

Appeals Court of the Commonwealth of Massachusetts

№ 2018-P-1605

Walter Tuvell

Plaintiff/Appellant

v.

Jack Marshall

Defendant/Appellee

On Appeal From A Judgment Of The
Middlesex Superior Court (№1781CV02701)

**REPLY BRIEF OF PLAINTIFF/APPELLANT
(WITH REQUEST/MOTION FOR ORAL ARGUMENT)**

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TECHNICAL NOTE ON PDF READERS (SOFTWARE): A number of the PDF documents we have submitted contain **PDF “annotations.”** However, there are many types of PDF annotations (26 in ISO 32000-1/PDF1.7, with new features added in ISO 32000-2/PDF2.0), and **PDF readers don’t always display** all PDF annotations properly (some don’t even display any annotations at all). This is especially problematic for “lightweight” PDF readers, such as those built into web browsers, or those running on small devices (such as cellphones). Therefore to avoid this problem (and similar ones, including “after-added OCR text layers”), you should **always download/view PDFs locally, and use up-to-date full-featured PDF readers on full-sized laptop/workstation computers.**

TABLE OF AUTHORITIES

We retain the table established at ApltBrief03, to which we now add:

Joseph Fernandez, *Defamatory Meanings and the Hazards of Relying on the “Ordinary, Reasonable Person” Fiction*, Pacific Journalism Review 23(1) 207–224 (2017)·····7 20

Hockey v. Fairfax Media Publications Pty Ltd, FCA 652,750 (Australia, 2015)·····7 20 26

Andrew Kenyon, Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defense Meanings, UNSW Law Journal 35(1), 31–69 (2012)·····7

Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 Univ of Virginia School of Law, Journal of Social Policy & the Law 155 (2016)·····20

Milkovich v. Lorain Journal·····*passim*

Sack on Defamation·····13

Scholz v. Delp·····12 17 22

NOTATION; ABBREVIATIONS

We retain the conventions established at ApltBrief
¶6, to which we now add:

- **ApleBrief** = Appellee's Brief (to which this ApltRply replies).
- **MotExtTime** = Marshall's Motion to Extend Time To File Apellee [*sic*] Brief.
- **OppExtTime** = Tuvell's Motion in Opposition to Time-Extension.
- **ApltRply** = Appellant's Reply (this very document).
- **AplApx** ¶77-111 *Bis* = SUPPLEMENT to this ApltRply (¶31 *infra*).

ADDENDA ET CORRIGENDA

- At Comp₁₇ AplApx₂₂: The content of f5 was erroneous. It was corrected at Opp_{12f17} AplApx₆₈; and also at AplApx₂₂ (via PDF Annotation).
- At Opp₁₃ AplApx₆₉: The reference to “Paragraph 1–2, pg. 7” should read “Paragraphs 10–12, Pg. 7.”
- At OppExhA₀ AplApx₇₇: The errors are explained/corrected in AplApx_{77–111} Bis, which is included in this very document as a SUPPLEMENT at ₃₁ infra.
- At ApltBrief_{8f7}: The language is garbled (mismatched wordings of final main text vs. draft footnote); the last phrase of the footnote should read: “some sensible potential qualified juror could possibly believe/credit nonmovant’s factual allegations and inferences under consideration.”
At ApltBrief₁₁: “attacked on by” should omit “on”
- At ApltBrief_{20l2}: “Diss Exhibit 1” should include a reference to “AplApx₅₀.”
- At ApltBrief_{31f39}: The word “Milkovich” should be italicized.
- At ApltBrief₃₂: The word “why” is erroneously rendered in a mixture of regular and italic font.
- At ApltBrief_{34f45}: We parsed the phrase “link in a comment to another commenter” in the “left-associative” manner for such unpunctuated/ambiguous three-

clause phrases $X \sqcup Y \sqcup Z$ — viz., $(X \sqcup Y) \sqcup Z$, as opposed to “right-associative” $X \sqcup (Y \sqcup Z)$. The analysis at ¶9 *infra* shows this distinction makes no difference in the case-at-bar. There was no “error,” and no “correction” is in order.

- At ApltBrief¶34f46: “Scholz ¶250” should not contain a space-character.
- At ApltBrief¶35–36: The quotation marks inside the quotation should be doubles (“”), not singles (‘’).
- At ApltBrief¶38, the word “are” is erroneously doubled.

INTRODUCTION

FACTS OF THE CASE. The ~57 incidents (TblDefam) are:

① **Lies** (~29) expressing defamatory false facts¹ (**DGIMF** = **Disputed Genuine Issue of Material Fact/Lie**); or

① **Implications** (~32) of ①'s or of undisclosed facts (**CTXDEFIMPL = Contextually Defamatory Implication**).²

(Marshall *pretends* his ①&①'s were "**opinions**;" but they were **not "true/honest" opinions: not based on true disclosed facts** — hence actionable as defamation. ApltBrief ¶31f39: **①&①/FALSITY TRUMPS "OPINION"**.)

There is one ambiguity amongst the facts (¶5 *supra*, last bullet item), meriting clarification (¶9 *infra*). Otherwise, no further elaboration about the facts of this case is needed: for, Marshall and the Judge have committed the **brightline failure** of conclusory whitewash hand-waving, instead of even *attempting* to honestly/head-on

1. In the sense of **Milkovich Material Falsity** (*cf.* Aplt-Brief ¶4f1). Lest we be accused of "grasping at straws" for invoking(/suggesting/insisting) "something obscure" (though **Landmark!**) like *Milkovich*, note that its core teachings sit at/near the continually-developing slowly-converging heart/"sweet-spot" of contemporary **international** defamation law (as befits the Internet's "Social Web 2.0"). See e.g. the case-study of *Hockey v. Fairfax*, in *Defamatory Meanings* (whose author is professor of media law with PhD in defamation) — there, the concept corresponding to *Milkovich's* **Materially False Defamatory Communication** is denominated **Conveyance of False Defamatory Imputation/Meaning**. (*Cf.* also Kenyon, concerning Australia's country-wide/uniform Defamation Acts, which continue to evolve in concert.)

2. **Nowhere** do we complain of "pure-insult-without-more."

address the fundamental “threshold matter” they *must* face (ApltBrief_¶4α) — **our ~57 ①&①’s** (see ¶19,38 *infra*)!

LAW OF THE CASE. There are **two core lapse/falsehood topic areas** (ApltBrief_¶28) — two “baskets” into which Marshall and the Judge “put all their eggs” — fundamentally “misunderstanding”/distorting the law. We shall (re-)address them in this ApltRply. These two areas have opposite characters, the **first** being old/solid/good law, the **second** being new/nebulous/strawman pseudo-law:

- **Universality of *Milkovich*** — We explicate the full impact on defamation law of ***Milkovich* in general** (as opposed to more restrictive Constitutional issues), and thence to our case-at-bar in particular.
- **“Forum Duty To Investigate” Myth** — We expose the paucity/impotence of this novel/bogus defamation theory, due to Marshall and the Judge below.

These two topic areas have already been addressed previously in our filings at great length (ApltBrief_¶28 *et seq*). But there, some of our arguments may have been left too *partially implicit*:³ for, Marshall (ApleBrief_¶9–11) appears to still believe he has some wiggle-room. So, revisiting these two “baskets” now (at ¶12,18 *infra*), it will be our goal to close loopholes, making our arguments *more explicit* (“misunderstanding”-bullet-proof).

3. Because, it was thought (and we still think), that no good-faith reading could “misunderstand” them.

LINKING/SELF-SANDBAGGING ≈ SIXTH WAY TO UNDERSTAND MARSHALL'S DEFAMATIONS

At ApltBrief_φ34f45, we gave easy/"baby" analysis of Marshall's **crucial/key/crux**⁴ "linking" defamation as LIE:

"... initially with a link in a comment to another commenter, causing me to miss it ..."

There, we parsed the underlined phrase this way:

"(a link in a comment) (to another commenter)" **means**
"a link in one of Tuvell's comments, pointing to a commenter other than Tuvell"

We now consider the other potential parsing scheme:

"(a link) (in a comment to another commenter)" **means**
"a link pointing somewhere, in one of Tuvell's comments to a commenter other than Marshall"

Examining all 10 of Tuvell's posts/comments (OppExhA AplApx *Bis infra*) on this new basis, we find only one potential candidate comment Marshall could possibly be referring to: #4 (OppExhA_φ9 AplApx_φ86 *Bis*), which contains a link pointing to Tuvell's own website (<http://JudicialMisconduct.US>).⁵ But, that sole *potential* link is **eliminated**, because of Marshall's attribution of "initially" — Tuvell had already (the previous day, post #1, OppExhA

4. "Crucial/key/crux" because it comprised Marshall's **premeditated/subterfuge** (so we allege) "**fig-leaf set-up**" for all his defamations, which thence followed immediately.

5. The other nine posts/comments are **eliminated**, because they either: (i) are directed to Marshall (not "to another commenter"); or (ii) don't contain any links at all; or (iii) contain a link to Wikipedia (which is not a conceivable candidate for making Marshall "miss something").

¶6–7 AplApx ¶83–84 Bis) proactively drawn Marshall’s attention explicitly/expressly to that exact link.

In other words: even under this new/alternate parsing/interpretation scheme, *NONE* of Tuvell’s posts/comments *could possibly* satisfy the criteria of Marshall’s linking defamation. **Marshall still LIED, just as much as he did under the original/first parsing scheme.**

Nevertheless, let us continue to pursue this line of “reasoning” (the new/alternate parsing of the linking defamation) to its logical conclusion. Namely, **suppose** it *is* the case that this link (the one presented in Tuvell’s post/comment #4) **was what “caused” Marshall to “miss something”** — and hence to issue his “sandbagging” defamation (see ApltBrief ¶36). Under that assumption, then the syllogistic calculus of Marshall’s warped mind must have gone like this:

I [Marshall] didn’t visit Tuvell’s website when he *first* linked me to it, in his initial post/comment [#1]. That was *grossly negligent* of me. But I’m the “ethics God/bully,” so I hope to get away with it.

- + But now, the next day, in another post [#4], he *repeats* his link, with the reminder “*I even proposed a topic.*” So I *finally* visit his website: and I see it *does prove* Judge Casper’s Judicial Misconduct! That makes me look stupid/unethical — compared to a goddamn “liberal.” OMG! **[I have sandbagged myself!!]**
- ➔ Hmm... To save face, rather than admit/apologize error [per ApltBrief ¶20], I’ll LIE by saying *he’s the one who sandbagged me, somehow.* Yeah, that’s the ticket! Obviously it’s an *insane/delusional/gaslight idea* — a *false/defamatory blind-alley mugging.* But I’m the “ethics God/bully,” so I hope to get away with it.

From this analysis, we conclude the following:

At ApltBrief_{¶30} we have listed **five** ways to potentially “understand” Marshall’s defamatory behaviors. We have now (*supra*) identified/explicated a **sixth**:⁶

(vi) Marshall accidentally **sandbagged (“self-owned”) himself**, making himself appear stupid/unethical to his public admirers. So to “save face” (in his mind), he falsely/defamatorily blamed Tuvell instead, believing(/knowing) his other readers/followers (other than Tuvell) wouldn’t notice/care, because they view him as their “ethics God/bully.” (And of course he obstinately wouldn’t “man up”/apologize either, because that would also/still expose him as weak/negligent⁷/stupid/unethical; see ApltBrief_{¶32} first bullet item.)

