July 2015

The Right to Republish Libel: Neutral Reportage and the Reasonable Reader

David McCraw

THE RIGHT TO REPUBLISH LIBEL: NEUTRAL REPORTAGE AND THE REASONABLE READER

by

DAVID MCCRAW*

INTRODUCTION

For nearly a decade and a half, the neutral reportage privilege has been a source of contradiction and confusion in the law of defamation. The doctrine was first recognized in 1977, in *Edwards v. National Audubon Society, Inc.*,[1] when the Second Circuit held that the U.S. Constitution protects a newspaper's republication of defamatory accusations against a public figure in controversies of public interest, even when the reporter knows that the accusations are false.[2] The ruling stands in contrast both to the common law's long tradition of holding the republisher of defamation equally liable with the originator of the defamation[3] and to Supreme Court precedents holding that the First Amendment does not protect media defendants who knowingly publish false and defamatory allegations.[4] Since then, the federal circuits and state courts have been unable to agree either on whether the privilege exists as a matter of constitutional law[5] or on the extent of its protection.[6] The Supreme Court denied certiorari in *Edwards*[7] and

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* Director of Journalism, Marist College, Poughkeepsie, N.Y., B.S., University of Illinois; M.P.S., Cornell University; J.D., Albany Law School. The author thanks Professor Steven Gottlieb of Albany Law School for his assistance with earlier drafts of this Article.

[1] 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

[2] *Id.* at 120.

[3] L. ELDREDGE, THE LAW OF DEFAMATION § 44 (1978). Over time, the common law did come to protect republication of defamatory statements made as part of certain governmental proceedings under the doctrine of fair report. *See* Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102 (1964). The neutral reportage doctrine, in contrast, does not require that the statement be made in a governmental context.

[4] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See infra* notes 57-58 and accompanying text.

[5] The *Edwards* holding has been rejected in Dickey v. Columbia Broadcast System, Inc., 583 F.2d 1221 (3d Cir. 1978); Tunney v. American Broadcasting Co., 109 Ill. App. 3d 769, N.E.2d 86 (1982); McCall v. Courier-Journal, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Postill v. Booth Newspapers, 118 Mich. App. 608, 325 N.W.2d 511 (1982); Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836, *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982).

It has been adopted in such cases as Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990), *reh'g denied*, 110 S. Ct. 1312 (1990); Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984); Huszar v. Gross, 468 So. 2d 512 (Fla. Dist. Ct. App. 1985); J.V. Peters & Co. v. Knight Ridder Co., 10 Media L.Rptr. 1576 (Ohio Ct. App. 1984); Burns v. Times Argus Ass'n, Inc. 139 Vt. 381, 430 A.2d 773 (Vt. 1981).

[6] *See, e.g.*, Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980); Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977); Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984); and *infra* notes 42-53 and accompanying text.

[7] 434 U.S. 1002 (1977).

has never ruled in a case in which the neutral reportage principle was directly implicated.[8]

In *Harte-Hanks Communications, Inc. v. Connaughton*,[9] however, the Supreme Court appeared to signal a willingness to resolve the uncertainty of the doctrine. Justice Blackmun's concurrence specifically criticizes the defense's strategic decision to drop its neutral reportage defense on appeal and suggests the case would have offered the Court an appropriate opportunity to review the doctrine.[10] It is perhaps significant as well that Justice Stevens, writing for the majority, uses footnote 1 to summarize the trial court's decision on the neutral reportage privilege even though the defense had not raised the issue for Supreme Court review.[11]

Supreme Court resolution of the neutral reportage debate would provide welcome clarity not only for the courts but for media decision-makers who must shape their conduct to the current contours of First Amendment interpretation. A review of lower court decisions shows that the neutral reportage privilege poses two broad policy and conceptual problems. First, is the privilege incompatible with *Gertz v. Robert Welch, Inc.*,[12] in which the Court held that the public or private status of the plaintiff -- and not the newsworthiness of the subject matter -- determines the constitutional protection afforded to the media?[13]

Second, is the privilege needed as a matter of public policy? In other words, is any additional First Amendment protection beyond that allowed by *New York Times Co. v. Sullivan*[14] and its progeny required to provide the "uninhibited, robust, and wide-open"[15] debate envisioned by the first amendment? As with any libel doctrine, that protection must be balanced against society's legitimate interest in protecting individuals against reputational injury.

This Article argues for a reconsideration and redefinition of the neutral reportage privilege. First, even if we accept *Gertz's* disapproval of newsworthi-

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[7] 434 U.S. 1002 (1977).

