I. INTRODUCTION

The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious.¹

Protection for publishing matters of public concern originated primarily from two sources — one is constitutional, beginning with the rules articulated in New York Times Co. v. Sullivan.² The second is the common law, where a privilege known as the “fair report” privilege or “record” privilege developed.³

Historically, the republication of a libel was actionable under the common law maxim that “tale bearers are as bad as tale makers.”⁴ In

². 376 U.S. 254 (1964) (noting actual malice as becoming the fault standard in cases where the plaintiff is a public figure and the matter is one of public concern).
other words, courts traditionally held that "in giving currency to libelous or slanderous reports and publications, a party is as much responsible, civilly and criminally, as if he had originated the defamation." The fair report privilege, however, protects both the press and individuals for the republication of libelous matters.

A majority of the states have adopted some form of a fair report or record privilege that provides protection when reporting on public hearings and official documents. These states, however, are not consistent in the amount of protection their privileges provide. A number of states apply a common law qualified privilege similar to that in section 611 of the First Restatement of Torts, while almost an equal number apply the absolute privilege articulated in section 611 of the Restatement (Second) of Torts.

While most forms of the fair report privilege have been adopted to provide protections to any entity reporting on official documents, proceedings or meetings, the purpose of this article is to examine the conflicting fair report privileges throughout the United States and address why a change in Nebraska's fair report privilege is necessary.

The article begins with an examination of the history of defamation law from the press' perspective in order to understand the emergence of defamation law into regulation of the press. The history and evolution of the fair report privilege follows to aid in understanding why fair report privileges were adopted in the majority of the states. This short discussion is followed by a discussion of the codification of the privilege in the original Restatement of the Law of Torts and the Restatement (Second) of Torts in order to gain an understanding of where Nebraska's current standard for the fair report privilege developed from and where it should go in the future. A brief discussion of the introduction of constitutional principles into defamation law is included to show the historical background these principles played in the development of the modern version of the fair report privilege. Examining the current status of the privilege across the United States then shows the move a number of states have taken by adopting the

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6. Id. The fair report privilege "protects fair and accurate reports of official actions and governmental proceedings and, in most jurisdictions, reports of public, non-governmental meetings dealing with matters of public concern." Id. The scope of the fair report privilege varies from state to state. Id. For a general discussion of its scope, see Rodney A. Smolla, Law of Defamation § 8:66-78 (2d ed. June 2002 Release), and Sanford, supra, §§ 10.2.1-10.4.
modern version of the fair report privilege. The article concludes with an analysis of the need for a change in Nebraska law regarding the fair report privilege.

II. HISTORY & DEVELOPMENT OF DEFAMATION LAW

In order to have a clear understanding of the development of defamation law, a brief history of the development of the press and regulation of the press in English history is necessary. England was introduced to printing, and therefore the press, in 1476. However, it was not until the reign of Henry the VIII that strict regulation of the press began. This strict regulation of the press lasted for centuries and survived a number of historic periods.

Throughout its lengthy history, regulation of the press took a number of forms. Common regulations included royal proclamations that prohibited certain publications, investigations by the Privy Council into alleged seditious publications, and a comprehensive licensing system. In fact, in 1586 a decree was issued that required all books to be licensed by the Archbishop of Canterbury and the Bishop of London. Even law books required a license issued by the Justices.

The establishment of Parliament did nothing to divert strict regulation of the press in England. Parliament conducted investigations and took action on any publication they deemed to be an “obnoxious publication” or “whenever a particularly irritating publication appeared.” Heavy regulation of the press continued to the time of the Commonwealth and after the Restoration. In the 17th Century, the Printing Act of 1662 was passed, and the high level of control that the English government exercised over the press could be seen in the statutory language. The Printing Act continued to require the licensing system that was already in place, along with a number of other regu-

8. Telnikoff, 702 A.2d at 240.
9. Id. (The regulation lasted through the entire Tudor period and through most of the Stuart period.).
10. Telnikoff, 702 A.2d at 240. “Distribution or possession of prohibited publications was punishable by fine, imprisonment, or execution.” Id. at n.17. “Numerous executions of persons distributing prohibited publications occurred during the sixteenth century.” Id.
12. Id.
13. Id. (citing Fredrick Seaton Siebert, Freedom of the Press in England 1476-1776 at 189 (1952)).
lations on publications. Although the Printing Act expired in 1694, regulation of the press continued.

During this heavy regulation of the press, a common law action for defamation emerged that placed even greater restrictions on the press. "The common-law claim of defamation at civil law sought to redress those injuries to reputation caused by the publication of false information damaging another's reputation." The English common law claim of defamation held a defendant liable for defamation if an unprivileged publication, that contained false or defamatory statements, injured the reputation of the plaintiff, even if the defendant was not at fault. Therefore, a defamation claim under the common law imposed strict liability. A party asserted a common law claim for defamation under one of two separate tort theories: libel or slander. "In short: libel is written or visual defamation; slander is oral or aural defamation."

Libel, the tort that is the focus of this article, began as a criminal offense in the common law. It was generally considered a protection of the reputation or inviolability of government and the ruling class, including feudal lords, monarchs, and the church. "Prosecutions for seditious libel and proceedings by the House of Commons and the House of Lords against publishers for breach of parliamentary privilege were major vehicles of suppression during the eighteenth century." Truth was not a defense to a libel charge, and the charge normally arose out of a writing that injured the reputation of the state, an established religion, or an individual who would be provoked to breach the peace.