6. And indeed this may very well be the “real” reason, because it makes so much sense — given that we’re continuing to see Marshall’s inveterate/kneejerk/congenital lying/defamatory demeanor/behavior, even to the point of **LYING to this very Panel**, by FALSELY/DEFAMATORILY pretending that Tuvell didn’t fulfill his sworn duty to serve AplApx upon him (see OppExtTime_{¶3¶v}).

7. Recalling (i) the **negligence** clause of cause-of-action for defamation (ApltBrief_{¶4γ}), and Marshall’s self-admitted/proved breach thereof (ApltBrief_{¶4f2}). And further noting that (ii) Marshall’s **egregious negligence** in our case — *viz.* (ii’) *initially ignoring/pretending/lying about* the two links to Tuvell’s website provided in Tuvell’s posts #1,4, and then (ii”) *later misreading/lying about* them (f30 *infra*) — easily satisfies the legal criteria for “**actual malice**,” which is (correctly) defined by Marshall himself (at Diss_{¶8} AplApx_{¶38}) as knowledge/scienter of falsity, or with reckless disregard about truth/falsity (and considered at: Opp_{¶5,11} AplApx_{¶61,67}; OATAnn_{¶i,l}, age18,33,143 AplApx_{¶157,160,181}; OpAnn_{¶u} AplApx_{¶220}).

YES: *MILKOVICH* DOES CONTROL THIS CASE

We have shown (correctly) in our ApltBrief that *Milkovich's* laser focus on Material Falsity comprises landmark Supreme Court precedent that should/must be obeyed in Massachusetts (esp. in our case). But our Superior Court Judge below *ignored* it,⁸ and Marshall too contends (*sotto voce*) that *Milkovich* is not “good law.” This section proves why we’re right, and they’re wrong.

***Milkovich* Test/Analysis**

Milkovich contains three cognizable holdings, enumerated/summarized in its Syllabus at its ¶1–2. The first and third hold no interest for us (those concern First Amendment, press, speech). But the second “clearly establishes” the ***Milkovich* Test/Analysis** as **THE DISPOSITIVE ISSUE/STANDARD (MATERIAL FALSITY)** for all defamation cases *generally*⁹ (*Milkovich*¶2,21; ApltBrief¶19,24):

***Milkovich* Analysis/Test (for opinion-vs.-fact in defamation law) {a.k.a. DEFAMATORY MATERIAL FALSITY = “tendency/potential/possibility to impute/impress/induce/inspire/convey/connote”**

8. This despite the fact that **some** Massachusetts judges **do** recognize *Milkovich* (and *Material Falsity*); see, e.g., *Scholz v. Delp*. (Our contention is that **all should/must.**)

9. Via “persuasive weight of Supreme Authority,” and desire for uniform/stable fairness/comity (noting the trans-state nature of our case). ApltBrief¶42f56. While *Milkovich* may not be “formally binding” *qua* “rigid/strict/hierarchical inter/intra-jurisdiction State-vs.-Federal reviewable precedent/*stare decisis*” *per se*, it **is** **already recognized in Massachusetts** (albeit sporadically, f8 *supra*).

factually false defamatory thoughts into minds of audience”}: A reasonable factfinder *could* [not “would/must”] conclude[/deduce] that the statements in the [Marshall posts] **imply an assertion** that [Tuvell] [committed bad acts]. [Marshall’s posts]¹⁰ did not use the sort of loose, figurative, or hyperbolic language that would **negate the impression** that [Marshall] was **seriously maintaining** [Tuvell] committed [bad acts]. Nor does the [posts’] general tenor negate this impression. In addition, the connotation that [Tuvell] committed [the acts] is **sufficiently factual** that it is susceptible of being [objectively] proved true or false.

***Milkovich* Context Non-Inheritance Rule**

Now, here’s the deal: In *Milkovich*, the **defense** proffered by respondent *Lorain*, and supported by its dissenting justices (and in our case by Marshall and the Judge),¹¹ argued (losingly)¹² that **“some sort of ambient opinionation orientation/aura/bubble/vener/sheen/corona around/about the ‘forum’”**¹³ — “something” vaguely/

10. This is an indispensable ingredient of *Milkovich*: It is precisely the **low-level/immediate/proximal posts themselves** that count — and assuredly **not** some sort of **high-level/remote/distal “ambiance”/aura/bubble/fluff** claimed/pretended to envelope them — as now explicated next *infra*.

11. OATAnn₆ AplApx₁₁₇; Op₁₅ AplApx₁₉₇.

12. Interestingly, Robert D. Sack — he of the canonical treatise *Sack on Defamation* — was one of the coauthors of the (rejected/losing) *amici curiae* brief submitted by the institutional press to that case (*Milkovich*_{3f*}).

13. (i) Pick your favorite choice of metaphor. (ii) The word **“forum”** comes from the Judge below (OATAnn₃ AplApx₁₁₄ and elsewhere at oral argument, and implicit in Op/OpAnn AplApx_{183–224}). By that term, we have presumed he means “audience;” but to the extent he also intends to include some concepts/aspects of **“setting,”** we now/here deal with that too, under our nomenclature **“‘broad’-context.”**

broadly/nebulously in-the-air/atmosphere, surrounding (but beyond the traditional proper/normal *relevant*/"**immediate**" context/confines of) the disputed defamatory communications — "somehow" imbues prophylactic inoculation/immunization against defamation actionability. Their passionate (but handwavy and rejected/losing) aura/bubble defense — advocating for a "**'broad'-context 'inheritance rule'**" (as we may call it here) — is presented at *Milkovich*³² (internal cites and quote-marks omitted):

***Milkovich* Pseudo-"Defense" ("Broad"-Context Inheritance):** [T]he tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. [The author] never says, for instance, that Milkovich committed perjury. He says that "[a]nyone who attended the meet ... knows in his heart" that Milkovich lied — obvious hyperbole ... The format of the piece is a signed editorial column ... Even the headline on the page where the column is continued ... reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the well recognized home of opinion and comment. Certain formats — editorials, reviews, political cartoons, letters to the editor — signal the reader to anticipate a departure from what is actually known by the author as fact. The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not "hard" news like those printed on the front page or elsewhere in the news sections of the newspaper.

BUT: None of that matters! That (rejected/losing) "broad"-context aura/bubble "*Milkovich* 'Defense'" argument was flatly/roundly/squarely rejected by the full

Supreme Court — because it ignores the really relevant issue, **Material Falsity**. The (winning) ***Milkovich* Test** blows that aura/bubble pretense/defense out-of-the-water. One paraphrase:¹⁴ “To call something ‘opinion’ doesn’t actually make it *true/honest opinion properly so-called*.”

The Test *actually* adopted/endorsed/ratified by *Milkovich* knowingly/affirmatively/definitively refuses to take any such broad-context nebulous/ephemeral aura/bubble-like “spin” into account. Any auric/bubbly/opinionationism broad-context trait **IS NOT “INHERITED”** by the actual challenged defamatory communications themselves. Instead, what does matter is that judges/courts **must** undertake a conscientious “solicitous and thorough evaluation”¹⁵ — adopting the *Milkovich* immediate-context rule — to “scrutinize”¹⁶ each/every individual¹⁷ complained-of defamatory low-level statement for Material Falsity.

PERIOD.

Application To The Case-At-Bar

Returning now to our case, this means (to reiterate

14. OATAnn¹⁶,ve77 AplApx^{127,170}. Another way to paraphrase this is: “It isn’t enough for ‘opinionation’ to be ‘in-the-air,’ it needs to be ‘on-the-ground’” (paraphrasing ApltBrief^{19f14}). And another way to paraphrase *Milkovich* as a whole is: “‘Opinion’ simply isn’t a ‘thing’ any more” (ApltBrief²³).

15. *Milkovich*²⁶ (referring to the *Milkovich* Test).

16. *Milkovich*³³ (referring to the *Milkovich* Test).

17. ApltBrief^{16f12, 30f38, 32f41, 33f42, 42, 45f60}.

ApltBrief₃₃) that defendants/judges must march stoically (because, per *Milkovich*, no Royal Road¹⁸ shortcut exists) through **each/every individual row** of our **Table of Defamations¹⁹** (TblDefam AplApx₂₄₋₃₀), **one-by-one**, supplying the *Milkovich*-mandated “conscientious/solicitous Material Falsity evaluation/scrutiny” to **all ~57 ①&① claims**.²⁰ The Judge below shirked/skirted/skated-away from that commandment, instead whitewashing/handwaving/sleepwalking his obligation to oblivion (ApltBrief₃₀ *et passim*). This Panel cannot accept/repeat such neglectful evasion.

Upon conscientious exercise of the *Milkovich* Test/Analysis/Evaluation/Scrutiny/Standard, the total *absence* of “honest” true-fact-based opinionation by Marshall — and the *omnipresence* instead of his compulsive ①&① lying statements of false fact and irrational *faux* opinions

18. Used metaphorically in several well-known quotations; see https://en.wikipedia.org/wiki/Royal_Road.

19. **Procedural Note:** By rule/law (at Motion-to-Dismiss stage), the courts **MUST recognize/acknowledge/heed/credit our precise list** of ~57 ①&① claims (in Comp, and now repeated in TblDefam), and **MUST ignore wholly** the FAKE/FALSE *vague* list Marshall foists at Diss₉ AplApx₃₉ (and which he then also seemingly relies upon for his false count of “33” at OATAnn₅₁₂₀ AplApx₁₁₆). Careful examination/comparison of those two fact-bound (typical for defamation cases) lists reveals that **the things Marshall pretends Tuvell complains-of, are DISHONEST LIES (DISTORTIONS, OMISSIONS, DE-CONTEXTUALIZATIONS, OBFUSCATIONS) about the ~57 ①&①’s Tuvell actually does complain-of** — e.g., esp., “complaining of ‘pure-insult-without-more’” (f2 *supra*) (which the Judge gullibly swallows, ApltBrief₄₀).

20. Recalling that the first two items of TblDefam₁ AplApx₂₄ have only ever been claimed *defamatory*, never *actionable* (the Judge “fudged” about that). ApltBrief₃₉.

based upon them (Material Falsity) — becomes immediately/trivially plain/obvious, upon any fair/unbiased inspection of the actual blog stream itself. *Proof*: All you have to do is go read it (~10 minutes). Right now. It's at OppExhA AplApx[¶]77–111, which is now re-attached hereto in a more-convenient/readable/beautified format, AplApx[¶]77–111 *Bis* (SUPPLEMENT [¶]31 *infra*), where its unboxed/X'ed content should/must be ignored, per the ***Milkovich* aura/bubble Non-Inheritance Rule** just articulated *supra*.

For emphasis, let's repeat this one final time:

The *right/correct/good-law* teaching/commandment of ***Milkovich*** is the **EXACT OPPOSITE** of the *wrong/false/bad-law* invoked/applied by our lower Judge, where he wrote (at Op[¶]15 AplApx[¶]197, citing *Scholz* [¶]252): “statements made in an **entertainment news column** [or in any other setting/medium/venue for that matter] **indicated**²¹ they were opinion” (emphasis added).