[8] *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 694 (1989) (Blackmun, J., concurring).

[9] 491 U.S. 657 (1989).

[10] "This strategic decision appears to have been unwise in light of the facts of this case....Were this court to adopt the neutral reportage theory, the facts of this case arguably might fit within it." *Id.* at 694 (Blackmun, J., concurring).

[11] *Id.* at 660 n.1.

[12] 418 U.S. 323 (1974).

[13] *Id.* at 347-51.

[14] 376 U.S. 254 (1964).

[15] *Id.* at 270.

ness as a criterion for First Amendment protection,[16] a closer look at the neutral reportage privilege reveals that, contrary to what many courts and commentators have said, newsworthiness is not a necessary element of the privilege. *Gertz* is thus inapplicable. Second, the more serious problems with the neutral reportage privilege arise from its advocates' failure to define what constitutes "neutrality"--in other words, to define what conduct by the reporter should legitimately give rise to immunity from libel actions. What level of reportorial diligence is required? What state of mind? What must be published in the story? No coherent scheme for answering these questions appears in the decisions or literature supporting the privilege.

But that failure need not be fatal to the doctrine. What is needed is a "reader-centered" definition of neutral reportage -- one in which the courts look at what readers could reasonably believe about the parties mentioned in the story, based on the story itself. That approach, contrary to the modern trend in libel litigation since *Times v. Sullivan,* focuses attention not on a reporter's conduct in *gathering* information (e.g., did the reporter act with actual malice?) but on the reporter's conduct in *selecting and presenting* information in the story. The reader-centered approach returns the focus of libel litigation to the often-overlooked question that should rightfully be at the center of the tort: Did the story cause reputational harm?

The neutral reportage privilege strikes an appropriate balance between the underlying policies of First Amendment liberty and society's legitimate interest in protecting citizens' reputations. In so doing, it helps move libel jurisprudence away from the flawed approach of *Times v. Sullivan* with its misplaced emphasis on reportorial methods.

THE EVOLUTION OF THE NEUTRAL REPORTAGE PRIVILEGE

If the history of the neutral reportage privilege has been marked by uncertainty and skepticism, much of the blame can be attributed to the uncertain foundation laid for it in the Second Circuit's *Edwards* decision.[17] In *Edwards,* The New York Times reported that a publication put out by the National Audubon Society had criticized certain scientists as "paid liars" for their support of the chemical industry in the controversy over the pesticide DDT.[18] The Audubon Society's publication mentioned no scientist by name in its editorial, but

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[16] *See infra* notes 66-70 and accompanying text.

[17] *See* Note, Edwards v. National Audubon Society, Inc.: *The Right to Print Known Falsehoods*, 1979 U. ILL. L.F. 943, 965-66 (criticizing the decision for failing to show that it is a natural extension of common law privilege); Bowles, *Neutral Reportage as a Defense Against Republishing Libel*, 11 COMM. & THE LAW 3, 9 Mar. 1989 ("the lack of a uniformly accepted theoretical basis for the doctrine has resulted in its uneven application").

[18] *Edwards*, 556 F.2d. at 117.

a Times reporter upon seeing the accusations phoned Audubon Society employees and in time persuaded them to name some of the researchers in question.[19] The subsequent Times story contained the Audubon Society's accusation, the names provided, and denials from the scientists, three of whom became the plaintiffs in *Edwards*.[20] At trial, the plaintiffs argued that the Times reporter had a duty to attempt to determine whether the "paid liar" accusation was true and that he had ignored information showing that at least two of the plaintiff scientists were not employed by the pesticide industry in any capacity.[21]

The jury found that the Times had acted with actual malice, the level of fault required by *Times v. Sullivan* for assessing libel damages in a case involving a public-figure plaintiff.[22] On appeal, the Second Circuit, with Chief Judge Irving R. Kaufman writing, held not only that the finding of actual malice was in error[23] but that, in the circumstances presented by the case, a constitutional privilege of neutral republication protected the Times, even if actual malice was to be conceded.[24] The court held: "Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity."[25] The court went on to explain that "(t)he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them."[26] Thus, the court offered constitutional immunity from defamation action to publications that could show (1) the allegations were made by a "responsible, prominent organization"; (2) the target of the allegations was a public figure; (3) the republication was done accurately and neutrally; and (4) the allegations were made in the context of a controversy existing prior to publication.[27]

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[19] *Id.*

[20] *Id.* at 118.

