?

Naturally, the New York Post counters no damages should be awarded on the grounds that the newspaper properly covered the Boston bombing.\(^{254}\)

This article continues by scrutinizing the accepted journalistic procedures for such crime coverage in case these reportorial standards arise in Barhoum.

**IV. Journalism Principles Regarding Possible Perpetrators: How Did the New York Post Stack Up?**

This part examines journalism standards and codes of conduct for reporting on potential suspects in criminal investigations. Such standards might be raised in court via expert witnesses.\(^{255}\) As media defense attorney

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Internet to Research Applicants, LAW USA, (July 16, 2007), available on NewsBank database (warning applicants, “potential employers may know a lot more about you than you think” based on their online reputations).


\(^{253}\) See, e.g., Matthew Barakat, *Va. Man Misidentified as DC Shooter Knew I Victim*, ASSOC. PRESS (Sep. 24, 2013), available on NewsBank database (providing the account of Rollie Chance and his claim against NBC and CBS for misidentifying him in Tweets that linked him to the Washington Navy Yard shooting in September 2013. The networks retracted the statements “within minutes,” but the damage was already done, according to his attorney, because Internet searches still link Chance to the massacre).

\(^{254}\) Defendants’ Memorandum of Law, supra note 51, at 1–2.

\(^{255}\) See Ky. Kingdom Amusement Co. v. Belo Ky., Inc., 179 S.W.3d 785, 792 (Ky. 2005) (concluding, in the context of a libel case, that a “journalism expert was properly allowed to testify about journalism standards and ethics”); see also Gajda, supra notes 61–62 and accompanying text (addressing the willingness of some courts to consider journalistic professional practices); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L. J. 781, 823 (2009) (observing that “[s]ome state courts have recognized journalism ethics codes in defining the standard of care for journalists”); Wendy Tannenbaum, *Media Ethics Debacle*
Charles Tobin notes, plaintiffs' lawyers sometimes use ethics codes "to try to create an atmosphere of incompetence, violation of written rules and the like."

Section A thus explores some leading ethics codes to outline guiding principles reporters should strive to follow when reporting on breaking criminal activity. Section B tunnels deeper into writings by journalism scholars and educators, while Section C concludes by comparing the New York Post's performance against the mainstream news industry's best practices. If the Barhoum court considers journalism standards—it is free, of course, to ignore them—they may prove valuable, as they "symbolize the industry's good faith in its reporting" and "establish industry-wide norms."

A. Problems and Ethics in Journalism and Crime Coverage

When it comes to breaking-crime stories, journalism ethics codes are perhaps best summarized by three core tenets: (1) Omit questionable information ("when in doubt, leave it out"); (2) speed is no substitute for factual and contextual accuracy ("get it first, but first get it right"); and (3) verification and skepticism are paramount ("if your mother says she loves you, check it out").

This trio of broad maxims typifies codes adopted by journalism trade groups and large news outlets. As Wake Forest University Law School

May Affect Lawsuit Outcomes, NEWS MEDIA & THE LAW 16, 16 (2003) (noting that "journalism ethics can be a factor in lawsuits brought against the press").

256. Tannenbaum, supra note 255, at 16.


258. Karcher, supra note 255, at 783.


261. BILL KOVACH & TOM ROSENSTIEL, BLUR: HOW TO KNOW WHAT'S TRUE IN THE AGE OF INFORMATION OVERLOAD 36 (2d ed. 2011) (quoting the now-defunct City News Bureau of Chicago).

262. Kovach and Rosenstiel identify the most common principles in journalism ethics codes as:

Dean Blake Morant notes, "[j]ournalistic codes of ethics seldom offer precise, bright-line rules that define problematic situations. Moreover, they often fail to provide the specific guidance needed to resolve these situations." But a few exceptions follow.

The Society of Professional Journalists ("SPJ"), America's oldest and largest organization for news professionals, instructs reporters to "minimize harm." Specifically, this entails being "[c]autious] about naming criminal suspects before the formal filing of charges" and "balanc[ing] a criminal suspect’s fair trial rights with the public’s rights to be informed." National Public Radio's Ethics Handbook waggishly reminds its reporters not to prematurely implicate, try or convict suspects because "[t]he 'court of public opinion' is an expression, not a legal forum."

The Los Angeles Times expressly discourages its reporters from identifying "suspects of criminal investigations who have not been charged or arrested." The Los Angeles Times's code acknowledges that occasionally "the prominence of the suspect or the importance of the case will warrant an exception to this policy," and "[i]n those instances, we must take great care that our sourcing is reliable and that law enforcement officials have a reasonable basis for considering the individual a suspect." Additionally, the Los Angeles Times code provides that, if

must be allowed to exercise their personal conscience. [10] Citizens too, have rights and responsibilities when it comes to the news.