15. Id.
16. Id. (stating from 1704-1714, Queen Anne issued royal proclamations that ordered publication of certain types of books and news stopped. In 1712, Parliament began levying taxes on newspapers and advertisements. The taxes were referred to as "taxes on knowledge" and were used to control comments and criticisms that were not appropriate in the eyes of the Crown.).
18. Moreno, 610 N.W.2d at 328 (citing Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 480-81 (Minn. 1985)).
19. Id.
23. Telnikoff, 702 A.2d at 241 (citing David S. Bogen, The Origins of Freedom of Speech and Press, 42 MD. L. REV. at 443-444)).
24. Jadwin, 367 N.W.2d at 480.
“By the 19th Century, libel was focused on community-based reputational or good name interests of the individual citizen.”25 Libel developed into a civil action as opposed to a criminal action, and the focus of the tort became the protection of personal reputations.26 Further, truth emerged as a defense to the presumption that defamatory statements were false.27

Not only did a truth defense to libel emerge, but privileges also developed that eliminated liability for libel. These privileges developed into two different categories: absolute privileges and qualified privileges.28 An absolute privilege gave the speaker total immunity from liability because of his/her position or status.29 The earliest absolute privileges were provided to public officials and those who served as judicial officers, legislators, and executive officers.30

On the other hand, a qualified privilege had nothing to do with the speaker’s identity, but focused on circumstances surrounding the defamatory statement.31 The basis for the first qualified privileges generally arose in one of five different situations:

[W]hen the speaker seeks to protect the speaker’s own interest; the interest of the recipient of the communication or a third person; an interest the speaker holds in common with others; the interest of a member of the speaker’s immediate family; or of the immediate family of the recipient or of a third person; and the interest of the public in general.32

Throughout this evolution of the libel tort, the press felt an impact. In the early stages of the tort, any writing that injured the reputation of the state or a religion could subject its author to a criminal penalty.33 In the 19th Century, the press had to consider the reputation of individuals to be sure that they were not the subject of a civil libel action.34

It was the adoption of fundamental documents in American history that caused a great divergence from the system of English control of the press and a change in the standards for libel. The Declaration of Independence, the adoption of state constitutions, and the later ratification of the First Amendment significantly changed the rights of

27. Id.
29. Id.
30. Id. at § 8.2.
31. Id. at § 8.1.
32. Id. at § 9.2 (citing RESTATEMENT OF TORTS §§ 594-98 (1938)).
33. See supra notes 17, 20 and accompanying text.
34. See supra note 22 and accompanying text.
the press.\textsuperscript{35} According to Justice Black, "to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'\textsuperscript{36}

Through this change in the regulation of the press, changes in the libel tort took place. The main reason behind these changes was the evolution of the cherished right of free speech.\textsuperscript{37} "Since 1964, the history of the law of defamation has in large measure been the history of the establishment of the First Amendment doctrine to govern the torts of libel and slander, and the application of that doctrine to long-established, frequently contrary, common-law principles."\textsuperscript{38}

Although a strong divergence from the English regulation of the press and changes in the libel tort came with the passage of fundamental documents in American history, some of the fundamental principles governing libel that developed in the English common law were applied by the states without considering the freedom of the press.\textsuperscript{39} One area that the English common law continued to influence was privileges to defamation, including the fair report privilege.

III. HISTORY OF THE FAIR REPORT PRIVILEGE

The fair report privilege emerged from the same place from which the first claim for defamation developed: the common law of 18\textsuperscript{th} Century England.\textsuperscript{40} The rationale for the privilege developed as more and more people in England began to read.\textsuperscript{41} The education of the English made it difficult for Parliament to control the information the public received through the press.\textsuperscript{42} The first version of the fair report privilege emerged in 1771. Under this privilege, the House of Commons no

\begin{itemize}
\item \textsuperscript{35} \textit{Telnikoff}, 702 A.2d at 242.
\item \textsuperscript{36} \textit{Id.} at 242 (citing Bridges v. California, 314 U.S. 252, 264-65 (1941)). Justice Black continued:
\begin{quote}
    It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.
\end{quote}
\item \textit{Bridges}, 314 U.S. at 264-65.
\item \textsuperscript{37} \textit{Jadwin}, 367 N.W.2d at 480.
\item \textsuperscript{38} ROBERT D. \textsc{Sack}, \textsc{sack on defamation}, § 1.1.
\item \textsuperscript{39} \textit{Telnikoff}, 702 A.2d at 244-45.
\item \textsuperscript{40} Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 986 n.9 (Okla. 1994).
\item \textsuperscript{41} \textit{Wright}, 873 P.2d at 986 n.9.
\item \textsuperscript{42} \textit{Id.}.
\end{itemize}
longer cited "newspapers for reporting speeches and thereafter confined its contempt power to charges for misrepresenting speeches or for libelous attacks on the reputations of individual members of Parliament."\textsuperscript{43}

Although the privilege had been established, it only applied to judicial and Parliamentary proceedings well into the 19\textsuperscript{th} Century.\textsuperscript{44} The privilege was defeated if it was shown that the report did not fairly and accurately republish the information presented at the public meeting.\textsuperscript{45} The privilege was also lost if the material that was republished was not of general public interest.\textsuperscript{46} Finally, in 1881 Parliament enacted the Newspaper Libel and Registration Act which provided for a qualified privilege in all "meetings called for a lawful purpose and open to the public, if republication of the material was for public benefit."\textsuperscript{47}

The privilege eventually expanded to cover areas other than legislative and judicial acts as American courts realized that a variety of situations existed that were not contemplated by those who initially crafted the privilege.\textsuperscript{48} As articulated by Alexander Hamilton in \textit{The People v. Croswell}:\textsuperscript{49}

\begin{quote}
[T]he liberty of the press consists in the right to publish with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals.\textsuperscript{50} If this right was not permitted to exist in vigour and in exercise, good men would become silent; corruption and tyranny would go on, step by step, in usurpation, until, at last, nothing that was worth speaking, or writing, or acting for, would be left in our country.\textsuperscript{51} The allowance of this right is essential to the preservation of a free government; the disallowance of it fatal.\textsuperscript{52}
\end{quote}

Hamilton's reasoning echoes a commonsensical basis for the privilege: "if the press, fearful of libel suits, failed to report on the judiciary and the proceedings leading up to judicial decisions, the public would

\textsuperscript{43.} Id. (emphasis in original). "Since at least 1796 in the case of Curry v. Walter, 126 Eng. Rep. 1046 (C.P. 1796), the common law has recognized a privilege of fair report of judicial proceedings." Ronwin v. Shapiro, 657 F.2d 1071, 1075 (9th Cir. 1981).
\textsuperscript{44.} Wright, 873 P.2d at 986 n.9.
\textsuperscript{45.} Id. at 989.
\textsuperscript{46.} Id.
\textsuperscript{47.} Id. at 986 n.9.
\textsuperscript{48.} Id. at 989 n.26.
\textsuperscript{49.} 3 Johns.Cas. 337 (N.Y.Sup. 1804).
\textsuperscript{50.} The People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).
\textsuperscript{51.} Croswell, 3 Johns. Cas. at 337.
\textsuperscript{52.} Id.
not have an ongoing, comprehensive view of the system, and thus one of the very tools necessary for a self-governing society would be lost.\textsuperscript{53}

Hamilton's reasoning is just one of the many bases for why the majority of the states have adopted some form of the fair report privilege. The fair report privilege has developed into two different categories: an absolute privilege and a qualified privilege.