[21] Edwards v. National Audubon Society, Inc., 423 F. Supp. 516, 518 (S.D.N.Y. 1976), *rev'd*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977). The reporter was also furnished with the names of sources with whom he could have checked the allegation. *Id.* On appeal, the Second Circuit ruled the evidence was insufficient to support a finding of actual malice. Edwards v. National Audubon Society, Inc. 556 F.2d at 120. "We do not believe . . . that the scientists' responses to Devlin's [the reporter's] inquiries could be found sufficient to warn Devlin of the probable falsity of the Society's charges." *Id.* at 121.

[22] *Id.* at 119.

[23] *Id.* at 120. *See supra* note 21.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 120-22.

In effect, the court was adding a further layer of "breathing space" to the *Times v. Sullivan* decision. In *Times*, the Supreme Court had held that a certain amount of defamation that would otherwise be actionable must be tolerated in state libel laws to give journalists the needed freedom to discuss public events without undue fear of legal consequences if they err.[28] The *Edwards* court did note, however, that a republisher who deliberately distorts the charges or who "espouses or concurs in the charges"[29] would not gain the benefit of the privilege's protection.[30]

From the beginning, the legal foundation of the *Edwards* ruling was suspect. The court cited two cases as authority for the neutral reportage privilege: *Time, Inc. v. Pape*[31] and *Medina v. Time, Inc.*[32] Neither case, in fact, speaks to the issue of neutral reportage.[33] Nor do the decisions attempt to justify the privilege by explicit reference to the core values underlying the First Amendment, the jurisprudential strategy used in *Times v. Sullivan* and other groundbreaking decisions in the area of defamation.

The legal foundation of the neutral reportage privilege was further eroded three years later by the Second Circuit itself in *Cianci v. New Times Publishing Co.*[34] The court, this time with Judge Friendly writing, gave a restrained endorsement to the *Edwards* ruling while acknowledging that the neutral reportage

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[28] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[29] Edwards v. National Audubon Society, Inc., 556 F.2d at 120.

[30] *Id.*

[31] 401 U.S. 279 (1971), *reh'g denied*, 401 U.S. 1015 (1971).

[32] 439 F.2d 1129 (1st Cir. 1971).

[33] *See, e.g.*, Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 501-508 (1979); Barry v. Time, Inc., 584 F. Supp. 1110, 1123 n.15 (N.D. Cal. 1984). In *Pape*, Time accurately republished excerpts from a government report on police brutality but failed to make clear that comments concerning police officer Pape were merely allegations. The Court held that Time had not acted with actual malice, and thus the plaintiff had not made a *prima facie* case. Time, Inc. v. Pape, 401 U.S. 279, 285 (1971), *reh'g denied*, 401 U.S. 1015 (1971). In *Medina*, the Court again found that Time had not acted with actual malice in republishing an allegation, this one arising from charges that an officer in Vietnam had killed a Vietnamese child. Medina v. Time, Inc., 439 F.2d 1129, 1130 (1st Cir. 1971). The important distinction between these two cases and neutral reportage theory is that in the latter the journalists are constitutionally protected even if they have acted with actual malice (that is, they knew the allegations they were republishing were false). By finding an absence of malice, the courts in *Pape* and *Medina* did not arrive at the issue of special privileges for republishers.

It should be noted as well that *Pape* is sometimes cited as creating a constitutional privilege of fair report, but Sowle convincingly refutes that reading of the case. Sowle, *supra*, at 501. The fair report privilege, which allows journalists to republish defamatory statements made in certain governmental forums, has been long recognized at common law but has not been established as a matter of constitutional law. *See infra* note 159 and accompanying text. The neutral reportage privilege differs from fair report in that it would encompass certain defamatory statements made outside governmental forums.

[34] 639 F.2d 54 (2d Cir. 1980). The court held that a magazine's allegations that the mayor of Providence, R.I., had bought off a witness against him in a rape case were not protected by the neutral reportage privilege because the magazine endorsed the allegations as fact rather than remaining neutral. *Id.* at 69.

privilege went beyond both the established common law privilege of fair report--which protected republication of defamatory statements only if they were made as part of certain governmental proceedings[35] -- and the Supreme Court's First Amendment interpretations -- which have held that in covering public figures reporters enjoy constitutional protection from libel liability only when they act without actual malice -- that is, their conduct does not exhibit a reckless disregard for the truth or falsity of the information published.[36] The neutral reportage privilege, to the contrary, provides immunity even when the journalist knows the allegations are false.