264. Morant, supra note 257, at 613.


267. Id.

268. Id.


271. Id.

272. Id.
possible, follow-up stories vindicating persons connected with crimes "should be played comparably to the original story." 273

Above all else, journalism ethics codes prioritize accuracy in every situation. SPJ's code alone contains seventeen clauses encouraging the press to "seek truth and report it." 274 For example—and with particular relevance for Barhoum—it calls on journalists to "make certain" 275 none of the visual and textual elements of a news report "misrepresent," 276 "oversimplify or highlight incidents out of context." 277 Similarly, and as would be relevant for the cover page at issue in Barhoum, Gannett's ethical guidelines call for its journalists and editors to "[m]ake certain that care, accuracy and fairness are exercised in headlines, photographs, presentation and overall tone." 278 In the same vein, the American Society of News Editors ("ASNE") advises that "[e]very effort must be made to assure that the news content is accurate, free from bias, and in context." 279

B. The Academic Perspective: Reporting Meaningfully While Minimizing Harm

This section reviews specific steps journalists should take to avoid propagating false accusations, as articulated by journalism educators and scholars. Even when prosecutors or law enforcement officials are confident of an individual's involvement in criminal activity, Professor Carol Rich warns journalists to "wait until a person has been charged" 280 before publishing a name. Similarly, the Missouri Group (a four-professor team behind a journalism textbook) calls on reporters to exercise "extreme caution" 281 when identifying individuals pre-arrest. Such discretion is necessary because, as journalism educator Tim Harrower warns, "it's often difficult to determine why police are investigating someone in connection

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273. Id.
275. Id.
276. Id.
277. Id.
280. CAROL RICH & CHRISTOPHER HARPER, WRITING AND REPORTING NEWS: A COACHING METHOD 405 (5th ed. 2007).
with a case, [so] it's best to avoid labeling anyone a 'suspect' until he or she is actually arrested."  

Therefore, waiting to print a name is not a mark of reportorial passivity because journalists must take time to seek and confirm a case's facts before publicizing them. As Professors Jerry Lanson and Mitchell Stephens write, "[a] journalist's truths are tentative clapboard structures banged together out of stripped-down, unvarnished facts," and "[w]hen people's reputations are at stake, information requires corroboration as well as attribution, no matter how carefully it's reported."

Few make that point better than Edna Buchanan, a Pulitzer Prize-winning cops-and-courts reporter who worked for the Miami Herald. She admonishes reporters that "[a] news story mentioning somebody's name can ruin their lives or come back to haunt them 25 years later . . . . So you knock on one more door, ask one more question, make one last phone call [because] it could be the one that counts." In other words, do not rush and do not be hasty when real damage can be done to a real person.

Buchanan's sentiments are reflected in the words of the late Richard Jewell, who was still haunted by the media's brutally negative coverage of him a decade after the Centennial Olympic Park bombing at Atlanta's summer games. As Jewell stated just one year before his 2007 death: "The heroes are soon forgotten. The villains last a lifetime. I dare say more people know I was called a suspect than know I was the one who found the package and know I was cleared."

Joann Byrd, the Washington Post's former ombudsperson, asserts that Jewell's case teaches journalists that "[t]he lesson is to presume that law enforcement work is preliminary—more preliminary than all our disclaimers made it sound at the time." Keith Woods, formerly of the Poynter Institute, believes that crime reporting prior to arrests too often involves mere inferences and insinuations in the form of "sophisticated..."
rumor-mongering. It encourages quick judgment and [a] mob mentality." \[290\]

The SPJ’s Ethics Committee acknowledges that covering individuals before and after arrests forces reporters to “walk an ethics tightrope\[291\] between reporting meaningful information about significant events and minimizing harm to possible suspects. But as that committee concludes, “[s]peculation regarding a suspect’s guilt is fodder for journalistic investigation, but not for undocumented publication.” \[292\]

In an era when “tyrannical pressure to gather and report news faster” \[293\] leaves journalists “little time to do basic research,” \[294\] Professor Ryan Thornburg reminds would-be reporters that “[o]nline news is still news.” \[295\] Practicing journalism, in turn, still entails “the exercise of judgment and discretion by people trained to organize information.” \[296\]

The next section elaborates on these industry standards and compares both them and journalism ethical principles against the New York Post’s April 18, 2013, coverage of Barhoum and Zaimi.