21. What's wrong/false/bad here is our Judge's claim that ***broad-context* “indicated.”** What's right/correct/good is exactly the opposite teaching, limiting the relevant context: **OTHER FACTORS (Ⓢ&Ⓢ's, NOT “BROAD”-CONTEXT) ARE WHAT “INDICATE”!** — that's exactly what the ***Milkovich* Context Non-Inheritance Rule** says!! The “~indicativeness” “cited” by the Judge (see ApltBrief[¶]29f35) sub-quotes nearly-stray-remark *obiter dictum* (itself relying upon old-style pre-*Milkovich* fact-vs.-opinion logic), thusly (internal citations omitted): “Moreover, the ... articles appeared in an entertainment news column ... ‘the court must give [*some unquantified, vague, variable*] weight to ... the medium by which the statement is disseminated and the audience to which it is published’” — which is **very far removed** from our Judge's perverse portrayal of valid holding/precedent. To recap:

***Milkovich* Test & Non-Inheritance Rule (re-paraphrased):**
CONTEXT MATTERS (*only* to the extent it helps to determine meaning) — **BUT NOT THAT MUCH** (*all* context is **subordinate** to *Milkovich* Material Falsity, which is well-settled law).

NO: MYTH OF “FORUM DUTY TO INVESTIGATE”

Marshall (with the Judge’s prompting/complicity) trots forth a concept/defense which has never heretofore been seen/heard/recognized in the law of defamation — namely, shifting the onus/duty for “sidestepping defamation” away from the author/publisher onto the audience:

(False/Mythical) Theory of “Forum Duty/Responsibility/Obligation To Investigate”: Every audience member receiving any (provocative) communication has an affirmative duty/responsibility/obligation to diligently investigate/research the author/defamer’s asserted statements of fact.²² And then, if/when they discover some statement to be factually false (insofar as they can discern, at the moment), they should/must simply mentally discount it, thereby “non-injuring” the defamee’s reputation in their minds with respect to that statement.²³

This is a nonexistent/speculative/mythological

22. Such as, specifically in the Internet environment, tracking-down and diligently studying the targets of links — a.k.a. “hyperlinks,” though *cf.* also “hashtags,” and now even “emoticon/emoji semantics,” etc., all recursively *ad infinitum* I guess `_(ツ)_/` — a “feature” we herein dub **“automatic (or self-executing) links.”** (But, the legal concepts involved aren’t limited/restricted by the underlying technology: no known legal rationale suggests the online world should have a Forum Investigation Duty different/unique from the offline life, noting that **links are simply “electronic cross-references,” albeit even more remote/tenuous.**) As such, the Forum Investigation Myth/pseudo-theory appears to involve 13 of our ~57 [Ⓢ]&Ⓢ defamation claims ([Ⓢ]7 *supra*), namely those identified in TblDefam AplApx[Ⓢ]24–30 by the tags †14Ha–b,14Ia–c,14K–M,14Na–e.

23. So that, if (almost-)all recipients do this, that instance of defamation supposedly becomes non-actionable. But if they don’t, then ... what? Is the audience somehow guilty of some other new theory of contributory neglect??

pseudo-“theory,” which is nonsense, and must be forcefully rejected by this Panel. It was first raised, not even in a filed paper/brief accompanied by thoughtful reasoning/argument, but only as an obscure non-adumbrated toss-off at Oral Argument (including a late prompt from the Judge); so we have addressed it in our Annotations thereto (OATAnn_¶7–8,32–33,ae–ag,e39,141,143 AplApx_¶118–119,143–144,162,179–181). And then the Judge adopted/incorporated it into his Opinion; so we also addressed it in our Annotations thereto (OpAnn_¶16 AplApx_¶198, OpAnn_¶r–u AplApx_¶217–220), and in our ApltBrief_¶30f36.

While those writings just cited *should suffice* to slay this mythical/imaginary Forum Investigation Duty/Responsibility dragon, we now address the topic a final time, offering the following additional/deeper thoughts to ponder — *just in case*. In no particular order:

- **Negligence.** Far from letting the author off the hook, the *exact opposite holds*: when defamatory publication occurs via falsification of publicly available materials which the defamer himself has access to (in our case, this means knowledge of relevant links, which Marshall self-admits he knew about), then the author is *automatically* guilty of **actionable incompetent/reckless negligence** (or, active lying). ApltBrief_¶4γ(Hornbook),_¶37f49; f7 *supra*.
- **It’s never been contemplated before.** Insofar as I

can determine, nothing resembling (closely or remotely) a “Forum Duty to Investigate” has ever been discussed anywhere in the law of defamation: not in the laws, nor the cases, nor the treatises, nor the law reviews, nor the law blogs, ..., nor anywhere.²⁴

■ **It breaks/defies *Milkovich’s* definition of context.**

The Investigation Responsibility/Duty Myth/Hoax posits that the context relevant to defamation law should be vastly expanded, *from* the traditional/normal levels (*supra*, e.g. f21), to “whatever defamer utters/writes that may require investigatory research to confirm.” Wrong: That horse has already left the barn long ago (“clearly established” Milkovich Context Non-Inheritance Rule ¶13 *supra*).²⁵

■ **It’s ridiculously unrealistic, screamingly unreasonable** (with reference to the law’s standard fictional

24. Notably our Judge slyly **failed/refused to provide a precedent/citation**; *if* a valid precedent exists, he *must* cite it, otherwise he’s just “winging”/inventing/conjuring-up a false pretense. OpAnn¶16 AplApx¶198. (None of the cites the Judge did provide were related-to/suggestive-of “visiting/investigating links,” in any way/shape/form.)

25. The only known cognizable exception (to context *vis-à-vis* Research Duty Myth) — which **some** (but *not all*, and then only to mitigate damages, not liability; see *Defamatory Meanings* ¶220, *Hockey v. Fairfax* 652 ¶208) **authorities recognize** (see e.g. Lidsky & Jones ¶164–165) — is that of a participant (purported defamer or defamee) *himself* **explicitly supplying references/context** (such as links), and expressly gesturing something like: “Here, check it out, this is what I’m talking about.” **BUT, Marshall did NOT bother supplying links (only Tuvell did).**

inhabitant, the “reasonable person/reader”).²⁶ In the case of “automatic links/cross-references” in particular, it doesn’t take superhuman powers of perception to observe that in practice the vast majority of website visitors simply **do not click the vast majority of the links/references in front of them** (much less 2nd/3rd/...-level links). (See also the **Reality Check** subsections, *infra*.)

- **What if specialized knowledge or investigatory capability is required?** How does one factor-in/assess/police the ability/diligence/quality of audience members’ Duty to Investigate? In particular, their capacity to “suss out” the truth if specialized knowledge/expertise/resources is required? The least/most-common-denominator of folks don’t have these skills. But such requirements do happen a lot. In particular, it happened in the case-at-bar, where the ability to adequately evaluate the Smoking Gun link (ADDENDUM: “SMOKING GUN” LINK ^{¶30} *infra*) requires legal knowledge/expertise that many/most readers will/do not possess. This is just an impossible expectation. OATAnn[¶]afe143(ii) AplApx[¶]180.

26. See https://en.wikipedia.org/wiki/Reasonable_person. We first made this unreasonableness/unrealness point at ApltBrief[¶]30f36. There, the “more-or-less ‘lazy’” characterization was of course not a derogatory slur, but simply a casual/commonplace observation of “run-of-the-mill”/“real-world” humanity — noting that “ordinary” people of “common interests” are often involved in “loose thinking,” etc., yadda yadda ...

- **Non-Analogy: Headlines.** It might be thought that an analogy between links and **headlines of articles** (*vis-à-vis* their underlying article-content; mentioned at ApltBrief_{¶13}; considered in *Milkovich*, see _{¶14} *supra*) might somehow apply. But it doesn't work, for at least these good reasons (beyond the obvious "cross-references aren't headlines")²⁷:
 - **Difference in kind.** Links are (generally) *syntactic* constructs, conveying nothing of their targets' content. Headlines (and captions, and magazine covers, etc.) are *semantic*, conveying non-trivial indicia of their articles' content.
 - **Ephemeral.** Links are (generally) mutable/non-static, susceptible to dynamic change of content, or even to disappearance altogether.²⁸ Not so for print-copy headlines.

In the following/terminating three subsections, we explore how (i) the audience, (ii) Marshall, and (iii)

27. And also beyond the fact that conventionally the legitimate press hyper-cautiously views the **"unit-of-disclaimer" to be the sentence** (that is, even more-granular than the *article*, much less the *headline*). This is exhibited by the fact that they insert the word **"allegedly"** so abundantly (per-sentence).

28. Indeed, such an example presents itself in this very instant case. Namely, the link to the *Scholz v. Delp* Complaint given in ApltBrief_{¶35}, though valid at that time of writing, is now invalid (a "dangling" link) as of this writing. (A copy has been retrieved/archived, and is now available at <http://JudicialMisconduct.US/sites/default/files/2019-01/Scholz-v-Delp%3DComplaint.pdf>.)

the Judge all failed to exercise/implement the (proposed, non-existent) Forum-Investigation/“automatic-link” Myth in the instant case. As is to be expected.

Reality Check: Audience

There is **no evidence whatsoever in the blog itself** (OppExhA AplApx⁷⁷–111 *Bis*) that any audience member followed any link to Tuvell’s website. Just go read it! **To the contrary**, all the evidence does point to the contrary: that all audience members simply took what was written in the blog and “ran with it,” dumbly believing Marshall’s (false) posts at face-value (as true).²⁹

This is standard par-for-the-course on the Internet, of course. And we all know it.

Reality Check: Marshall

Marshall himself **violated his own Forum-Research/automatic-link theory**, by failing/refusing to visit Tuvell’s website^{30,31} (*cf.* Tuvell’s posts #1 (Diss⁴ AplApx

29. After all, Marshall “is God” (hence unquestioningly trustworthy) there. OpAnn^{ie15C} AplApx²⁰⁸.

30. And then, after he did *later* visit Tuvell’s website, he factually-falsely reported what he found there (e.g., “messy,” “single issue,” merits of lawsuit and Judicial Misconduct complaint, etc.) — through either egregious negligence/nondiligence (contrary to what his own Forum Research Duty theory demands), or through intentional lying (both of which are actionable as defamation).

31. Actually, what Marshall did is an even bigger lie: He was **fully aware** of Tuvell’s ***initial*** post (containing the link to Tuvell’s website) ***hours before it was posted***, [‡]²⁴

¶34; OATAnn¶8e50 AplApx¶119,166) and #4 (c. ¶10 *supra*)).

If Marshall himself feels no compunction/responsibility to conduct research (even to the extent of clicking a link), how can he logically/reasonably/ethically expect all his audience members to do so?

Reality Check: Judge

The Judge expressly knows (OpAnn¶16 AplApx¶198) that Tuvell's initial post to Marshall's blog (#1 OppExhA¶6–7 AplApx¶83–84 *Bis*) supplies a pinpoint/exact link to the **"Smoking Gun"** image/text on his website (ADDENDUM: "SMOKING GUN" LINK ¶30 *infra*).³²

Now, if we accept our Judge's own theory of "self-executing links," then we must assume (to avoid unethical hypocrisy) that **he himself**, during the course of his deliberations on the instant case, **must** have checked-out/studied that Smoking Gun link/image/text.³³ And as he was

¶23 but he approved/allowed it to be posted anyway — thereby **self-disproving his own lie/claim about being "sandbagged"** (TblDefam¶2†14Ca AplApx¶25). That's because Marshall's blog is *not* "open-enrollment:" every first-time commenter/poster is formally/manually checked/vetted by Marshall himself personally before their initial post is released for posting, and Tuvell's initial post was indeed delayed for hours during that period.

32. This Smoking Gun was also raised explicitly at Oral Argument (OATAnn¶31 AplApx¶142), so our Judge was aware of it then too, including its Judicial Misconduct character.