The court nonetheless maintained that *Edwards* was still good law in the Second Circuit, but held that the contours of the neutral reportage privilege had not yet been fully defined and that the limited scope of the privilege necessitated a case-by-case examination of the facts.[37]

Thus, those courts choosing to accept the doctrine were left with the task of spelling out its bounds as well as defending its constitutional status despite an absence of Supreme Court precedent. *Barry v. Time, Inc.*[38] offers one of the most expansive and favorable judicial discussions of neutral reportage as a constitutional doctrine. *Barry* involved a controversy surrounding a college basketball coach. The court found that *Edwards* could be reconciled with existing Supreme Court precedents and that, combined, they established a two-part inquiry.[39] The courts should first determine whether the plaintiff is a public figure and whether the alleged defamation concerns his or her status as a public figure, as required under the Supreme Court's decision in *Gertz*.[40] After that, the court said, *Edwards* merely required courts to take a second step and "assess whether the defamer is a party to the controversy and whether the report is accurate and neutral."[41] If those requirements were met, the privilege applied.

Yet, even in those jurisdictions accepting the neutral reportage privilege, courts have struggled with some of the specific language of *Edwards*. The judge

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[35] *Id.* at 67. The common law privilege of fair report is intended to promote full coverage of trials and legislative proceedings. Both the originator of the defamatory statement and the republisher are protected, but at early common law the republisher was held to be absolutely liable for correctly reproducing the statement. Sowles, *supra* note 33. Neutral reportage, as defined by *Edwards*, does not require that the statement be made in a governmental context.

[36] The Supreme Court has not recognized either the fair report or the neutral reportage privilege as constitutional law, preferring to carve out protection for the press by defining the level of fault that must be shown by the plaintiff under the First Amendment. Sowle, *supra* note 33. Public figure plaintiffs must show that the defendant acted with actual malice. New York Times Co v. Sullivan, 376 U.S. 254 (1964).

[37] *Cianci*, 639 F.2d at 68.

[38] 584 F. Supp. 1110 (N.D. Cal. 1984).

[39] *Id.* at 1125.

[40] *Id.* For a discussion of *Gertz*, *see infra* notes 66-70 and accompanying text.

[41] 584 F. Supp. at 1125.

in *Barry* struck down the requirement that the accuser be an organization,[42] and he also took issue with the Second Circuit's requirement that the accuser be "responsible" and "prominent."[43] Instead, he advocated that the courts drop any requirements of accuser trustworthiness as elements of the privilege.[44] Because the statements were not being reported for their potential truthfulness, but to give the public a full account of a controversy of legitimate public concern, the significant question, according to *Barry*, is whether the defamatory allegations were published neutrally.[45] Among the factors the court found relevant were the publication of the plaintiff's denials and the revelations, also in the original story, of the accuser's questionable credibility.[46] Other jurisdictions, contrary to *Barry*, have held that trustworthiness is a central component in determining when the privilege will be applicable.[47]

The courts have also split on other aspects of the *Edwards* test, including the role of the reporter. At least one federal court has ruled that the privilege does not extend to defamations arising from investigative reporting,[48] while another extended the privilege to statements made in an interview.[49] The crucial dividing line appeared to be whether a controvery existed prior to the reporter's activities.[50] The implication is that a reporter who solicits the allegation no longer can be considered a neutral observer for the purposes of the privilege.

NEUTRAL REPORTAGE UNDER ATTACK

While courts embracing the neutral reportage privilege have struggled to define its contours, other jurisdictions have rejected it in toto.[51] The result has been conflicting laws not only state by state and circuit by circuit, but even within

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[42] *Id.*

[43] *Id.* at 1126.

[44] *Id.* ("A much more sensible approach is to extend the neutral reportage privilege to *all* republications of serious charges made by one participant in an existing public controversy against another participant in that controversy, regardless of the "trustworthiness" of the original defamer") (emphasis in original). *Id.* The court justifies this extension by referring to the privilege's underlying public policy of "providing the public with 'full information' about public controversies." *Id.* The accuser in *Barry* was a convicted felon who failed a lie detector test. *Id.* at 1127.

[45] *Id.*

[46] *Id.*

[47] *See, e.g.*, Fogus v. Capital Cities Media, Inc., 111 Ill. App. 3d 1060, 444 N.E.2d 1100 (Ill. App. Ct. 1982) (holding that "unnamed youths" did not qualify as a "responsible, prominent organization" in a story alleging police brutality); J.V. Peters & Co. v. Knight Ridder Co., 10 Media L. Rptr. 1576 (Ohio Ct. App. 1984) (holding that the state attorney general's office was a responsible organization).