Certain speakers are granted an absolute privilege because of the position they hold. The basis for granting these speakers an absolute privilege is the belief that certain positions require speakers to be free from liability in order to properly perform their duties.\textsuperscript{54} The most important aspect of any absolute privilege is that there is not an inquiry into whether the speaker had a malicious purpose for making the statements alleged to be defamatory.\textsuperscript{55} As a result, an absolute privilege protects statements that qualify for the privilege "no matter how false or harmful, irrespective of the defendant's state of knowledge of falsity or the likelihood of harm, and regardless of how base the speaker's motivation might be."\textsuperscript{56} Therefore, a state with an absolute fair report privilege will not investigate the motive of the press who published an alleged defamatory statement.

A qualified privilege on the other hand does not provide the same protection as an absolute privilege. As stated earlier, a qualified privilege does not arise because of the identity of the speaker, rather the occasion on which the defamatory statement is made determines if the privilege exists.\textsuperscript{57} However, the occasion on which the defamatory statement is made is not the only factor in determining whether a qualified privilege exists. Not only must the occasion be privileged, but the speaker must make the statement in good faith and for proper purposes.\textsuperscript{58} The need for good faith and proper purposes limits a qualified privilege to those occasions when there is a qualified occasion and the speaker made the statement without malice.

The reason for having certain privileges that are qualified is "the common convenience and welfare of society."\textsuperscript{59} Certain occasions warrant the speaking of a defamatory statement without having the fear

\textsuperscript{53} 38 MERCER L. REV. at 871, 880, (citing Croswell, 3 Johns. Cas. at 337).
\textsuperscript{54} ROBERT D. SACK, SACK ON DEFAMATION § 8.2.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} At § 9.1. (The occasions that provided protection were deemed to be "privileged." The fact that the privilege can be lost if abused is why the privilege is deemed to be "qualified" or "conditional.").
\textsuperscript{58} ROBERT D. SACK, SACK ON DEFAMATION § 8.2.
\textsuperscript{59} Id.
that the speaker may be liable for those statements. This interest is seen to outweigh the damage that might be caused to the reputation of the subject of the statement.60

However, before a situation will give rise to the protection of a qualified privilege, a malice inquiry will take place. This determination is not as easy as it sounds because just as there are two different kinds of privileges, there are two different kinds of malice. The two types of malice which are applied to a qualified privilege are common law malice and actual malice.61 Common law malice is defined "as spite, ill will, hatred, or the intent to inflict harm, or 'a direct intention to injure another, or . . . a reckless disregard of [the defamed party's] rights and of the consequences that may result to him.'"62 Some jurisdictions expand this definition to include any wrongful motivation,63 making it difficult to satisfy the qualified privilege standard.

Actual malice, on the other hand, relates to the constitutional standards that are involved in the malice inquiry.64 Actual malice is shown to exist in some jurisdictions when the speaker knows that a statement is false or doubts the truthfulness of the statement.65 The Supreme Court defines actual malice "as a knowing or reckless disregard for the truth or falsity of a statement that has nothing to do with motive or ill will in the publishing of otherwise defamatory statements."66 These definitions do not cover the actual malice standard developed in every court or how the courts choose to apply the actual malice term.67 However, the general sense of falsity is present in the majority of actual malice definitions.

The inconsistency of the actual malice definition from one court to another is increased when courts confuse the standard for common law malice with that of actual malice. According to Sack on Defamation, "in some cases the term 'actual malice' has been used to mean

60. Id.
61. Id. at §§ 9.3.1 - 3.2.
62. Id. at § 9.3.1 (citing Kuwik v. Star Mktg. & Admin., Inc., 156 Ill. 2d 16, 619 N.E.2d 129, 135-36 (1993)).
63. ROBERT D. SACK, SACK ON DEFAMATION § 9.3.1. ("Thus, if it can be shown that a speaker, who claims that a defamatory statement was made pursuant to a moral duty to a third person, was motivated solely by a desire to further the speaker's own business interests, the speaker would be guilty of 'malice' because his or her motivation was wrongful and unrelated to the privilege claimed. The fact that the speaker harbored no particular animus toward the plaintiff would not save the speaker from a finding of 'malice.'").
64. Id. at § 9.3.2.
65. Id. at § 9.3.2. (definition developed from the explanation of actual knowledge concerns knowing or "doubting" falsehood.).
67. ROBERT D. SACK, SACK ON DEFAMATION § 9.3.2.
common law malice.” Regardless of which type of malice inquiry a state applies, the inquiry makes their fair report privilege a qualified privilege.

The variety of fair report privileges adopted by the states makes examining the requirements of each fair report privilege essential in order to determine just how much protection the privilege actually provides. The qualified privilege of the first Restatement of Torts or the absolute privilege of the Restatement (Second) of Torts serve as guidelines for these examinations.

IV. FIRST RESTATEMENT

Mandated by important public policy considerations, including the public interest in police activities and violations of the law, the fair report privilege significantly changed the traditional common law rule of liability for republication. The fair report privilege was first codified in section 611 of the original Restatement of Torts, captioned “Reports of Judicial, Legislative, and Executive Proceedings.” Section 611 provides:

The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is (a) accurate and complete or a fair abridgment of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed.