33. Indeed, we even have additional/independent verification that our Judge did indeed visit Tuvell's website (via Internet/website traffic analysis tools/logs). These observations support our "Judge Conjecture" at ApltBrief¶44.

doing so, he **must** have immediately realized (as a trained legal professional) that this Smoking Gun incident really does provide **auto-incriminating Judicial Misconduct (and even criminal behavior)** by Judge Casper. And so at that point, our Judge was himself actively bound by rules of Judicial Ethics to affirmatively refer/report Casper's Smoking Gun misdeeds to higher authorities.³⁴

Did he do so?:—

- If so, why haven't we heard about it? It would, after all, put the lie to Marshall's false dissing of Tuvell's case, hence the instant case should not have been dismissed.
- If not, why not?³⁵ As just noted, that would amount to a violation of our Judge's Judicial Ethics oath, plus a criminal charge of Cover-Up in its own right, due to his dismissal of the instant case.

Need we say more? Really??

34. "A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, integrity, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority. ... A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action." — ABA Model Code of Judicial Conduct Canon 2 Rule 2.15(A,C). The same Massachusetts Rule is identical to the Model in all substantive respects.

35. Perhaps for the reason we conjectured at ApltBrief_ø44?

CONCLUSION

Obviously/trivially:³⁶ Every type/venue of human communication medium/technology³⁷ supports varying degrees of fact/fiction/opinion/rhetoric/vagueness/hyperbole/insult/freewheeling/unruliness/“anything-goes” ... and all that.

Yet: No legal jurisdiction has ever upheld anything approaching a *Milkovich* “Defense” (¶14 *supra*) “prior immunity” ruling: “everything published via some sacrosanct venue is categorically exempted ‘per se’ from defamation action/liability.” That would be outrageous/idiotic.³⁸

Instead: The *Milkovich* Standard/Analysis controls universally — as to both **inclusion (Test)**, and **exclusion (Context Non-Inheritance Rule)**. It is very “good law” — “national/world/‘natural’ common-law,” if you will (f9,1 *supra*) — promoting/enhancing “equal justice.”

So: *If* this Panel now essays to trailblaze far-reaching/precedential “new ‘law’” — defying/dismissing/disobeying *Milkovich* — you had best be highly **non-conclusory** about it: Methodical/Exhaustive/Particular/Meticulous/Diligent/Thoughtful/Rational/Honest/Articulate.³⁹

36. No citation needed (or at most, “judicial notice”).

37. Face-to-face, mail, bulletin board, telephone, newspaper, magazine, book, radio, TV, email, website, tweet, etc.

38. But our Judge did it (ApltBrief¶29,f35; f21 *supra*)! **REFUSAL TO EVEN CONSIDER TRUTH/FALSITY** (Ⓢ&Ⓢ’s, ¶7 *supra*)
 ↪ “**EGREGIOUSLY ERRONEOUS (NON-)FINDING OF FACT/FALSITY.**”

39. ApltBrief¶27. See *Hockey v. Fairfax* for “how-to.”

REQUEST/MOTION FOR ORAL ARGUMENT

Request for oral argument on this matter before the Appeals Panel is hereby respectfully submitted.

SIGNATURE & VERIFICATION; CERTIFICATES

SIGNATURE & VERIFICATION

Respectfully submitted, and hereby signed, under the pains and penalties of perjury. (This signature/verification and date also apply to the CERTIFICATES ¶29 *infra*.)



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CERTIFICATES

CERTIFICATE OF COMPLIANCE

Pursuant to MRAP 16(k),20(a), I hereby certify this document is in substantive compliance with all material aspects of the pertinent Rules of Court, to the best of my good-faith ability to understand/implement them, such as: Linux; Fedora; LibreOffice; 8½"×11"; DejaVu Sans Mono 11.8; 27 lines/page; maximum line-length 57 characters (see bottom of this page, noting that 5½ inches/line × 10½ chars/inch = 57¾ chars/line); 20 pages (¶7–26). (See also ¶28 *supra.*)

WETuoll

CERTIFICATE OF SERVICE

Pursuant to MRAP 13(d), I hereby certify that I have served notification of and access to this document upon Defendant, via email and first-class U.S. Mail: Jack Marshall; 2707 Westminster Place; Alexandria, VA; 22305; jamproethics@verizon.net; http://JudicialMisconduct.US/sites/default/files/2019-03/ApltRply.pdf. (See also ¶28 *supra.*)

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ADDENDUM: "SMOKING GUN" LINK

This is the target/content of the link given in Tuvell's initial post #1 to Marshall's blog (OppExhA₆₋₇ AplApx_{83-84 Bis}), <http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun>.⁴⁰

THIS IS PRECISELY WHERE THE JUDICIAL MISCONDUCT ORIGINATED (recurring/covered-up many times, as related *infra*): In arriving at her (false, bad-faith) decision/opinion on the Summary Judgment motion, the District Judge (falsely, in-bad-faith) refused to "hear" any part of plaintiff's side of the case at all — by **WHOLLY IGNORING/EXCLUDING** plaintiff's **REQUIRED PSOF (Dkt#83)**, as marked "★" *supra*, and paying attention **ONLY** to defendant's **DSOF (Dkt#74)** — recalling that the court is **ABSOLUTELY NON-DISCRETIONALLY REQUIRED** to do the **exact 180° opposite: consider and credit PSOF (Dkt#83) over DSOF (Dkt#74)** for the purposes of summary judgment (by rule: the "**nonmovant-trumps-movant**" tenet of the **SJTOR**). Indeed, Judge Casper herself **explicitly/expressly admitted/vouchsafed** such, by authoring/signing the following **self-contradictory "SMOKING GUN"** passage (i.e., single/discrete/standalone piece of irrefutable evidence sufficient to support charges of wrongdoing) in her *Decision/Opinion* ₂ (annotated here):

the production of evidence that is 'significant[ly] probative.'" *Id.* (quoting *Anderson*, 477 U.S. at 249) (alteration in original). **The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor."** *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background **This "Factual Background" (at SJ) is a TOTALLY INSANE/ILLEGAL LIE! By SJ RULE/LAW (Rule # 56 + LR # 56.1 + "Standard of Review" just stated), the court "MUST" CREDIT PSOF (Dkt.# 83), TRUMPING DSOF (Dkt.# 74)!**

The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted. **DSOF(Dkt.# 74) & PSOF(Dkt.# 83) are REQUIRED (by LR # 56.1); RespDSOF (Plf.'s Response to DSOF, Dkt.# 82) is OPTIONAL. RespDSOF pointed into PSOF 19 times, but the judge DIDNT FOLLOW those pointers, not even once.**

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress

SMOKING GUN BIG LIE Elephant-in-the-Room (from District Court Decision/Opinion ₂)

This (mis)behavior (which may be languaged as "***treating the Plaintiff/Nonmovant as INVISIBLE***") constitutes/proves obvious/blatant/egregious/outrageous criminal/impeachable Judicial Misconduct — Falsification of Facts, Obstruction of Justice, Fraud Upon the Court (by a Judge) [and, later, Cover-Up by this and other judges, see *infra*] — pure and simple. **QED.**

40. **NOTE:** An attempt has been made to add an OCR text layer to this image, but it "failed" (the resulting PDF was not usefully/accurately text-searchable). But this is not an impediment, as the image is so small anyway (it's just an "image," not a whole "document"). Of course, the Panel is invited to visit the actual online version itself (which is naturally text-searchable).

SUPPLEMENT: OppExhA AplApx_ø77–111 *Bis*

As noted previously (at AplApx_ø2), the version of Marshall’s blogpage in dispute as presented at AplApx_ø77–111 is somewhat **difficult to read** (though substantively accurate), compared to its original version (OppExhA) — because, the required addition of an OCR text layer has badly impaired the quality of its images (colors and sharpness) and some text (esp. links).

We have now sought-out, and obtained, a **better OCR technology**, which *retains the readability quality* of the original OppExhA. The result is now presented *infra*.

The **page-numbers** of both OppExhA and AplApx_ø77–111 have been retained (there’s no need for 35 more/new page-numbers); and we also take this opportunity to make the **correction and mark-up** noted on the first page (AplApx_ø77 *Bis, infra*).⁴¹ No other changes have been made (in particular, of course, no content has been deleted/obscured).

We believe this good-faith Supplement will helpfully aid the Panel in its mission (that’s its sole purpose).

41. We use **PDF annotations** (regarding which, see the **Technical Note** at _ø2 *supra*).

EXHIBIT A

EthicsAlarms Blogpage, Aug 27 2017
(<https://EthicsAlarms.com/2017/08/27>),

Relevant Part

(<https://EthicsAlarms.com/2017/08/27/morning-ethics-warm-up-82717/#more-40109>)

This blogpage (blogpost with attendant comments) is **the primary/ key piece of evidence (“Smoking Gun”)** in this case. Narrative explanation for it is given at Comp~~5~~¶7-~~8~~15¶14·Q.

Note: This blogpage is “threaded” (as is typical). Consequently, in particular, the chronological/timestamp-order of the posts/comments “jumps around” relative to its textual/linear-order. Plaintiff’s 10 posts/comments, in chronological order, occur at (Eastern Standard Time):

- **#1** Aug 27 1:08 p.m. — OppExhA~~6~~.
- **#10** Aug 2~~8~~ 5:54 p.m. — OppExhA~~14~~.
- **#3** Aug 28 7:26 a.m. — OppExhA~~33~~.
- **#4** Aug 28 1:24 p.m. — OppExhA~~9~~.
- **#5** Aug 28 1:45 p.m. — OppExhA~~10~~.
- **#6** Aug 28 1:52 p.m. — OppExhA~~11~~.
- **#7** Aug 28 4:11 p.m. — OppExhA~~11~~.
- **#8** Aug 28 4:27 p.m. — OppExhA~~13~~.
- **#9** Aug 28 5:08 p.m. — OppExhA~~13~~.
- **#2** Aug 2~~8~~ 5:18 p.m. — OppExhA~~32~~.

CORRECTIONS & MARK-UP FOR THIS AplApx~~77~~-111 Bis:

- (i) Two of the timestamps (above) should be corrected, and the list re-ordered as indicated (#1-10).
- (ii) The blog content (below) should be marked with boxes surrounding the relevant content (un-boxed/X’ed-out content is irrelevant to our case, and to be ignored, per the *Milkovich* aura/bubble Non-Inheritance Rule).

Ethics Alarms

AUGUST 27, 2017 · 11:19 AM

Morning Ethics Warm-Up: 8/27/17



GOOD MORNING!

(he said through gritted teeth..)

1. **I received a nice, polite e-mail from a new reader here** who accused me of engaging exclusively in “partisan/political rants.” “Further,” he wrote, “everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).”

The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I’m trying to think of the last Republican leader, conservative or otherwise, I designated as “good”), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don’t know how else I am supposed to address that. It would have been nice, for balance’s sake, if a conservative cast of white actors in, say, a hit musical called “The Ray Coniff Story” had stepped out of character and harassed, say, Chuck Shumer, but this didn’t happen. If it had,

I would have treated that breach of theater ethics *exactly* as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

If Hillary Clinton had been elected President and Donald Trump and the Republicans formed an anti-democratic movement called "the resistance," tried to use a single Federalist paper as a rationalization to change the rules of the election and then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation. If conservatives were trying to limit free speech according to what they considered "hateful," a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven't advocated such restrictions, however. Progressives have. The Mayor of Portland has called for a "hate speech" ban. What party is he from? Howard Dean said that "hate speech" wasn't protected. What party was he the Chair of? I forget. What was the party—there was just one— of the mayors who announced that citizens holding certain views should get out of town?