[48] McManus v. Doubleday & Co., 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981).

[49] Woods v. Evansville Press Co., 11 Media L. Rptr. 2201, 2204 (S.D. Ind. 1985), *aff'd*, 791 F.2d. 480 (7th Cir. 1986).

[50] Bowles, *supra* note 17, at 15.

[51] *See infra* notes 72-77 and accompanying text.

overlapping jurisdictions. Such is the case in New York, where the New York Court of Appeals has rejected neutral reportage[52] but the Second Circuit continues to recognize it in federal courts sitting within the state.[53]

Courts unwilling to embrace neutral reportage as constitutional law have typically set forth two arguments:[54] First, they assert that the doctrine is incompatible with the Supreme Court's holding in *Gertz* that the newsworthiness of a story is not to be used in determining the level of First Amendment protection afforded media defendants.[55] Such an objection is based on the theory that the neutral reportage privilege applies only when the controversy being publicized is newsworthy. Second, some courts have held that the neutral reportage privilege is unnecessary because the protection provided by the Supreme Court's "actual malice" standard in *Times v. Sullivan* and its progeny adequately safeguards the media's First Amendment liberty.[56]

Times v. Sullivan and *Gertz* mark the beginning and end of the most important 10-year period of Supreme Court litigation on the application of the First Amendment to state libel statutes. In *Times v. Sullivan*,[57] the Court overturned its own precedents and the long history of defamation litigation by ruling that libel fell within the purview of the First Amendment and was not merely a matter of state law.[58] In the view of the Court, state libel laws that held media outlets responsible for all statements that were false and defamatory unconstitutionally restrained the press by failing to give the media room to err in

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[52] Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836 (1982), *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982). The defendant newspaper, which reported allegations of criminal activity on the part of a politician's son, argued that it should be protected from a libel claim by the neutral reportage doctrine. The court ruled that the doctrine could not be squared with the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which held that the public or private status of the defendants, and not the content of the allegedly defamatory publication, determines the extent of first amendment protection provided to the press. *Hogan*, 84 A.D. 2d at 478, 446 N.Y.S. at 842.

[53] *See* Cantwell, *The Controversy over Media Reporting of Public Disputes*, 60 N.Y. ST. B.J. 22 (Apr. 1988). Neutral reportage makes for an interesting conflict-of-law issue. While the federal courts, under the *Erie* doctrine, are to apply the substantive law of the state, the Second Circuit continues to rely on *Edwards* as constitutional law that necessarily supercedes any state law. *Id.* at 24. The state courts, on the other hand, refuse to acknowledge neutral reportage as constitutional doctrine in the absence of a Supreme Court ruling. *Id.* at 24-25.

[54] Barry v. Time, Inc., 584 F. Supp. 1110, 1124 (N.D. Cal. 1984).

[55] *Id.*

[56] *Id.*

[57] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[58] *See e.g.*, Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, for a discussion of the case's significance. The case originated from an advertisement placed in The New York Times by civil rights activists. *Times*, 376 U.S. at 256. L.B. Sullivan, a police commissioner in Montgomery, Ala., claimed the ad's discussion of police activities during a civil rights demonstration libeled him. *Id.*

their coverage of public affairs.[59] The Court's concern was that stringent libel laws created self-censorship among members of the press and thus frustrated the purposes of the First Amendment by restricting the flow of information to society.[60] Thus, the Court held that in cases involving public officials as plaintiffs, media defendants would not be found liable, even if the story was false and defamatory, unless the defendants acted with actual malice -- i.e., the defendants knew the story was false or displayed a reckless disregard for whether it was true or false.[61] The actual malice standard was later extended to public figures as well.[62] Then in *Rosenbloom v. Metromedia, Inc.*,[63] a plurality of the Court held that the actual malice standard should not hinge on the public status of the plaintiff but on whether the allegedly defamatory publication concerned a matter of public interest.[64] Under *Rosenbloom*, a plaintiff, whether public or private, who was defamed in an article on a topic of public concern could not prevail in a libel suit unless actual malice was shown, even if the story was both false and harmful.[65] The decision provided the broadest scope given to the First Amendment in the area of defamation and clearly indicated the willingness of at least part of the Court to tilt the balance of competing interests heavily toward press liberty and away from protection of reputation.