Three rationales traditionally advance the aforementioned protections afforded by the original fair report privilege. The first is the agency rationale, which justifies the privilege of fair report by rooting the privilege in an individual’s common law right to attend judicial proceedings. The press acts as an agent of the public in gathering

68. Id.
70. See Sahara Gaming Corp. v. Culinary Workers Union Local 226, 984 P.2d 164, 166 (Nev. 1999) (“The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report news worthy events in judicial proceedings.”) (citing Restatement (Second) of Torts § 611). See also Restatement (Second) of Torts § 611, cmt. a (1976 Main Vol.) (describing the privilege as neither absolute or qualified: “Character of Privilege. The privilege of the publication of reports of defamatory statements covered in this Section is not an absolute privilege. It is, however, somewhat broader in its scope than the conditional privileges covered in §§ 594 to 598A.”).
71. Restatement (Second) of Torts § 611 (1971).
and disseminating the publicly available information, "reporting only that which others could hear for themselves were they to attend the proceedings."\textsuperscript{73} Based on this rationale, the privilege arises out of practical necessity, as busy citizens cannot attend all official and governmental proceedings; therefore, they must rely on the press to provide informative accounts of these proceedings.\textsuperscript{74}

The second theory underlying the fair report privilege is one of public supervision. Borrowing a quote from Mr. Justice Lawrence in \textit{Rex v. Wright},\textsuperscript{75} Justice Holmes eloquently articulated this principle:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.\textsuperscript{76}

The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. It used to be said sometimes that the privilege was founded on the fact of the court being open to the public.\textsuperscript{77}

This, no doubt, is too narrow, as suggested by Lord Chief Justice Cockburn in \textit{Wason v. Walter}, but the privilege and the access of the public to the courts stand in reason upon common ground.\textsuperscript{78} It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no

\begin{itemize}
\item \textsuperscript{73} Hogan v. Herald Co., 446 N.Y.S.2d 836, 841 (App. Div. 1982), aff'd, 444 N.E.2d 1002 (N.Y. 1982).
\item \textsuperscript{74} \textit{ELDER}, \textit{supra} note 71, n.3.
\item \textsuperscript{75} 101 Eng. Rep. 1369 (K.B. 1799).
\item \textsuperscript{76} \textit{Id.} See also Davison v. Duncan, 7 El. & Bl. 229, 231; Wason v. Walter, L. R. 4 Q. B. 73, 88; Commonwealth v. Blanding, 3 Pick. 314.
\item \textsuperscript{77} \textit{Id.} (citing Stockdale v. Hansard, 9 A. & E. 1, 212).
\item \textsuperscript{78} \textit{Id.} (citing Lewis v. Levy, El., Bl. & El. 537, 558).
\end{itemize}
light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity.79

The public's interest in learning of important matters, Justice Holmes noted, forms a third rationale for the privilege.80

Under the original Restatement of Torts, the privilege applied if it was an "accurate and complete or fair abridgment of such proceedings," but the privilege could be lost if the report was "made solely for the purpose of causing harm to the person defamed."81 Accordingly, even though a publication was a fair and accurate report, the fair report privilege could still be lost if published with malice under the original Restatement. As the First Restatement was adopted in 1938, approximately a quarter of a century before constitutional principles were introduced into the law of defamation by the Supreme Court in Sullivan, common law malice, as opposed to constitutional malice, was the standard.

V. CONSTITUTIONAL CONSIDERATIONS

The history of the development of both the law of libel and the fair report privilege was primarily common law based in America until the United States Supreme Court introduced constitutional principles in determining the outcome of defamatory matters. In 1964, in New York Times v. Sullivan,82 the U.S. Supreme Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."83 The decision directly affected public comment on public officials.84 The Supreme Court determined that there was a strong interest in redressing harms to reputation, but found the need for "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" to outweigh this need.85 Based on

79. Id. See also Sanford v. Bennett, 24 N. Y. 20, 27; Lewis v. Levy, supra; Barber v. St. Louis Dispatch Co., 3 Mo. App. 377.
80. Id.
84. Moreno, 610 N.W.2d at 328.
85. Id. (citing 360 U.S. at 270).
this belief, the Supreme Court determined that a public official could recover under defamation law if they could prove that actual malice existed. Therefore, a constitutional qualified privilege, with an actual malice inquiry, developed for those who commented on public officials.

In 1970, in *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, the Supreme Court indicated that accurate and truthful reports at public hearings are a matter of "particular First Amendment concern," as they involve "public meetings of the citizens of a community concerned with matters of local governmental interest and importance." In 1975, in *Cox Broadcasting Corp. v. Cohn*, the United States Supreme Court constitutionalized the common law protections for publication of matters disclosed in court proceedings. In *Cox Broadcasting*, the Court considered the constitutionality of a Georgia Supreme Court decision which held that a rape victim whose name was obtained from an indictment and broadcast in a televised report may have a cause of action for invasion of privacy. The appellants raised the broader question of whether truthful publications may ever be subjected to civil or criminal liability consistent with the First and Fourteenth Amendments. The Supreme Court, however, declined to hear this question, determining instead that the proper question was "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records, specifically, from judicial records which are maintained in connection with a public prosecution and which are themselves open to public inspection."

Speaking for the majority, Justice White stated "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions ... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." Justice White further recognized the value inherent in reports of judicial proceedings:

> In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of govern-

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86. Moreno, 610 N.W.2d at 329 (citing Sullivan, 360 U.S. at 279-80).
89. 420 U.S. 469 (1975).
91. *Cohn*, 420 U.S. at 491.
92. *Id*.
93. *Id.* at 492.
ment, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.\textsuperscript{94}

The Court held that civil liability may not be imposed on a party based upon the publication of truthful information contained in official records open to public inspection:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.\textsuperscript{95}

Thus, it became constitutionally mandated that liability cannot be imposed when truthful material is disclosed as part of the public record.\textsuperscript{96}

\textsuperscript{94} Id. at 491-92.
\textsuperscript{95} Id. at 495.
\textsuperscript{96} To date, the Supreme Court of the United States has not adopted a constitutional fair report privilege. Some of the circuit courts, however, have commented on the possibility of a constitutional fair report privilege, while others adopted such a privilege based on constitutional principles. In Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1098-99 (4th Cir. 1993), the court cited Reuber v. Food Chemical New, Inc., 925 F.2d 703 (4th Cir. 1989) as the case which recognized a fair report privilege in the Fourth Circuit. The Second Circuit "expanded the 'fair report' privilege into a more general 'neutral reportage' privilege. Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir.). The Third Circuit failed to adopt a federal fair report privilege, but commented that recent Supreme Court decisions pointed towards the recognition of a constitutional fair report privilege. Medico v. Times, Inc., 643 F.2d 134, 143 (3rd Cir. 1981). Similarly, the Ninth Circuit stated that the basis of a constitutional privilege is still in debate. Ronwin v. Shapiro, 657 F.2d 1071, 1075 (9th Cir. 1981). The only circuit to explicitly reject the adoption of a constitutional fair report privilege is the Fifth Circuit. See Levine v. CMP Publications, Inc., 738 F.2d 660, 670 (5th Cir. 1984). And compare Time, Inc. v. Firestone, 424 U.S. 448 (1976), where the Supreme Court held that an inaccurate, defamatory report of judicial proceedings involving a private person did not invoke the actual malice standard under New York Times v. Sullivan. See also RESTATEMENT (SEC-
VI. SECOND RESTATEMENT