"Need I go on? I could, *because the uniquely un-American, unfair and destructive conduct from Democrats, progressives and the anti-Trump deranged has continued unabated and without shame for 10 months now.* That's not my fault, and I don't take kindly to being criticized for doing my job in response to it. I have chronicled this as unethical, because it is **spectacularly** unethical, and remains the most significant ethics story of the past ten years, if not the 21st Century to date.

And the reluctance and refusal of educated and usually responsible liberals and Democrats to exhibit some courage and integrity and vigorously oppose this conduct *as they should* and *have a duty as Americans to do*—no, I am **not** impressed with the commenters here who protest, "Hey, I don't approve of all of this! Don't blame me!" as if they bear no responsibility—is the reason this execrable conduct continues. It is also why I have to keep writing about it.

~~2. I'm still awaiting the apologies and acknowledgement of my predictive abilities from all of my friends who chided me for suggesting that the Confederate flag and statuary-focused historical airbrushing mania would shoot down the slippery slope to threaten the Founders and more. CNN political commentator and former Congressional Black Caucus director Angela Rye proclaimed on CNN [that the country must tear down all memorials and likenesses of George Washington and Thomas Jefferson](#). Rye said on CNN that "George Washington was a slaveowner. Whether we think they were protecting American freedom or not, he wasn't protecting my freedom."~~

Her ignorance and arrogance is staggering. Naturally, no one on CNN had the integrity, historical perspective, courage or wit to explain why her position is destructive and foolish. Hey, but it's all right! There's no slippery slope!

Oh, Professor? When Republicans and conservatives start tearing down statues of, say, Margaret Sanger in the dead of night, you can count on me to condemn **that**, too.

3. Now here's a rant:

As I explained in the [previous post](#), the President's pardon of anti-immigration zealot Joe Arpaio was ill-considered and a poor use of the pardon power. To say, however, that the attacks on it are wildly disproportionate to its actual impact is an epic understatement. The crime Arpaio was convicted of is a *misdemeanor*. The sentence is light. He is 85 years old, and there is no chance of him repeating the crime—criminal contempt—or doing any further harm, other than shooting off his mouth, Joe's specialty.

I was watching CNN to see how hard Texas is being slammed by ex-hurricane Harvey, and the crawl about how outraged various politicians are over the pardon was almost continuous. There was never such unbroken focus, by CNN or anyone else, when Bill Clinton *took a bribe* to pardon a rich fugitive with no redeeming characteristics whatsoever. There was no similar indignation about contempt for the rule of law when Obama's Justice Department deliberately ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color.

Then an esteemed reader sent me this head-exploding link to a Huffington Post article by a HuffPo "social engineer"—*give me a break!*—making the claim that the pardon was unconstitutional and would have a major impact—get this—on the investigation *by the special counsel*. I responded to the link thusly, in part:

This is in the disgraceful category of other forced arguments that Trump has committed a "high crime" that can't exist, or has triggered an opportunity to remove him, like the Emoluments clause, or the claim that it's "obstruction of justice" to fire someone he has the power to fire, or that there's a loophole to allow his election not to count....

I've researched this. That "social change engineer"—how can you take anything written by someone who calls himself that?—is intellectually dishonest. ALL pardons cross the separation of powers. Only impeachment is immune from a Presidential pardon, and even that is sort of misleading.

Impeachment itself isn't a conviction for a crime.

The post is garbage, and the theory wouldn't last two seconds in the Supreme Court. The argument against the pardon is that it's a bad pardon. It is unquestionably a LEGAL pardon.

Later, I read my New York Times front page article that said that the pardon is "almost certainly" legal. Since the Times has never seen an impeachment theory it didn't like, "almost certainly" almost certainly means, "*No way, Jose! Even we can't concoct an argument to back this up.*"

And yet a smart, observant, progressive-minded reader found the "social change engineer's ignorant claims persuasive! This is hate and confirmation bias run amuck, and, frankly, I've lost patience with it.

The predominant approach to the Trump Presidency is that all previous standards of law, logic and fairness have been suspended, because Hillary's legions and the impotent Republican bunglers who let Trump take control of their party are so *furios* that an unqualified, impulsive, narcissistic fool of inadequate education and intellectual resources became President of the United States. Well, they haven't been suspended, you bitter *assholes*. We have laws, and processes and precedents, and no matter how much you wish it were otherwise, you can't make up reasons to void an election *just because you really don't like the winner*, even if you have wonderful reasons to dislike the winner (and you do).

Owning hotels is not going to become a grounds for impeachment. **Stop saying it is.** Using his family members as advisors is not a high crime or misdemeanor. Saying and tweeting stupid things is not a high crime or misdemeanor, no matter how stupid they are. Doing things that other Presidents have done without consequences are not suddenly crimes because this President does them. The President is not "disabled" under the terms of the 25th Amendment just because you regard not bowing down to progressive cant and the Political Correctness Gods as proof of a mental illness. These and other biased, irresponsible crack-brained fantasies mislead the public, waste everyone's time and energy, and worst of all, force *me* to defend a President who **literally** has no *ethics alarms*—thus getting myself accused of being a white supremacist— because double standards are unethical *per se*.

Cut it out. It's embarrassing *you*. It's aggravating *me*. It is harming the *nation and the democracy*. Meanwhile, it increases the likelihood that President Trump really will do something epicly stupid and destructive. Just as Obama was a much worse President because the news media gave him a free pass and the impression that he was a brilliant leader when in truth he was a feckless fraud, the news media has squandered any ability it might have had to Trump him toward competency and responsibility by establishing itself as a relentless, inept, partisan adversary. Good job, Journalists. You are *pathetic*.

If everything Trump does is horrible, nothing is. If the narrative is that his very existence is grounds for impeachment, then the President has no comprehensible limits to what he can do. The assault, which has gone on literally from the second he was elected, is unethical indefensible, disastrous, destructive and incredibly stupid.

I have been, if anything, too tolerant of it. No more. This is *wrong*.

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And I'm REALLY Sorry I
Have to Keep Writing
About It.
In "Citizenship"

73 responses to "Morning Ethics Warm- Up: 8/27/17"

Other Bill

August 27, 2017 at 11:33 am



Bravo!

[Reply](#)

Steve-O-in-NJ

August 27, 2017 at 11:39 am



Amen.

[Reply](#)

JP

August 27, 2017 at 11:42 am



Bias makes you stupid, but if anything given enough time as the last 10 month have taught us it also makes you an a...ole.

[Reply](#)

Steve-O-in-NJ

August 27, 2017 at 1:02 pm



Anyone who's been watching the last 20 years should know that. There was plenty of jerkassery on both sides over the last 2 decades.

Reply

JP

August 27, 2017 at 1:52 pm

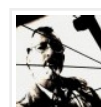


Well to be fair to me I've only been trying to check my bias for the last 12 months.

Reply

fattymoon

August 27, 2017 at 11:43 am



#1 Agree.

#2 Agree

#3 Tire Fires says it best. I think it's a metaphor... <https://medium.com/geezer-speaks/tire-fires-8f783170717d>

Reply

Tippy Scales

August 27, 2017 at 1:00 pm



Don't worry about charges of right-wing bias. As far as I can see, you always call out all unethical behavior, no matter who does it. This is one of the few sites I've found that is fair and balanced to all sides. That's why I come here so often: To get a whiff of sanity in this hyper-partisan environment we're in right now.

And you hate John Lennon's "Imagine" to boot!

Don't you ever change.

Reply

#1

Walter E. Tuvell

August 27, 2017 at 1:08 pm



I am the author of "Item #1" in Jack's Morning Ethics Warm-Up for Aug 27 2017. For the record, here is the content of the email I sent him, which instigated Jack's response:

Jack —

I've been following your website (<https://ethicsalarms.com>) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or am I missing something?

Thx.

— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., "not-a-crank")

I counter-respond as follows:

First: I am not an "academic" (well-educated, yes, but worklife has been in the computer industry). Nor am I an American leftist, sycophant, familiar, university, show business, news media, etc. Rather, I'm just a guy looking for serious ethical guidance in uncertain times, of the sort Jack mentions/advertises on his About page (<https://ethicsalarms.com/about>).

Second: My note was not, I think, an "accusation," but rather an "observation," based on the deviance of the website's content vs. the wording of its About page. Granted I'm a relatively new reader, so don't have the benefit of long-term familiarity, but from what I've seen to date, everything has decidedly political/partisan, in one particular direction (from left to right). That seems biasedly unbalanced (black-and-white, no gray) to me.

Third: I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (<http://JudicialMisconduct.US>). THAT'S the sort of thing I wonder what a non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the "Smoking Gun" at <http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun>.

— Walter Tuvell

[Reply](#)

Jack Marshall

August 27, 2017 at 2:24 pm



Thanks, Walter. I was hoping you would post.

[Reply](#)

Jack Marshall

August 27, 2017 at 2:27 pm



And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don't.

[Reply](#)

Alex

August 27, 2017 at 4:27 pm



Hello Walter!

Welcome. I hope you enjoy it here. Jack has built a really nice place in here where there is genuine diversity of viewpoints and debate is almost always rational. We may seem like a rough crowd sometimes but there is a real feeling of a community that cares about ethical issues.

[Reply](#)

Red Pill Ethics

August 28, 2017 at 9:11 am



I mean it's nice of you to respond Walter, but Jack very clearly presented his case for why the ethics criticisms have been so one way – a large and sustained breakdown of ethics and reason in the left with many supporting examples. If you respond to anything I'd be most interested in hearing your response to that. Maybe something along the lines of an equivalent large and sustained breakdown of ethics and reason in the right with many supporting examples. If you can provide a good argument for that, then I'd 100% agree that the one sided coverage appears to show an ideological bent. If you can't... then maybe an apology is in order.

[Reply](#)

Chris

August 28, 2017 at 9:24 am



The election of Donald Trump was a massive failure of ethics on the right.

Reply

texagg04

August 28, 2017 at 9:32 am



Quit this tired argument.

It has been made absolutely clear that the ENTIRE election, Democrat side as well, was an ethics failure.

That your side continues to pretend like Hillary wasn't as horrible of an option as Trump (the two of them having their own uniquely horrible qualities) is just further demonstration that your side has no self-awareness or accountability.

Reply

Chris

August 28, 2017 at 3:01 pm



I'm not the one dodging accountability here. I agree that leftists bear some blame in helping getting Donald Trump elected. But the primary responsibility for electing Trump has to go to the people who elected him. Just as the primary responsibility for electing Clinton, had she won, would have gone to Clinton voters. Republicans had 16 other choices, only one or two of which would have been as unethical a choice as Trump. They chose Trump. This was an ethics failure at the highest levels of the Republican party, as well as on the level of voters. Democrats played a part in that failure, but the primary responsibility lies with Republicans.

Reply

#4

walttuvell

August 28, 2017 at 1:24 pm



Red Pill Ethics: You say I should "apologize" if I don't provide a case for (an examples of) large and sustained breakdown of ethics and reason on the right.

I have no idea what you're talking about. It is not ME who supports OR denies any breakdown of ethics/reason on the left OR right. Thought, that appears to be what (all?) others here care about.

With the few short notes I've posted here, I've made it clear (but I'll repeat again) that I care nothing about partisan politics, be it under the guise of "ethics" or just plain naked pot-calling-kettle-black. And I certainly won't apologize for that.

To the contrary, I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (<http://JudicialMisconduct.US>). But no takers. Such things appear not to be what this site is about.

Reply

texagg04

August 28, 2017 at 1:34 pm



“Such things appear not to be what this site is about.”

Then you should take the time to avail yourself of the 1000s of posts Jack has composed over the decade plus of his discussion group.