Gertz v Robert Welch, Inc.,[66] which came only three years later, marked a hasty retreat from *Rosenbloom* and a return to the original schema of public plaintiffs (who must show actual malice) versus private plaintiffs (who will be allowed to show a lesser degree of fault, such as negligence).[67] The Court expressed concern that the *Rosenbloom* approach lent insufficient reputational protection to private individuals who had not voluntarily placed themselves before the public[68] and that the determination of whether a publication was of public interest would pose great difficulty for the courts.[69] As expressed in a later case: "Use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an

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[59] *Times*, 376 U.S. at 271-72 ("erroneous statement is inevitable in free debate" and must be protected to provide needed "breathing space").

[60] *Id.* at 276.

[61] *Id.* at 279-80. In effect, the ruling meant that even a story that was false and defamatory would not lead to compensation if the plaintiff was a public official who could not prove actual malice.

[62] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967) (overruled by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[63] 403 U.S. 29 (1971).

[64] *Id.*

[65] *Id.*

[66] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[67] *Id.* at 346. The case was brought by a criminal defense lawyer who was labeled a communist in a publication of the ultraconservative John Birch Society. *Id.* at 325-26.

[68] *Id.* at 344.

[69] *Id.* at 346.

improper balance between. . .the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances."[70]

Because *Edwards* has been read to use the newsworthiness of the controversy[71] -- and not the status of the plaintiff as a public figure -- as the determinative factor for applying the privilege, some courts have construed the *Edwards* approach as using a subject-matter classification to determine First Amendment protection, contrary to the ruling in *Gertz*.[72] In the leading New York case, for example, the court said: "The unequivocal holding of *Gertz* is that a publisher's immunity is based upon the status of the plaintiff, not the subject matter of the publication. Presumably, all publications of the news media are newsworthy. They are not privileged, however, (unless they meet the standards of *Times* and *Gertz*)."[73]

Other courts have questioned why protection beyond the actual malice standard of *Times* is needed by the press.[74] The Supreme Court in *Times* intentionally placed a substantial burden on libel plaintiffs and, in effect, recognized that defamation of many public figures should go uncompensated as part of the price to be paid for an informed democracy.[75] Because of the broad reach of *Times* and its progeny, in many cases (e.g., *Edwards*), neutral reportage will simply be alternative grounds for finding for the defendant because plaintiff will have failed to make the requisite showing of actual malice. Neutral reportage, however, would be the sole source of constitutional protection in cases in which the reporter knew (or should have known) that a defamatory statement uttered in a public controversy was false and wished to publish it anyway.[76] *Edwards* saw social value in reporting such statements simply because they were made, but other courts and commentators have argued that neutral reportage, in going beyond the actual-malice test, underprotects the reputational interest of

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[70] Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976).

[71] The *Edwards* court's statement of the neutral reportage privilege does not use the word "newsworthy." It speaks only of "serious" charges against a "public" figure. However, the court immediately goes on to say, "We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." 556 F.2d at 120.

[72] *E.g.*, Dickey v. CBS, Inc., 583 F.2d 1221 (3d Cir. 1978); Newell v. Field Enterprises, Inc., 91 Ill. App. 3d 735, 415 N.E.2d 434 (Ill. App. Ct. 1980); Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836 (1982), *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982).

[73] Hogan v. Herald Co., 84 A.D.2d at 478, 446 N.Y.S.2d at 842.

[74] *E.g.*, Postill v. Booth Newspapers, Inc., 118 Mich. App. 608, 325 N.W.2d 511. The case arose over newspaper reports that a county deputy had accused the county sheriff of assaulting and threatening him at a wedding. The court held that the press "is adequately protected" by *Times*. *Id.* at 625, 325 N.W.2d at 518.

[75] *Times*, 376 U.S. at 279.

[76] If the statement is communicated as part of a governmental proceeding, it would enjoy common-law protection under the privilege of fair report in jurisdictions where that doctrine is recognized, regardless of whether plaintiffs proved there was actual malice. *See infra* note 157 and accompanying text.

those who become subjects of media stories and unfairly skews the balance of interests toward media liberty and away from reputational protection.[77]

In sum, then, three concerns must be addressed in assessing the viability of the neutral reportage privilege as a matter of constitutional law. First, is it incompatible with the Supreme Court's holding in *Gertz*? Second, if it can be reconciled with *Gertz*, would its adoption represent, as a matter of public policy, a sound extension of evolving First Amendment doctrine? Third, if so, how should its contours be defined?