It was against this constitutional backdrop that in 1976, the American Law Institute changed section 611 and expanded the protections afforded by the First Restatement and the constitutional principles announced in *Sullivan, Greenbelt* and *Cox*. The modern view, embodied in section 611 of the *Restatement (Second) of Torts*, removes the malice requirement such that the privilege is lost only by a "showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment."97

Section 611, captioned "Report of Official Proceeding or Public Meeting," provides that "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."98 So long as the account presents a fair and accurate summary of the proceedings, the law abandons the assumption that the reporter adopts the defamatory remarks as his own. Thus, the privilege allows the press to relieve itself of liability without establishing the truth of the substance of the statement reported.

Despite the broader view of the Second Restatement, the privilege of fair report, even if of official proceedings, may be lost if the proceedings are not also public. According to the comments to section 611, the basis of the privilege is the "interest of the public in having information made available to it as to what occurs in official proceedings and public meetings."99 "In the case of a nonpublic proceeding, the media cannot act as an 'agent' for an individual who had no right to attend; nor should the media be permitted to provide a supervisory function

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97. *Restatement (Second) of Torts* § 611 cmt. b. ("If the report of a public official proceeding is accurate or a fair abridgement, an action cannot be constitutionally maintained, either for defamation or invasion of privacy.").

98. *Restatement (Second) of Torts* § 611 cmt. b (1971). *See also* Rosenberg v. Helinski, 328 Md. 664, 678, 616 A.2d 866, 873 (1992); Lawton v. Georgia Television Co., 22 Media L. Rep. 2046, 1994 WL 538892 (Ga. Super. 1994). One commentator suggests that this occurred because the Reporter of the American Law Institute felt the Supreme Court would so rule. Paul B. Bech, *Isolating the Marketplace of Ideas from the World: Lee v. Dong-A Tbo and the Fair Report Privilege*, 50 U. Pitt. L. Rev. 1153, 1158 (1989) (citing HARPER, JAMES & GRAY § 5.24 at 208). *See also* SANFORD, supra, § 10.2 (noting that the fair report privilege affords even broader protection to the press than does the actual malice rule of *Sullivan* and its progeny: "the privilege often applies even if the publisher knows the assertions reported are false, and its application is not limited to cases where the plaintiff is a "public figure" or "public official").

99. *Id.* at cmt. a.
for the public greater than the public's own supervisory responsibility."¹⁰⁰

Perhaps most significant, the fair report privilege applies "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding."¹⁰¹

With regard to the accuracy and fairness of the report, it is enough that it conveys a substantially correct account of the proceedings.¹⁰² The accuracy requirement of section 611 relates to what transpired at the proceedings, not to the objective truth of the underlying alleged defamatory charges.¹⁰³ Section 611 does not require that each reported statement be specifically attributed to an official document or proceeding.¹⁰⁴ Furthermore, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression.¹⁰⁵ The consideration supporting unfettered, accurate and fair publication of records do not dissolve even if the information contained therein later turns out to be incorrect.¹⁰⁶ The fair report privilege protects the initial publication based upon it being a fair and accurate report of what occurred in the original official proceedings.¹⁰⁷

Moreover, in testing the accuracy of the reporting under the fair report privilege, the literal truth is not necessary and substantial truth, sometimes referred to as the "gist" or the "sting," will suffice.¹⁰⁸ In other words, under the fair report privilege, the "gist" or the "sting" of an official action or proceeding must be accurately conveyed in the report.¹⁰⁹ Many jurisdictions have used a similar standard in the context of the fair report privilege to test the accuracy of the reporting.¹¹⁰

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 611, cmt. a.
¹⁰² Id. at cmt. f.
¹⁰⁶ See Medico, 643 F.2d at 134 (3d Cir. 1981).
¹⁰⁷ Id.
¹⁰⁸ See RESTATEMENT (SECOND) OF TORTS § 611 cmt. f. (citing PROSSER, HANDBOOK OF THE LAW OF TORTS, 798-99 (4th ed. 1971)).
¹¹⁰ See First Lehigh Bank v. Cowen, 700 A.2d 498, 503 (Pa. Super. 1997) ("The question of whether the fair report privilege has been abused has been distilled by the federal court to a 'gist' or 'sting' test. 'A statement is substantially accurate if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.'"); Dorsey v. National Enquirer, Inc., 973 F.2d
Thus, under the Restatement (Second) of Torts, whether the publication was made in good faith or without actual malice is no longer an inquiry. The only condition is that the report be accurate and complete or a fair abridgment of the proceedings reported.111 As stated in Moreno v. Crookston Times Printing Co:112

[T]he purpose of the fair and accurate reporting privilege is to insure that the public interest is served by the dissemination of information about events occurring at public proceedings and public meetings. The privilege rests on two basic principles. First, because the meeting was public, a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting. The second principle is the "obvious public interest in having public affairs made known to all." As stated earlier the privilege may be lost by showing that the report is not a fair and accurate representation of the proceedings or meetings.112

Accordingly, so long as the accuracy and fairness tests have been met, both the publication's truth and the publisher's knowledge of its truth and motivation for publishing it are irrelevant.113

VII. STATUS OF THE FAIR REPORT PRIVILEGE ACROSS THE UNITED STATES

The adoption of revised section 611 in the Restatement (Second) of Torts by the American Law Institute shows the changes that are occurring to the fair report privilege across the United States. A number of states have specifically adopted the Restatement (Second) of Torts section 611 as the standard for their fair report privilege and cite to the Second Restatement as their source.114 A number of other

1431, 1436 (9th Cir. 1992); Williams v. WCAU-TV, 555 F.Supp. 198, 202 (E.D. Pa. 1983).
111. See Moreno, 610 N.W.2d at 321.
112. Moreno, 610 N.W.2d at 331 (citing Prosser and Keeton on Torts § 115, at 836).
113. See id. See also Restatement (Second) of Torts § 611 cmt. a (1977) (actual malice does not defeat the privilege.).
states adopted the standard of the Second Restatement for their privilege, but do not cite to the Second Restatement as their source.115

Other states have not converted to the standard of the Second Restatement and continue to have a malice inquiry as an element of their fair report privilege.116 However, eight of those states that maintain a malice inquiry have not addressed the fair report privilege


since the adoption of the Second Restatement.\textsuperscript{117} Nebraska is one of the eight states that has not addressed the fair report privilege since the adoption of the \textit{Restatement (Second) of Torts}. 