Jack isn’t partisan or biased. It’s just demonstrative of how far off the rails the Left has gone in it’s unethical conduct post election. And Jack IS frank about his view their their current insurrectionist and counter-constitutional mindset and conduct ARE the gravest threat to our nation.

So of course they seem to get more coverage. But that isn’t a bias problem of Jack’s.

Reply

walttuvell

August 28, 2017 at 1:45 pm



I’ve already disclaimed my inexperience with this site, being a new-ish user of only a couple months’ standing. Unfortunately, from what I’m seeing, it’s doubtful that “taking the time” of absorbing the whole past of the site, as you suggest, will disabuse me of my initial assessments.

For, what you just wrote (and which you claim is representative of the site) is itself quintessential troll-like partisanship: “Everything Jack/we say is non-partisan, because the Left has gone unethically off the rails in their insurrectionist/counter-constitutional mindset/conduct, representing a grave threat to the nation.”

Reply

texagg04

August 28, 2017 at 1:50 pm



So you’re not going to even try?

Good strategy.

#5

#6

[Reply](#)**walttuvell**

August 28, 2017 at 1:52 pm



Correct. The whole partisan politics thing is tiresome/boring, and I have no dog in that fight. I just don't care about that whole "I-am-not, you-are-so" scene, from any direction. Silly.

[Reply](#)**texagg04**

August 28, 2017 at 1:56 pm



Suit yourself.

[Reply](#)**Jack Marshall**

August 28, 2017 at 2:18 pm



KABOOM! If it is silly, why did you choose that precise issue to begin with?

[Reply](#)

#7

walttuvell

August 28, 2017 at 4:11 pm



Oh Come On, Jack, I did NOT "choose that precise issue," and you know it. I wrote a private note to you about "am I missing something," in thinking I was seeing mostly partisan-politics-pretending-to-be-ethics. THAT'S the "topic" I chose (expecting a simple private response). Instead, it got twisted (intentionally?).

The topic of THIS ("silliness") subthread is that some people think I should give some sort of apology, and/or some sort of arguments/examples about how the Left is better than the Right in some sense — "as if" I'm some kind of Leftist and believe that — because somehow I got tagged with being some sort of Leftist in some sense. But I've made no proclamations/hints whatsoever about being any such thing. Perhaps this happened because I was misperceived initially as an "academic," and some people somehow lump "academics" into the Left. Though in fact I've long disavowed being either Right or Left, and care nothing about it, because it's a silly tempest-in-a-teapot.

Why are you (and others) pretending otherwise?

[Reply](#)

Chris

August 28, 2017 at 4:24 pm



Walt, some advice from one of this blog's leftists: Move on. Jack's blog is very valuable to me, and has taught me a lot about ethics. From my perspective most of his posts lately have been about politics, but that's because politics are a great window into the ethics of a country, especially at this moment in time. I *do* agree with you that Jack, like all people, has a bias, and I think he's been less careful about mitigating that bias lately. But I've made a case for that when I've seen it, whereas you have just repeated it without really citing evidence for it. If you choose to stick around I hope you will do the same, but right now you're going in circles trying to justify your original comment, which, to me, was overly broad and unsupported.

Jack Marshall

August 28, 2017 at 2:16 pm



Walt, I'm not obligated to do this, but just for you, I picked the last full month of the blog, and kept score, running backwards, regarding whether a post criticized the left or the right. In doing so, I ignored the Daily updates, since they are mixed topics, and also decided to place criticism of President Trump down as criticism of the right, as he is technically a Republican. I did not score posts that did not involve politicians, government, new reporting or public policy debates.

I stopped after checking 16 posts, when the score was 8 to 8. I have done this before, with similar results. I'm sure, indeed I know, that there are periods when the balance is not this close, but I picked July 2017 at random. My survey simply does not support your claim. Neither would your own survey.

People are wedded to their own world view, come here, see that i designate some position that they have an emotional attachment to as based on unethical principles, and default to bias as an explanation.

Your claim is simply unsupportable on the facts, as is the claim that the blog is primarily political in nature. As I often note, the fact that the Left has inexplicably bundled issues and made it part of its cant does not make rejection of one of those

issues partisan or political. Saying that illegal immigrants should get a free pass to the benefits of citizenship isn't *liberal*, it's idiotic and wrong. Holding that gay Americans shouldn't have all attendant rights of citizenship isn't a conservative position, it's an *ignorant* position.

You can believe what you choose; most people do. But I work extremely hard to avoid exactly the kind of bias you accuse me of, and I stand by the results. I am not always right, but when I am wrong, it is not because of partisan bias.

[Reply](#)

#8

walttuvell

August 28, 2017 at 4:27 pm



Unfortunately, you're misrepresenting me (see initial email) again, because all you doing is "keeping Left/Right score." I don't care about Left/Right anything! What I care about is Ethics per se, as opposed to partisan political rants of any kind, which is what appears to dominate this site (and seemingly from the Right=Good point of view, but that's a sub-observation, not the main theme of my interest).

I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., <http://judicialmisconduct.us/CaseStudies/WETvIBM/Story#smokinggun>). You've done nothing to address that, and nobody on this site appears to have any inclination to so.

Fair enough. But at least please be straightforward about it, instead of twisting what I'm saying beyond all recognition.

[Reply](#)

#9

walttuvell

August 28, 2017 at 5:08 pm



Oh, and another thing: Why in the world did I ever think that Jack (and by extension this blog/website) might be interested in Judicial Misconduct?

Why, because it's advertised on the About page, of course: "I [Jack] specialize in legal ethics ..."

[Reply](#)

#10

texagg04

August 28, 2017 at 5:23 pm



You sound more and more like another incarnation of a guy who would frequent this blog beating on ONE topic and ONE topic only...every thread that guy began seemed “new” but ended up ALWAYS redirecting to Supreme Court malfeasance and Judicial misconduct...

Hm.

He’d always get banned...

Then he’d always come back under another name.

[Reply](#)

walttuvell

August 28, 2017 at 5:54 pm



Oh, yes. Damnation by (invalid) innuendo. Trying to twist my one-and-only post into a multiplicity of “threads.” Very clever/subtle/bogus. NOT.

[Reply](#)

Jack Marshall

August 28, 2017 at 6:08 pm



I just banned Walt. Read my post about it. He’s special.

[Reply](#)

Jack Marshall

August 28, 2017 at 6:11 pm



I have already spammed two more posts by the jerk.

Jack Marshall

August 28, 2017 at 5:23 pm



Or, you could search for judicial ethics, or judges, right on the blog! The last judicial conduct post was [almost exactly a month ago](#). They come up when

they come up.

Reply

texaggo4

August 28, 2017 at 5:30 pm



<https://ethicsalarms.com/?s=judicial+ethics>

Reply

Jack Marshall

August 28, 2017 at 6:07 pm



ATTENTION: Walt Tuvell is banned from commenting here.

I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—**HINT**: if you want a reaction to a specific issue, the best way is to write me at jamproethics@verison.net, and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT?

Come on, *guess!*

Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through [here](#)

The case is **Tuvell v IBM**, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means that the judge is unethical.

I was going to, as a favor to Walt, because i am a nice guy, show my good faith by addressing his issue *even though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted*. Then I read as much of the entry on his blog—which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case—as I could stand, and realized that Walt is, in technical terms—this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana— a few cherries short of a sundae. This became clear in this passage..

Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/bullying-instigated PTSD, stemming from previous defamatory/abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse.

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court dicuments. This is the first time, however, someone has abused Ethics Alarms for a personal agenda.

I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances.

Walt was also obviously looking for a cheap, as in *free*, expert opinion that he could use in his crusade against the judge.

What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here.

Can you tell that I'm ticked off?

[Reply](#)

Chris
August 28, 2017 at 6:38 pm



Good lord.


[Reply](#)

Jack Marshall
August 28, 2017 at 6:46 pm



My thoughts exactly.

Hal Mirlan
August 27, 2017 at 2:39 pm




Mr. Marshall,

I share your frustration and appreciate your continuing efforts to promote ethical behavior and civility in hopes of preserving American democracy. Please don't give up! Thank you! Hal Morlan

[Reply](#)

Jack Marshall
August 27, 2017 at 2:43 pm



Here is ABC's Sunday talking heads orgy making this single pardon into what it isn't. What is a fair word for this, other than stunning bias? Hysteria?

ABC
This Week
August 27, 2017
9:28:56 AM Eastern

(...)

ROLAND MARTIN: I do not want us to forget what Arpaio did: He racially profiled individuals. I'm not dealing with the politics. He defied a court order, that's what he did. What Trump has been doing is pushing the racial resentment buttons of white Americans from the elections to the present day. He was also in line with the birther who was racist and shameful, his attacks on President Obama. Trump and Arpaio have yet to apologize for that. What is more shameful, are these conservative evangelicals who stand with Trump, who do not condemn inhumane treatment from Arpaio. And that's Paula

White, that's Jerry Farwell Jr., that's Ralph Reed. They are more focused on the p-r-o-f-I-t of the faith, not the p-r-o-p-h-e-t. Be prophetic voices who lead!

MATTHEW DOWD: Just to drop back a little bit on this is – Donald Trump in his desire to destabilize the status quo, which needs reform and all that. Has gone out of his way to decimate the common standards and the attributes of our country and the institutions of our country. Where the last two weeks have demonstrated how much we need the institutions of our government. Charlottesville was a demonstration of on how much we need a president that can heal, that can bring the country together and unify, and not benefit from racial divisions in this. The hurricane that we're in, is a demonstration how important the institutions of the government are. And as and Donald Trump, one after another after another, decimates those institutions, we have an inability as a country to unify and fix it.

GEORGE STEPHANOPOULOS: Jen Psaki, you see lot of Democrats saying in the wake of this Arpaio pardon, that what that really was was a signal to anyone who might be a target of Robert Mueller's investigation, "I've got your back."

JEN PSAKI: Well, yes. And here's why. The process piece of this that should be concerning to people is one, he sought out his attorney general to see if he could get rid of the nasty piece of legal business against his political friend. And two, the Department of Justice was not remotely involved in the pardon, which they've said. That is what is very different from past presidents.

So it just furthers this belief that he lives above the law. That he doesn't think that he's all powerful. That the checks and balances that have been in place for decades, hundreds of years, don't apply to him. And that's concerning to people because people suspect there could be a need for more pardons to come for over political allies.

DOWD: He ran on this law and order candidate and has done his very best to try to dent the law and order of our country and the rule of law.

[Reply](#)

Chris

August 27, 2017 at 3:47 pm



I can't find a single line in there I find inaccurate or over-the-top, Jack.

On the other hand, your false claim that the Obama DOJ ruled the Black Panthers' voter intimidation as "acceptable" is ridiculously over-the-top, has no relation to reality, and is far beneath the standards you have set for this blog.

[Reply](#)

Chris

August 27, 2017 at 3:28 pm



Jack:

There was no similar indignation about contempt for the rule of law when Obama's Justice Department deliberately ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color.

I have much more to say on this thread, but this line really jumped out at me, Jack. **It is blatantly untrue.** This massively misstates both the judgment in this case and the bipartisan process that led up to it. You need to edit to update this article and issue a correction; as long as this lie stands, you are simply confirming your friend's allegation of partisan bias.

Reply

Matthew B

August 27, 2017 at 4:06 pm



Are you saying the US Civil rights administration is lying about the case?

http://www.usccr.gov/NBPH/USCCR_NBPP_report.pdf

Reply

Chris

August 27, 2017 at 4:11 pm



I'm not reading a 232-page document. Point me to the part that supports Jack's claim that the Obama administration, which filed an injunction against one of the Black Panthers in this case, found their actions "acceptable."