NEUTRAL REPORTAGE, NEWSWORTHINESS, AND *GERTZ*

A principal objection to *Edwards* has centered on the Second Circuit's failure to harmonize the newly articulated neutral reportage privilege with the Supreme Court's *Gertz* decision, in particular, *Gertz's* holding that the newsworthiness of the publication should not be used to determine the level of First Amendment protection under the actual malice test of *Times* and subsequent cases.[78]

Whether the Supreme Court remains steadfast in its opposition to subject-matter classifications has become an open question in recent years.[79] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[80] the Court establishes a test that requires, at least in some libel cases, a judicial determination of whether the publication involved "matters of public concern" -- a standard nearly identical to that articulated in *Rosenbloom* and struck down in *Gertz*.[81]

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[77] *See, e.g*, Comment, Edwards v. National Audubon Society, Inc.: *A Constitutional Privilege to Republish Defamation Should be Rejected*, 33 HASTINGS L.J. 1203 (1982); Hogan v. Herald Co., 84 A.D.2d at 478, 446 N.Y.S.2d at 842 (*Edwards* "upset" the balanced rights previously established by the Supreme Court in *New York Times* and *Gertz*).

[78] *See supra* notes 66-70 and accompanying text.

[79] In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), the Court held that in cases involving private plaintiffs, presumed and punitive damages would be allowed if the publication involved "no matters of public concern." *Id.* at 763. Professor Smolla notes that the language in *Dun & Bradstreet* ("matters of public concern") is "virtually indistinguishable" from the language in *Rosenbloom* ("matters of public or general interest"), which had held that the newsworthiness of the publication would determine the degree of First Amendment protection and which *Gertz* explicitly overturned. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1541 n.104 (1987). While *Dun & Bradstreet* was addressing the types of damages that could be awarded and *Gertz* was concerned about the level of fault that must be shown, the ruling clearly undercuts *Gertz's* reasoning that determinations of newsworthiness would unduly burden trial courts. Smolla argues that *Dun & Bradstreet* has resurrected *Rosenbloom* in a fashion: "Justice Powell's *Dun & Bradstreet* opinion refitted *Rosenbloom* for a different purpose: to contract First Amendment protection rather than to expand it." *Id.* at 1541.

See also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.35, at 939 (3d Ed. 1986) ("What is clear from *Dun & Bradstreet* is that a majority of the Court is unhappy with the constitutional law of libel as formulated in *New York Times* and *Gertz*"). Since then, one member of the majority advocating reconsideration, Chief Justice Burger, has been replaced by Justice Kennedy.

[80] 472 U.S. 749 (1985).

[81] *Id.* at 763.

But that question need not be resolved to find that *Edwards* and *Gertz* can co-exist as constitutional doctrine. While *Gertz* and *Edwards* are actually speaking to different elements of a tort action -- *Gertz* addressing the *prima facie* issue of fault and *Edwards* the affirmative defense of privilege to be asserted against the *prima facie* case -- two questions are central to an analysis of *Gertz's* relevance to neutral reportage. First, does *Gertz's* disapproval of newsworthiness as a consideration apply with equal force to all elements of the tort, including a privilege? Second, if so, is newsworthiness an essential component of the neutral reportage privilege? In other words, if one removes the often-cited requirement that a subject must be newsworthy for the neutral reportage privilege to apply, does the privilege lose its value as a potential First Amendment doctrine?

The Problems of a Newsworthiness Standard

Despite the Court's recent revival of newsworthiness as a criterion in at least one First Amendment context,[82] *Gertz's* logic remains worthy of consideration. *Gertz*, by explicit reference, incorporates the *Rosenbloom* dissents of Justices Harlan and Marshall in attacking the idea that newsworthiness rather than the public status of the plaintiff should determine when a showing of actual malice will be required.[83] The majority in *Gertz* embraces Justice Harlan's contention that the ambiguous definition of newsworthiness would lead to "unpredictable results and uncertain expectations" for journalists attempting to decide whether their conduct would gain First Amendment protection, were the story to lead to litigation.[84] Such lack of certainty can itself lead to the very self-censorship *Times* and later cases were seeking to avoid.[85]

Equally important, at the core of the two *Rosenbloom* dissents is the recognition that, despite the constitutional implications, defamation remains a tort action and thus the rules to be applied, as a matter of logic, should speak to the conduct of the actors.[86] Because tort law encompasses not merely determinations of fault and causality but also collective social judgments about what risks are acceptable,[87] the analysis of conduct must include in its scope the risks and conduct not only of the defendant but also of the plaintiff. The message of the *Gertz* majority and the *Rosenbloom* dissent is this: The First Amendment may require

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[82] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[83] *Gertz*, 418 U.S. at 338-39, 342-43.