\section*{VIII. NEBRASKA'S FAIR REPORT PRIVILEGE}

The Nebraska Supreme Court first recognized the fair report privilege in \textit{Fitch v. Daily News Publishing Co.}\textsuperscript{118} In \textit{Fitch}, the plaintiff brought a cause of action against the defendant for malicious and defamatory libel after the defendant published an article regarding the plaintiff's divorce on the front page of the home edition of its newspaper. The headline, strongly objected to by the plaintiff, ran across six columns and read: "Claims He Suspected Imaginary Lover." The defendant based its article on facts contained in a petition for divorce filed against the plaintiff by his wife, and argued that it published the article "in good faith, without malice, as a matter of general information, being a report of court records upon which a restraining order had been issued by the district judge to prevent the plaintiff from molesting his wife, and that there having been judicial action on it, it was privileged."\textsuperscript{119} In agreeing with the defendant that the matter it published was privileged, the Court stated:

\begin{quote}
It is not open to dispute that a fair report in a newspaper or pending judicial proceedings is proper, and that this privilege extends to all matters which have been made the subject of judicial proceedings, though such proceedings may be merely preliminary, or interlocutory, or even ex parte.\textsuperscript{120}
\end{quote}

\begin{quote}[I]f this were not so the ridiculous result would follow that, where the trial of a case of the greatest public interest lasted fifty days, no report could be published until [it] was ended.\textsuperscript{121}
\end{quote}

[A] newspaper publication, to be privileged as a publication of judicial proceedings, must be fair; that is, just, impartial, and

\begin{footnotesize}

\textsuperscript{118} 116 Neb. 474, 217 N.W. 947 (1928).


\end{footnotesize}
free from animus against the party complaining; and it must be correct and accurate so as to give the public a reasonably correct statement of the matter involved.\textsuperscript{122}

[A] newspaper is allowed to make comments, draw deductions, and slightly add to court documents, if such inferences are fair, honest, and truthful deductions from the privileged proceedings \ldots \textsuperscript{123}

Based on the foregoing, the Court determined that the defendant's report of the plaintiff's divorce action was reasonably fair to the plaintiff and was printed in good faith, solely as a matter of news and public interest. The Court further stated that the headline, as well as a few comments in the article, while not in good taste, were within the limits of the law. The Nebraska Supreme Court therefore affirmed the district court's disposal of the case by dismissal.

More than thirty years would pass before the Nebraska Supreme Court would have occasion to revisit the fair report privilege. In \textit{Rhodes v. Star Herald Printing Co.},\textsuperscript{124} the Nebraska Supreme Court, relying on \textit{Fitch}, held that the defendant's publication regarding the plaintiff was privileged. In \textit{Rhodes}, the plaintiff, a local attorney, sued the Scottsbluff Star Herald and others alleging that the defendant's article regarding the plaintiff was published for the purpose of damaging his business and reputation. The article recited various court appearances which had been made by the attorney based upon a charge of arson. All defendants demurred to the petition and the demurrer was sustained. In sustaining the demurrer, the \textit{Rhodes} court stated the following:

The article published appears to be a fair and impartial statement of facts dealing with judicial proceedings, the truth of which is not denied. It appears to have been published in good faith and to have been free from malice. Plaintiff contends that animus and malice appear by innuendo. We point out that in an action for libel per se the language of the publication can alone be looked to, giving the language its usual and ordinary meaning. Innuendo may not be resorted to in such a case except when it is supported by the language of the publication with outside aid.\textsuperscript{125}

An examination of the published article reveals that it is a mere statement of facts. It does not purport to charge the plaintiff with a crime. It does not subject him to ridicule, ignominy, or disgrace. It purports only to be a statement of the

\textsuperscript{122} \textit{Id.} (citing Jones v. Pulitzer Pub. Co., 240 Mo. 200, 144 S. W. 441).

\textsuperscript{123} \textit{Id.}


\textsuperscript{125} \textit{Rhodes, supra} note 116, at 661 (citing Layne v. The Tribune Co., 108 Fla. 177, 147 So. 234 (1933)).
acts of the courts and their officers in relation to court proceedings, the fixing of bonds, the failure of plaintiff to post bond, and the attempt of an officer to take plaintiff into custody in default of such bond. Such a statement recites facts which the public is entitled to know and falls within the rule of qualified privilege that protects a newspaper in the dissemination of news. See Restatement, Torts, § 611, p. 293. 126

The Rhodes case was decided in 1962 before the United States Supreme Court's holdings in Sullivan, Greenbelt and Cox, which, as stated previously, introduced constitutional principles in determining the outcome of defamatory matters, and also prior to the Restatement (Second) of Torts which was introduced in 1976. As can been seen from the above quote, the Rhodes Court's reliance was on the original Restatement, which was relied upon by Nebraska courts in defamation issues prior to the Second Restatement.127 Under existing historical case law in Nebraska, a defendant would lose the privilege of fair report if the plaintiff could prove that the defendant published its article with malice or, as articulated by the First Restatement, “solely for the purpose of causing harm.”128

In light of the changes which have occurred in the law of defamation since Fitch and Rhodes, Nebraska courts should adopt the Second Restatement's version of the fair report privilege. In fact, doing so would be consistent with other aspects of Nebraska defamation law and the constitutional considerations which overlay the same.