Reply

Matthew B

August 27, 2017 at 4:38 pm



Well there is a logic jump necessary. If someone commits illegal actions, and those with the authority to prosecute, do not do so because *they disagree with the enforcement* not because of the strength of the case, it's not a stretch to say that those electing not to prosecute find the conduct "acceptable."

As to where: Start reading 1/2 way down on page 50 and read the next 9 pages. Do you consider it acceptable for African Americans to intimidate voters? Or is it only bad if whites do it? If you are for the latter, you're a disgusting person.

Reply

Chris

August 27, 2017 at 4:43 pm



Well there is a logic jump necessary. If someone commits illegal actions, and those with the authority to prosecute, do not do so

The ringleader of the intimidation **was prosecuted.**

because they disagree with the enforcement not because of the strength of the case, it's not a stretch to say that those electing not to prosecute find the conduct "acceptable."

The Bush administration filed a criminal case against the two Black Panthers, but dropped it. Do you assume that the Bush administration found their actions acceptable?

As to where: Start reading 1/2 way down on page 50 and read the next 9 pages. Do you consider it acceptable for African Americans to intimidate voters? Or is it only bad if whites do it? If you are for the latter, you're a disgusting person.

Do you beat your wife? If so, you are a disgusting person.

[Reply](#)

Matthew B

August 27, 2017 at 5:25 pm



You failed at the fallacy of supposition: It's supposed to read *do you still beat your wife?*

[Reply](#)

Jack Marshall

August 27, 2017 at 5:14 pm



The Panthers were indicted, had already defaulted in their trial by not showing up, and the racist Obama Civil Rights division deliberately withdrew the charge. If that doesn't signal behavior is acceptable, what else do you call it?

[Reply](#)

Chris

August 27, 2017 at 5:26 pm



Where are you getting your info from? The government got a default injunction against

one of the Panthers after he failed to show up. I don't know if that counts as an "indictment," but as far as I know it was never withdrawn. The charge against the other Panther, who was not carrying a nightstick, was withdrawn, but I don't believe he was ever indicted. The case was weak; no voters who claimed to have been intimidated were ever found. By your logic, any time the government withdraws a charge against someone, we can accuse them of finding the underlying behavior behind the charge "acceptable." That isn't reasonable.

[Reply](#)

Jack Marshall

August 27, 2017 at 5:41 pm



The law does not require that voters claim to be intimidated. That's a dodge (not YOUR dodge, but the dodge that was used at the time.) I don't want to relitigate this one again; I wrote about it a lot at the time. It was a pure, race-based decision, with Perez taking the position that blacks doing what whites had been charged with and punished for doing was not worth addressing when the perps were black. This signaled the racial bias that would poison the entire Obama administration for eight years, and sowed the seeds that bloomed into the disastrous racial divide we have now.

This was a per se and undeniable violation.



[Reply](#)

Chris

August 27, 2017 at 5:43 pm



Why did the Bush administration drop their criminal case?

Reply

Jack Marshall

August 27, 2017 at 6:00 pm



Here was the account by J. Christian Adams, a civil rights attorney who resigned from DOJ over the case:

On the day President Obama was elected, armed men wearing the black berets and jackboots of the New Black Panther Party were stationed at the entrance to a polling place in Philadelphia. They brandished a weapon and intimidated voters and poll watchers. After the election, the Justice Department brought a voter-intimidation case against the New Black Panther Party and those armed thugs. I and other Justice attorneys diligently pursued the case and obtained an entry of default after the defendants ignored the charges. Before a final judgment could be entered in May 2009, our superiors ordered us to dismiss the case.

The New Black Panther case was the simplest and most obvious violation of federal law I saw in my Justice Department career. Because of the corrupt nature of the dismissal, statements falsely characterizing the case and, most of all, indefensible orders for the career attorneys not to comply with lawful subpoenas investigating the dismissal, this month I resigned my position as a Department of Justice (DOJ) attorney.

The federal voter-intimidation statutes we used against the New Black Panthers were enacted because America never realized genuine racial equality in elections. Threats of violence characterized elections from the end of the Civil War until the passage of the Voting Rights Act in 1965. Before the Voting Rights Act, blacks seeking the right to vote, and those aiding them, were victims of violence and intimidation. But unlike the Southern legal system, Southern violence did not discriminate. Black voters were slain, as were the white champions of their cause. Some of the bodies were tossed into bogs and in one case in Philadelphia, Miss., they were buried together in an earthen dam.

Based on my firsthand experiences, I believe the dismissal of the Black Panther case was motivated by a lawless hostility toward equal enforcement of the law. Others still within the department share my assessment. The department abetted wrongdoers and abandoned law-abiding citizens victimized by the New Black Panthers. The dismissal raises serious questions about the department's enforcement neutrality in upcoming midterm elections and the subsequent 2012 presidential election.

The U.S. Commission on Civil Rights has opened an investigation into the dismissal and the DOJ's skewed enforcement priorities. Attorneys who brought the case are under subpoena to testify, but the department ordered us to ignore the subpoena, lawlessly placing us in an unacceptable legal limbo.

The assistant attorney general for civil rights, Tom Perez, has testified repeatedly that the "facts and law" did not support this case. That claim is false. If the actions in Philadelphia do not constitute voter intimidation, it is hard to imagine what would, short of an actual outbreak of violence at the polls. Let's all hope this administration has not invited that outcome through the corrupt dismissal.

Most corrupt of all, the lawyers who ordered the dismissal – Loretta King, the Obama-appointed acting head of the Civil Rights Division, and Steve Rosenbaum – did not even read the internal Justice Department memorandums supporting the case and investigation. Just as Attorney General Eric H. Holder Jr. admitted that he did not read the Arizona immigration law before he condemned it, Mr. Rosenbaum admitted that he had not bothered to read the most important department documents detailing the investigative facts and applicable law in the New Black Panther case. Christopher Coates, the former Voting Section chief, was so outraged at this dereliction of responsibility that he actually threw the memos at Mr. Rosenbaum in the meeting where they were discussing the dismissal of the case. The department subsequently removed all of Mr. Coates' responsibilities and sent him to South Carolina.

Mr. Perez also inaccurately testified to the House Judiciary Committee that federal "Rule 11" required the dismissal of the lawsuit. Lawyers know that Rule 11 is an ethical obligation to bring only meritorious claims, and such a charge by Mr. Perez effectively challenges the ethics and professionalism of the five attorneys who commenced the case. Yet the attorneys who brought the case were voting rights experts and would never pursue a frivolous matter. Their experience in election law far surpassed the experience of the officials who ordered the dismissal.

Some have called the actions in Philadelphia an isolated incident, not worthy of federal attention. To the contrary, the Black Panthers in October 2008 announced a nationwide deployment for the election. We had indications that polling-place thugs were deployed elsewhere, not only in November 2008, but also during the Democratic primaries, where they targeted white Hillary Rodham Clinton supporters. In any event, the law clearly prohibits even isolated incidents of voter intimidation.

Others have falsely claimed that no voters were affected. Not only did the evidence rebut this claim, but the law does not require a successful effort to intimidate; it punishes even the attempt.

Most disturbing, the dismissal is part of a creeping lawlessness infusing our government institutions. Citizens would be shocked to learn about the open and pervasive hostility within the Justice Department to bringing civil rights cases against nonwhite defendants on behalf of white victims. Equal enforcement of justice is not a priority of this administration. Open contempt is voiced for these types of cases.

Some of my co-workers argued that the law should not be used against black wrongdoers because of the long history of slavery and segregation. Less charitable individuals called it “payback time.” Incredibly, after the case was dismissed, instructions were given that no more cases against racial minorities like the Black Panther case would be brought by the Voting Section.

Refusing to enforce the law equally means some citizens are protected by the law while others are left to be victimized, depending on their race. Core American principles of equality before the law and freedom from racial discrimination are at risk. Hopefully, equal enforcement of the law is still a point of bipartisan, if not universal, agreement. However, after my experience with the New Black Panther dismissal and the attitudes held by officials in the Civil Rights Division, I am beginning to fear the era of agreement over these core American principles has passed.

[Reply](#)

Chris

August 27, 2017 at 6:02 pm



J. Christian Adams? Seriously?

Why don't I just use Media Matters to rebut him, since we're using biased partisan hacks as trustworthy sources for information now?

I know you can do better than this because I've watched you do better than this.

[Reply](#)

Jack Marshall

August 27, 2017 at 6:23 pm



That's just *ad hominem*, Chris. This occurred before anyone heard of Adams. In part, this episode made him a conservative blogger. He is a lawyer, He testified under oath. His view should be respected. It's what he saw, and how he saw it. That doesn't mean he's right in all respects. he was accurate regarding the process timeline, which was what you asked about, no?

But what he wrote was before OPR (the office of professional responsibility) filed its report, which I wrote about [here](#). I concluded,

One of the reasons the incident generated so many articles is that there were multiple ethical issues involved: the original decision, the media's immediate reaction of assuming the critics were politically motivated, the intellectual dishonesty and deceit of some pro-Administration flacks in describing the incident as "trumped up," the late coverage of the story by papers like the Washington Post, ultimately condemned by the paper's own ombudsman, and more. In my view, the eagerness of the media to bury the story was more disturbing than the allegations themselves.

The OPM report, thorough as always, reviews its investigation and concludes that there was not, in fact, a race-based decision made regarding the two men, and that whether or not the Justice Department made the right call, it was a good faith call that was defensible under the facts.

Case closed. I've read the report, you can too, if you like, [here](#). Already, I have read accusations on various blogs that it is a whitewash: this is utter nonsense. OPM is independent, and exists to root out unethical attorney conduct in the U.S. Government, not to protect it. The report is thorough, covers all sides and allegations, and is scrupulously fair.

The fact that the allegations were shown to be unsupportable, however, does not in any way vindicate those who tried to ignore the seriousness of the allegations and pretend that there was nothing to investigate. There was a *prima facie* case of biased enforcement that, like many *prima facie* cases prosecuted every day, could not be proven with the available evidence. I continue to believe, having read the report, that while the handling of the case was not unethical and was in good faith, it was spectacularly stupid, and unnecessarily sowed distrust in the

Obama Justice Department.

That was written 6 years ago. Now that I have seen how the Justice Department behaved in the following years, I'm less sanguine about the OPR report. I wouldn't call it a whitewash, but it relied on the good faith of Perez and others, and I have learned that Perez especially should not be trusted.

Chris

August 27, 2017 at 6:43 pm



Jack, if I cited Media Matters to rebut you, I'd expect you wouldn't waste your time reading it. That's how I feel about Adams. Call that ad hominem all you like; I've read his accounts of the incident before, and I have come to the conclusion that he's a dishonest person.

Your previous analysis is far more fair, and I don't think you've provided anything to support your claim in this article that the DOJ "ruled that club-wielding Black Panthers intimidating voters at a Philadelphia polling place in 2008 was acceptable, because of their color."

If a lefty responded to Trump's pardoning of Arpaio by saying "Trump ruled that Arpaio's targeting of Latinos was acceptable, because of their color," you'd take that as evidence of Trump Derangement Syndrome. And yet you fall into Obama Derangement Syndrome here.

Jack Marshall

August 28, 2017 at 9:03 am



No, actually I'm pretty sure Trump does think profiling Hispanics to find illegal immigrants is acceptable, and that is one of the messages the pardon sends. Just like Obama pardoning drug sellers in part sends the message that drug use is acceptable. Anytime anyone is pardoned, there are ancillary messages, real or perceived.