C. From Watchdog to Rabid Dog \[297\]

Did the New York Post fail to follow proper journalistic protocol when it dubbed two Moroccan immigrants\[298\] “BAG MEN” on April 18, 2013? \[299\] What should it have done to avoid potentially implying, in defamatory fashion, that Barhoum (a Boston-area high school student who at the time worked at Subway) \[300\] and Zaimi (his twenty-four-year-old track club coach) \[301\] were connected to the Boston Marathon bombing? From the

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290. Id. at 253.
292. Id.
294. Id.
296. Id.
297. Infra note 287 and accompanying text.
299. Complaint, supra note 12, at Exhibit A.
300. SMOKING GUN, supra note 298.
301. Id.
start, the *New York Post*’s Boston bombing coverage did not meet at least three basic standards of responsible reportage outlined by media ethicists Bill Kovach and Tom Rosenstiel: (1) A “journalism of verification”;302 (2) a “skeptical way of knowing;”303 and (3) “interpretative reporting”304 in the newspaper’s investigation of the bombing.

Regardless of what authorities say during a fast-breaking news story, a reporter engaging in a “journalism of verification” must only “[w]rite what you can prove.”305 This entails “a method that involves a systematic chain of reporting”306 that includes “a painstaking accumulation of details and facts.”307 But instead of building and presenting its story about the men on a clear, solid base of evidence, the *New York Post* relied on anonymous sourcing and scant details in its story308 (along with the vague phrase “The Post has learned”309 in a front page disclaimer).

Kovach and Rosenstiel also describe the acute need for reporters to practice a “skeptical way of knowing”310 by seeing, analyzing and testing the evidence behind a source’s assertions. The *New York Post*, on the other hand, merely repeated anonymous law enforcement claims that the plaintiffs might know something about the bombing.311 Thus, too often in an era of continuous live news, journalists simply disseminate information from their sources,312 and “the chance of being used by investigatory sources is high.”313

As former SPJ President Richard Geimann told a Congressional committee investigating the Jewell affair, “[w]hat I don’t understand is why so many reporters and so many news organizations followed in lock step regurgitating their anonymous leaks and blasting them in bold, front page headlines.”314 Underscoring that point, Kovach and Rosenstiel write that, “[r]eporting on investigations requires enormous due diligence . . . [but] news outlets often think just the opposite—that they can more freely report

302. KOVACH & ROSENSTIEL, BLUR, supra note 261, at 36.
303. Id. at 31.
305. KOVACH & ROSENSTIEL, BLUR, supra note 261, at 97.
306. Id. at 96.
307. Id. at 95.
308. Complaint, supra note 12, at Exhibit B.
309. Id. at Exhibit A.
310. KOVACH & ROSENSTIEL, BLUR, supra note 261, at 103–09.
311. Complaint, supra note 12, at Exhibit B.
312. KOVACH & ROSENSTIEL, BLUR, supra note 261, at 44.
313. KOVACH & ROSENSTIEL, THE ELEMENTS OF JOURNALISM, supra note 259, at 149.
314. Geimann, supra note 293.
the suspicions or allegations because they are quoting official sources rather than carrying out the investigation themselves.”

Thus, with the “BAG MEN” headline, the New York Post’s journalists fit legendary muckraker I.F. Stone’s description of the press as “stenographers with amnesia,” dutifully publishing officials’ statements and reporting the news bereft of history, context or a critical eye.

Regardless of the authoritativeness of the New York Post’s sources, the newspaper should have practiced “interpretative journalism.” This entails judging the truthfulness of information and assessing a source’s motives before publication. Instead, the newspaper’s reporters succumbed to “the daily pressure to produce fresh tales of late-breaking mayhem.”

Of course, tabloids such as the New York Post are sometimes sensational and exploitative. They are designed to “prioritize entertainment, human interest stories and commercial profitability.” Nothing, however, in the definition of “tabloid” calls for propagating untruths.

No matter the news outlet, ethical issues can arise regarding a source’s depiction because journalistic stories are less like mirrors of reality than frames with which reporters often “hang facts” against a backdrop of predetermined, simplistic storylines. In chastising the media for its depiction of Jewell, Woods concedes that reporters feel a societal mandate to immediately identify possible suspects in high-profile crimes. But “under the optional umbrella falls the placement of a story, the tone of the storyteller, [and] the framing of the story.”