IX. NEBRASKA DEFAMATION LAW

Nebraska is one of a minority of states that require a defendant in a defamation action to prove more than the truth in order to be protected from liability.129 Neb. Rev. Stat. section 25-840 provides:

In the actions mentioned in Section 25-839 [libel and slander], the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.130

126. Id. at 499, 500, 113 N.W.2d at 661.
128. See Restatement of Torts § 611 (1938).
This statutory law is consistent with Nebraska's Constitution. Article I, Section 5 of Nebraska's Bill of Rights provides, "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."\(^{131}\)

Thus, Nebraska is a state requiring a defamation defendant to show not only the truth of the allegedly defamatory statement but in practice, also that the publication was with good motives and for justifiable ends.\(^{132}\) This is commonly referred to as a "truth plus motive" defense.\(^{133}\)

With regard to motive, Nebraska courts have adopted the common law definition of malice, "hate, spite or ill will."\(^{134}\) When the plaintiff is a public figure, however, the Nebraska Supreme Court has followed the mandate of *New York Times v. Sullivan* and required proof of constitutional malice — knowledge that a statement was false or made with reckless disregard of its truth or falsity.\(^{135}\)

Absent the plaintiff being a public figure, however, the Nebraska Supreme Court has continued to recognize the "truth plus motive" analysis in deciding defamation cases. In *McCune v. Nitzel*,\(^{136}\) the defendant spread the rumor that the plaintiff had contracted the HIV virus. The court did not discuss the "truth plus motive" defense, as it was not raised as an affirmative defense. The court did, however, indicate that had the defense been properly plead, common law malice — hate, spite or ill will — would have been used in the analysis.\(^{137}\)

The constitutionality of Nebraska's truth plus motive analysis, at least with respect to the press, is suspect. In *Philadelphia v. Hepps*,\(^{138}\) the United States Supreme Court, in analyzing a statute under Pennsylvania law similar to Neb. Rev. Stat. section 25-840, held that such law was unconstitutional when the action involved a media defendant reporting on a private figure, where the matter was one of public concern.\(^{139}\) Under these circumstances, the Supreme Court

\(^{131}\) *Neb. Const.* art. I, § 5.
\(^{132}\) Powell, 72 Neb. L. Rev. at 1237.
\(^{133}\) Powell, 72 Neb. L. Rev. at 1237 n.2.
\(^{135}\) *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).
\(^{138}\) 475 U.S. 767 (1986).
held that the plaintiff had the burden of proving falsity, as opposed to the media defendant having the burden of proving truth.  

As Nebraska's libel statute, section 25-840, still carries with it the common law presumption of falsity and places the burden of proving the truth of the statement on the defendant, it too would be unconstitutional under a Hepps scenario involving a media defendant reporting on a matter of public concern. Because the fair report privilege is designed to cover the republication of information arising from official meetings, official actions, or official documents,\textsuperscript{141} such information would, theoretically, always be a matter of public concern. Accordingly, the republication of the same by the press, even if in relation to a private figure, would presumably fall under the Philadelph\textit{ia} v. Hepps analysis and not under Nebraska's "truth plus motive" statute.

As \textit{Hepps} gave the press added protection when reporting on matters of public concern, so should Nebraska's fair report privilege, as a malice qualifier is inconsistent with First Amendment principles. When the press reports on official meetings, official actions or official documents, it is not adopting the statements made as their own. Malice, whether common law or constitutional, therefore should not be an inquiry or an exception to the fair report privilege as the truth of the statement is not necessarily an issue. Indeed, the inquiry is not whether the report is true or false, but whether it is accurately and fairly reported.\textsuperscript{142} Under this analysis, the application of common law malice as a defense makes little sense from a reporter's perspective. It would be the extraordinary case where evidence of "hate, spite or ill will" would exist, as that type of connection would rarely exist between the plaintiff and a press defendant, particularly when the plaintiff is a private figure.\textsuperscript{143} Moreover, a malice qualifier to the fair report privilege, when reporting an official matters, would impose self-censorship upon the press, which may have a chilling effect upon the reporting of legitimate matters of public concern.

Application of a constitutional malice qualifier also makes little sense. The fair report privilege under section 611 is designed to enable the public to know what occurs in public meetings or public records, irrespective of whether the reporter believes the information

\textsuperscript{140} Hepps, 475 U.S. at 767.

\textsuperscript{141} Smolla, Law of Defamation §§ 8:68 - 8:74 (June, 2002 Release).

\textsuperscript{142} Restatement (Second) Torts § 611.

\textsuperscript{143} Sanford, supra, at § 10.3.3 (citing \textit{Restatement (Second) of Torts} § 611, at 1321 (App. 1981) (reporter's note) ("Indeed, according to the drafters of the Restatement (Second) of Torts, no reported cases exist in which the privilege was lost on the ground that the defendant was motivated solely by a desire to do the plaintiff harm.").
is true or false, or perhaps more important, could establish that belief in court.\textsuperscript{144}

Thus, while the application of the version of the fair report privilege under the First Restatement is consistent with Nebraska's historical defamation law (i.e. "truth plus motive"), the application of First Amendment constitutional principles has changed the landscape considerably requiring Nebraska to change with it. This includes eliminating the malice qualifier in the application of the fair report privilege.

Other facets of Nebraska law similar to its defamation law support a progressive movement. From a legislative perspective, in 1979, Nebraska adopted certain privacy torts, that of commercialization, intrusion and false light.\textsuperscript{145} Significantly, however, Nebraska did not adopt the privacy tort that dealt with the publication of private facts.\textsuperscript{146} Moreover, when adopting these privacy torts, the Nebraska legislature made it clear that the broadest extent of all defenses and privileges under federal and Nebraska constitutional law, the law of defamation, and the common law of privacy in Nebraska and other states, were to apply.\textsuperscript{147}

Further, since the adoption of the \textit{RESTATEMENT (SECOND) OF TORTS}, the Nebraska Supreme Court has routinely looked to it for guidance in its analysis of defamatory issues.\textsuperscript{148} Moreover, some of the