Chris

August 28, 2017 at 9:23 am



Fair response, Jack, but the Black Panthers were not pardoned.

Chris marschner

August 27, 2017 at 9:34 pm



Page 92. Doj filed suit. Not contested by Shabazz. Court issues default judgement for DOJ then DOJ withdraws dropping all sanctions

[Reply](#)

Chris

August 27, 2017 at 11:17 pm



No, they did not drop *all* sanctions, and page 92 doesn't say they did.

[Reply](#)

Chris

August 27, 2017 at 3:44 pm



The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had, I would have treated that breach of theater ethics exactly as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

I have no doubt this is true.

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

I have no doubt this is true.

But when Don Trump Jr. was caught red-handed attempting to get dirt on Hillary Clinton from what he was told was the Russian government, you said it was no big deal.

then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation.

I have no doubt this is true.

But when Donald Trump decided to boycott the White House Correspondents' Dinner, you said this was an ethical decision.

If conservatives were trying to limit free speech according to what they considered "hateful," a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven't advocated such restrictions, however.

Conservatives have also advocated many restrictions on free speech. For instance, the ban on doctors asking about guns in Florida. Threats to take away funding for colleges that perform plays conservatives don't like. Trump's threat to open up the libel laws.

What was the party—there was just one— of the mayors who announced that citizens holding certain views should get out of town?

What party was the president who said that citizens who protested against him should be investigated? What party was the president who said the press was "the enemy of the people," which you called an ethical statement?

I have no doubt that you would have condemned Republicans for doing the same things the Democrats did in the statements above. I also have no doubt that if Democrats did some of the things I just talked about Republicans doing, you would have absolutely condemned them, even though you did not condemn the Republicans in those cases. If Chelsea Clinton had attended a meeting with the expectation that she was going to get damning intel on Trump from the Russian government, I think you would see that as a major scandal. If President Obama had refused to attend the WHCA because Fox News would be there, and called them "the enemy of the people," I think you would have seen that as a threat to the First Amendment and evidence of an embarrassingly thin skin.

So I think that while the reader who e-mailed you is overstating their case, you do show evidence of a bias against the Left.

~~*2. I'm still awaiting the apologies and acknowledgement of my predictive abilities from all of my friends who chided me for suggesting that the Confederate flag and statuary-focused historical airbrushing mania would shoot down the slippery slope to threaten the Founders and more. CNN political commentator and former Congressional Black Caucus director Angela Rye proclaimed on*~~

CNN that the country must tear down all memorials and likenesses of George Washington and Thomas Jefferson. Rye said on CNN that "George Washington was a slaveowner. Whether we think they were protecting American freedom or not, he wasn't protecting my freedom."

Her ignorance and arrogance is staggering. Naturally, no one on CNN had the integrity, historical perspective, courage or wit to explain why her position is destructive and foolish. Hey, but it's all right! There's no slippery slope!

That a few people start making dumb arguments using the same talking points as other, better arguments, does not mean that the worst-case scenarios of a slippery slope will come to pass. There are pedophiles who use similar talking points as the LGBT community used to argue that pedophilia should be legalized. Does that mean gay rights are a "slippery slope" that naturally lead to tolerance of pedophilia?

3. Now here's a rant:

As I explained in the previous post, the President's pardon of anti-immigration zealot Joe Arpaio was ill-considered and a poor use of the pardon power. To say, however, that the attacks on it are wildly disproportionate to its actual impact is an epic understatement. The crime Arpaio was convicted of is a misdemeanor. The sentence is light. He is 85 years old, and there is no chance of him repeating the crime—criminal contempt—or doing any further harm, other than shooting off his mouth, Joe's specialty.

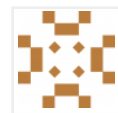
The response isn't about what Joe has been convicted of, it's about everything he's gotten away with. He faked an assassination attempt against himself. He tortured people in his jails. Dozens of people died in his jails as a result of the conditions. He ignored sex crimes to focus on targeting Latinos. He had critics arrested. Trump's pardon of Arpaio signals his approval of all of this.

Yes, the pardon was legal, and liberals who say otherwise are idiots. But outrage is absolutely appropriate here.

[Reply](#)

Isaac

August 27, 2017 at 9:25 pm



Sure, the minimum amount of outrage, maybe. It's pretty well accepted now that Presidents pardon people who are convicted of crimes. That's kinda the point.

You may recall that Bill Clinton pardoned over 400 convicted criminals, including his scoundrel brother (who proceeded to go out and drive drunk within a year), people who fell on their sword to protect him in the Whitewater scandal, terrorist bombers, tax frauds, Democrat Congressman child pornographers and embezzlers from the government, a guy who stole millions of dollars that was supposed to go to starving people in Iraq, various people who had given Bill and his wife money over the years, friends, associates, kidnappers, drug cartel guys, money launderers, etc.

Either you want the President to be able to pardon people, or you don't. But we're WAY past accepting that a President might use the power of the pardon in a myriad of shady and unethical ways. Clinton pretty much covered the entire spectrum of them, and was (after a lot of handwringing) found to have been within his rights.

[Reply](#)

Red Pill Ethics

August 28, 2017 at 9:34 am



I'm gonna be honest I only skimmed this response but at least aprt of it was so wrong that I felt compelled to respond.

"Conservatives have also advocated many restrictions on free speech. For instance, the ban on doctors asking about guns in Florida. Threats to take away funding for colleges that perform plays conservatives don't like. Trump's threat to open up the libel laws."

No conservatives don't advocate restrictions of free speech you hack. This is a blatant mischaracterization. A single state (my home state of Florida) passed a stupid bill that censored a single extremely narrow and easily identifiable topic. That law was subsequently struck down with absolutely no protest or rioting from the right. That's a *far* cry from the comically vague hate speech that mayors, governers, congressmen, senators, and the base from every corner of liberal America actively push for and occasionally riot over when they don't get their way. I also recall that Jack criticized the law here.

I'm not familiar with the theater thing and I threw a few google searches at with nothing to show for it. If you shoot me a link I'll check it out.

As for Trump's libel nonsense, I'll also need a link but I can guess what it was about. In the end though Trump is Trump and actions speak louder than his half formed thoughts. What actions has he taken to stifle freedom of speech in the US and when have those actions been widely embraced by the conservative base? I'm betting not a lot and hardly ever. Compare that to the Obama's administration where the hate speech witch hunt would occasionally rear it's ugly head to thunderous applause from across the left.

[Reply](#)

Chris

August 28, 2017 at 2:55 pm



No conservatives don't advocate restrictions of free speech you hack

...I just showed you that they have, and in response, you didn't provide any argument that they haven't; you just said they haven't done so to the same degree as the left. I agree.

Let me repeat that: I agree that the majority of threats to free speech, at this moment in time, are coming from the left.

[Reply](#)

Matthew B

August 27, 2017 at 3:46 pm



Mike Rowe (of "Dirty Job" fame) recently dealt with a similar attack where he was accused of being a white supremacist in a massive logical fallacy. His response is pretty impressive:

<https://www.facebook.com/TheRealMikeRowe/posts/1639271342749669>

This is truly a derangement syndrome on the part of many people. They've had all logical reasoning overridden by emotion and can't discuss anything rationally.

[Reply](#)

Wayne

August 27, 2017 at 4:02 pm



Jack I dedicate this song to the mainstream media, the Democratic Party, NEA, and liberal academics everywhere:

Honesty Billy Joel



[Reply](#)

#2

walttuvell

August 27, 2017 at 5:18 pm



Right, Jack, you don't "wear your credentials on your sleeve," to your credit, which I generally agree with (though your bio does indicate you're a "Harvie (Harvard)," whereas I'm a "Techie (MIT)"). I only appended the "not-a-crank disclaimer" as a prophylactic, because "on the Internet, nobody knows you're a dog" (https://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you%27re_a_dog). The point being, that some sort of cred-establishment is more-or-less required upon an initial encounter, esp. on the Internet, where "everybody is a troll, until proven otherwise" (just like in Court, "everybody is a liar, until proven otherwise").

Reply

Jack Marshall

August 27, 2017 at 5:29 pm



I know. Sorry, I was teasing. I am unusually anti-credentials. Some of the wisest, smartest people I know have none, and some of the biggest fools have an alphabet after their names. I am also disgusted with scholars, academics and alleged smart people right now. I shouldn't have taken it out on you.

I apologize, Walt; you didn't deserve the snark,

Just for that, you can call me partisan again.

Reply

Sue Dunim

August 27, 2017 at 8:14 pm



Partisan? I'll call you a Glaive, or a Guisarme!

Reply

Steve-O-in-NJ

August 28, 2017 at 10:22 am



You've just been poleaxed.

Reply

Eternal optometrist

August 27, 2017 at 9:47 pm



In court, a person is not a liar until proven otherwise. In fact, just the opposite. There are jury instructions that you should assume witnesses are telling the truth until you have evidence to the contrary.

[Reply](#)

#3

walttuvell

August 28, 2017 at 7:26 am

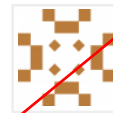


Are you, perhaps, referring to the aphorism (not “jury instruction”) that “the accused is presumed innocent until proven guilty” (https://en.wikipedia.org/wiki/Presumption_of_innocence)? If so, then you’re misinterpreting what I (intended to) say, and we’re actually in agreement. For, what we’re both saying amounts to “the burden of proof is on the prosecution/claimant” — i.e., “the prosecutor/claimant (not the accused) is presumed to be lying, until they provide proof of what they’re saying (to some standard, e.g., ‘beyond a reasonable doubt’).”

[Reply](#)

Isaac

August 27, 2017 at 5:31 pm



It WOULD be nice if we could claim a moral equivalency and not have to single out one side for most of the outlandish behavior. It would be nice, if:

- Thousands of conservative rioters, most of whom didn’t even vote, had wrecked several American cities in anger after the election of President Obama.
- Millions of Men’s Right’s Activist alt-righters had swarmed Washington and other large cities with their junk hanging out, dragging kids along and holding nasty signs, wearing penis-hats, and then left mountains of trash and junk all over the streets for public servants to clean up.
- Thousands of people were dying in cruel attacks all over the world perpetuated by Bible-thumping, Christian fundamentalists, targeting completely innocent families and children. And with the tacit approval of somewhere between 15-35% of all self-identifying Christians. And with Rightist politicians, local governments, and celebrities insisting that being too concerned about this was definitely anti-Christian and therefore racist.
- Universities and corporations were singling out Left-wing points of view, even fairly moderate ones, and banning them from public platforms under flimsy pretenses.
- Right-wingers were using major news outlets to campaign against the very idea of free speech and a marketplace of ideas, insisting that the government and corporations should be allowed to decide

arbitrarily what ideas and people should be allowed to be heard.

-The Tea Party was pooping on police cars, blocking streets, and hiding rapes within their ranks from the police, instead of just having a bunch of potlucks and peaceful meetings.

If THAT were the case, than I wouldn't have to look like a "partisan hack" for pointing out the obvious: that there are massive differences in scale between the crazy Right and the crazy Left right now.

Reply

Wayne

August 27, 2017 at 7:16 pm



Hahaha, this is pretty good sarcasm!

Reply

texaggo4

August 28, 2017 at 9:39 am



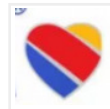
I don't it was sarcasm. It's a valid point made that the vast majority of political misbehavior since Trump's election has been from the Left.

And the Left does not care.

Reply

slickwilly

September 12, 2017 at 1:22 pm



AND they say the right 'acts just like that'

Reply