So, did the New York Post frame Barhoum and Zaimi as a pair of “BAG MEN” because it saw them as two bag-toting Middle Eastern-looking men standing near where two bombs tore through Boston? And was the newspaper’s online follow-up reporting sufficient to repair the reputations of two innocent men? Ultimately, as Professor Rich warns

315. Id.
317. Id.
319. KRAJICEK, supra note 316, at 96.
321. Id.
322. Id.
324. Id. at 158–59.
325. BLACK, supra note 289, at 253.
326. Id.
327. Supra note 298.
reporters, "[i]t’s up to a jury to decide if you were negligent, careless or reckless in your disregard for the truth,"\textsuperscript{328} and "[c]orrections do not undo the harm of inaccurate information."\textsuperscript{329}

Although courts are not required to consider media ethics codes and journalistic standards in libel cases, as mentioned in the Introduction,\textsuperscript{330} their existence may be helpful in determining whether the New York Post is at fault.\textsuperscript{331} But long-time media critic Jack Shafer has already reached his verdict on the New York Post’s "BAG MEN" cover.\textsuperscript{332}

Shafer decries the New York Post’s bombing stories for having "defined the basement into which no media outlet that wants respect wishes to descend."\textsuperscript{333} He further characterizes the newspaper as "diseased"\textsuperscript{334} for plastering Barhoum and Zaimi on its cover like a wanted poster. Woods also uses the language of disease to describe reporters rushing to implicate individuals, "[w]e gnash our teeth and wring our hands over Richard Jewell, but I worry about those many less-public people who are bitten each day by rabid watchdogs."\textsuperscript{335}

\textbf{V. Conclusion}

The April 18, 2013, edition of the New York Post certainly "sparked outrage,"\textsuperscript{336} but was it also libelous? This article attempted to address this question by examining several facets of the lawsuit in Barhoum v. NYP Holdings, Inc. These aspects included defamation by implication, defamation by headline, defamation by cover page, and the possible impact of both a front page disclaimer and subsequent reportage alerting readers that the "Bag Men" were cleared of wrongdoing.

Massachusetts courts now have the opportunity in Barhoum to clarify the muddle that is defamation by implication and to consider whether a claim for defamation can stand solely on a tabloid cover page. As this article has explained, in Stanton v. Metro Corp.,\textsuperscript{337} a federal appellate

\textsuperscript{328} RICH & HARPER, supra note 280, at 284.
\textsuperscript{329} Id.
\textsuperscript{330} Supra notes 61–63.
\textsuperscript{331} Id.
\textsuperscript{333} Id. (emphasis added).
\textsuperscript{334} Id.
\textsuperscript{335} BLACK, supra note 289, at 253.
\textsuperscript{337} Stanton v. Metro Corp., 438 F.3d 119 (1st Cir. 2006).
court found a disclaimer box insufficient to offset the defamatory power of a headline, and the decision in *Kaelin v. Globe Communications Corp.* reinforced the idea that tabloid cover headlines alone can be libelous.

But perhaps the more important lessons for the future pivot on how the *New York Post* could have more responsibly reported on the individuals depicted in the front page photograph without exposing the newspaper to a possibly successful libel suit. How can news organizations, in the era of social media when anyone and everyone on Reddit attempts to break news about sensational crimes at a rapid-fire pace, cover the identification of possible perpetrators in a way that better balances those individuals’ reputations against the public’s right to know?

*Washington Post* media critic Erik Wemple suggests the *New York Post* could have:

1. Not used the term “Bag Men”; 2. Explained in the text that authorities were distributing a whole bunch of photos [not just those of the plaintiffs] taken at the Boston Marathon finish line; 3. Done the necessary research to track down the identifiable young man in the photo, who turned out to be a completely innocent 17-year-old . . . 4. Bagged the darn story altogether.

Furthermore, journalists might avoid the fury of libel plaintiffs by following journalism critic Daniel Okrent’s simple advice. He delivers it in Rachel Smolkin’s postmortem piece about the news media’s failed coverage of the Duke lacrosse scandal in 2006. Okrent asserts that a reporter should start covering a crime “by being prudent and, as things develop, that determines whether you amp up the volume or not.” Instead, as with Richard Jewell’s case more than fifteen years before it, the *New York Post* “began with a roar at the very start.”

Ultimately, while journalism ethics codes may not be binding in court, the self-restraint they suggest might have helped both the *New York Post* and its readers to better understand and contextualize the truth about Barhoum and Zaimi. Instead, the *New York Post’s* coverage was grossly disproportionate to the fleeting, meager attention investigators paid to the pair. Neither the size nor the substance of both the cover-page headline

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339. *Id.*
341. *Id.*
342. *Id.*
342. *Id.*
and photo was proportionate with the reality of the factual situation. Even if the *New York Post* ultimately escapes legal liability in *Barhoum*, its unethical brand of reporting should make all journalists pause in the future before covering breaking crime.