\begin{itemize}
    \item \textsuperscript{144} ROBERT D. SACK, \textit{SACK ON DEFAMATION}, § 7.3.2.1.2 (April, 2002 Release).
    \item \textsuperscript{145} NEB. REV. STAT. §§ 20-201, et. seq.
    \item \textsuperscript{146} Mary T. Powers, \textit{The Right to Privacy in Nebraska}, 13 CREIGHTON L. REV. 935, 936 (1980).
    \item \textsuperscript{147} NEB. REV. STAT. § 20-206 (Reissue 1997). Neb. Rev. Stat. § 20-206 states: In addition to any defenses and privileges created in Sections 20-201 to 20-211 and 25-840.01, the statutory right of privacy created in Sections 20-201 to 20-211 and 25-840.01 shall be subject to the following defenses and privileges: (1) All applicable federal and Nebraska statutory and constitutional defenses; (2) As to communications alleged to constitute an invasion of privacy, defense that the communication was made under circumstances that would give rise to an applicable qualified or absolute privilege according to the law of defamation; and (3) All applicable, qualified, and absolute privileges in defenses in the common law privacy in this state and other states."
    \item Id.
    \item \textsuperscript{148} McCune v. Neitzel, 235 Neb. 754, 457 N.W.2d 803 (1990) (applying the \textit{RESTATEMENT (SECOND) OF TORTS} in a slander case holding the plaintiff is not required to show that slander was made known to the public generally and further applying \textit{RESTATEMENT (SECOND) OF TORTS} § 578 to measure of damages in slander action); Turtner v. Welliver, 226 Neb. 275, 411 N.W.2d 298, 309 (1987) (following the of \textit{RESTATEMENT (SECOND) OF TORTS} § 595 in defamation action in determining existence of qualified privilege and further following the suggestion of § 566, comment b of the \textit{RESTATEMENT (SECOND) OF TORTS} by holding that protection which the first amendment accords to speech prevents defamation actions based on pure opinion, even when a non-media defendant is involved, however dishonest the publisher might be in expressing that opinion); Deaver v. Hinel, 223 Neb. 559, 391 N.W.2d 128 (1986) (following Restatement (Second) of Torts, § 580A comment d in libel suit against newspaper and holding a pub-
states whose law was relied upon in the *Fitch* and *Rhodes* cases, the last fair report privilege cases decided in Nebraska, have relied upon the *Restatement (Second) of Torts* as their guiding principle on the fair report privilege.\(^1\)

Accordingly, Nebraska’s adopting of the fair report privilege as contained in the *Restatement (Second) of Torts* section 611 is consistent from a constitutional perspective, a current legislative perspective, and the Nebraska Supreme Court’s current analysis of defamation issues.\(^2\)

Therefore, the statement of the law contained in *Restatement (Second) of Torts* section 611 cited previously should be followed in Nebraska with respect to the application of the fair report privilege. The reasoning is clear: prior Nebraska cases\(^3\) as well as constitutional principles\(^4\) support the fair and accurate dissemination of information concerning public proceedings. If any member of the public would have the opportunity to view a document or attend the proceedings, the press cannot be sanctioned for reporting the same. This reasoning is consistent with those jurisdictions that have adopted section 611 of the *Restatement (Second) of Torts* as the applicable common law on the fair report privilege, to wit:

lic-libel plaintiff must establish actual malice, or knowledge of falsity or reckless disregard for the truth, rather than common law malice, by clear and convincing evidence); *Hennis v. O’Connor*, 223 Neb. 112, 388 N.W.2d 470, 475 (1986) (following the Restatement (Second) of Torts §§ 614, 615 in slander action in holding that it is for the court to determine whether language is of such a character as to make a statement actionable per se and that prior to such a determination, the court decides (1) whether a communication is susceptible of a particular meaning and (2) whether that meaning is defamatory; the jury decides whether the statement, capable of a defamatory meaning, was so understood by its recipient); *Beckenhauer v. Predoehl*, 215 Neb. 347, 338 N.W.2d 618 (1983) (relying on the *Restatement (Second) of Torts* in action for damages for libel and holding that libelous matter in a pleading which is relevant to, or has some reasonable relation to, the judicial proceeding in which it is filed is absolutely privileged). *Compare Ronwin v. Shapiro*, 657 F.2d 1071, 1075 (9th Cir. 1981) (stating that it was confident that an Arizona court would follow the *Restatement (Second) of Torts* § 611 in a fair report privilege case as in the past, Arizona courts had relied on the *Restatement (Second) of Torts* in fashioning appropriate rules in other defamation cases).


\(^2\) Such adoption would also be consistent with the Uniform Defamation Act which was proposed by the National Conference of Commissioners on Uniform Statute Laws in the early 1990's: “Section 16. ABSOLUTE PRIVILEGES. An action may not be maintained under the [Act] based on: (2) a statement that constitutes a fair and accurate report of an official action or proceeding of a governmental body, including an order of a court, or of a meeting of a governmental body which is open to the public.”

\(^3\) See supra notes 117-25 and accompanying text.

\(^4\) See supra notes 88-95 and accompanying text. See also *Cohn*, 420 U.S. at 469.
Those jurisdictions that have expressly adopted section 611 have done so because they have agreed with the reasons expressed in the Restatement: that the information was always public at its release and that the public interest in knowing the events of public proceedings is better served by protecting a fair and accurate relaying of these events. We agree with the policy objective that the fair and accurate reporting privilege supports — that the public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings. Further, we find persuasive the Restatement (Second) of Torts § 611's articulation of the common-law on the fair and accurate reporting privilege.153

X. CONCLUSION

Nebraska's defamation law — that of truth plus motive — is archaic, as is the fair report privilege as a conditional privilege with a malice qualifier. As demonstrated, a malice qualifier on the fair report privilege makes no sense in application and is inconsistent with policies underlying the First Amendment. The constitutional freedoms enjoyed by the press enable it to better serve the public under a democratic form of government. By requiring the report to be a fair and accurate rendition, without exaggeration or deletion that would change the meaning of what was reported, sufficient common law154 and constitutional155 safeguards are in place. Indeed, it is a truism that the fair report privilege partakes of the core value of the First Amendment, that being political enlightenment.156 Therefore, it necessarily follows that the privilege should be as broad as possible to protect that core value.

 Accordingly, in today's media driven society, where news is literally disseminated to millions with the touch of computer button, the broadest possible protections should be the benchmark by which the dissemination of information contained in official documents or in official proceedings is governed. This benchmark does not include a malice qualifier and the same should be eliminated from Nebraska's fair report privilege.

153. Moreno, 610 N.W.2d at 332 (citations omitted).
154. Section 611 of the Restatement (Second) still requires the report to be fair and complete or a fair abridgment of the occurrence as did the First Restatement. Restatement (Second) of Torts § 611.
155. The matter reported on must still be part of a public proceeding or public record. Moreover, one commentator has suggested that a malice inquiry may still be relevant to the question of whether the proceedings have been fairly and accurately reported. Smolla, supra, § 8:78.
156. Smolla, supra, § 8:67.