[84] *Id.* at 343.

[85] *See* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 708 (1978) ("[t]he method of prevention of overcautious self-censorship must be the tolerance of undercautious regulation").

[86] *Gertz*, 418 U.S. at 339 (noting that the two *Rosenbloom* dissenters endorse the idea that states should be allowed wide freedom to continue the common-law evolution of fault standards and other elements of the tort).

[87] Calabresi, *Torts The Law of the Mixed Society*, 56 TEX. L. REV. 519, 525 (1978).

that some defamation go uncompensated, but the rules leading to that result should not be drawn in such a way as to disregard important differences in conduct between different types of plaintiffs.

Gertz argues that a newsworthiness standard is more likely to sweep into its grasp -- and thereby prevent recovery to -- purely private individuals.[88] These individuals are less likely to have means of redress outside litigation (e.g., holding press conferences and publicizing their replies to the defamation).[89] Second, fundamental to *Gertz's* notion of who is a public figure is some voluntary conduct that exposes the plaintiff to the public eye.[90] It follows that society can more fairly place the burden of uncompensated defamation on public figures who have freely assumed some risk in deciding to place themselves before the public. The use of the "public figure" test to set the bounds of reputational protection under the First Amendment is consistent with these concerns for fairness and assumption of risk.

A newsworthiness standard, on the other hand, fails to address these issues of cost and conduct (e.g., the assumption of risk and the availability of alternate remedies). Under a newsworthiness approach, plaintiffs will be denied judicial relief even though they neither invite public scrutiny nor have other means of protecting their good names. And, at least in the minds of the *Gertz* majority, a newsworthiness standard is more difficult to administer judicially than the public-figure standard.[91] While these problems in *Gertz* were raised in regard to fault standards in the plaintiffs' *prima facie* case, they do not disappear when the element under consideration is not fault but a tort privilege like neutral reportage.

Newsworthiness and Neutral Reportage

Thus, if the validity of the neutral reportage privilege depends on the inclusion of newsworthiness in the privilege's definition, the *Gertz* critique would appear to render a fatal blow. One commentator, writing in favor of the privilege, has concluded, "The concept of newsworthiness is central to the *Edwards* privilege."[92] He cites *Edwards'* assertions that allegations made in a public

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[88] *Gertz*, 418 U.S. at 345.

[89] *Id.* at 344.

[90] *Id.*

[91] The Court defines a public figure as a person who has pervasive influence or one who voluntarily places himself or herself in the public spotlight. *Id.* at 351. While the Court apparently concludes that defining public figures is an easier task for judges than defining newsworthiness, the problem of knowing who is a public figure was raised sharply in Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976), in which a socially prominent divorce litigant was held to be a private individual for purposes of her libel action. *Id.* at 454.

[92] Comment, *Restricting the First Amendment Right to Republish Defamatory Statements*, 69 GEO. L.J. 1495, 1507 (1981).

controversy about public figures are newsworthy and that the First Amendment should not be read to suppress newsworthy publication.[93] The requirement of newsworthiness is routinely cited in summaries of the law as an essential element of the privilege.[94]

The problem is that newsworthiness was not part of the definition of the elements of the privilege in *Edwards*. Judge Kaufman in stating the elements of the privilege[95] makes no reference to newsworthiness at all. The term is raised for the first time in the opinion *after* he provides the elements, as part of his attempt to justify the privilege's inclusion in constitutional doctrine as a matter of public policy.[96] A close reading of *Edwards* indicates that rather than being an independent element to be proved as part of the privilege, newsworthiness in this context is little more than a short-hand reference to the fact that public policy will be served when the elements of the privilege are met and the privilege is applied. Just as in *Gertz*, the court under *Edwards* looks to see whether the plaintiff qualifies as a public figure.[97] While the assumption in both cases is that media stories about public figures will be stories with public value -- i.e., they will be newsworthy -- that is neither a necessary result nor a necessary condition of the constitutional protection.

Barry v. Time, Inc.[98] comes to a similiar conclusion, explicitly rejecting the notion that newsworthiness is needed under *Edwards*.[99] It holds that the claim of neutral reportage requires not a showing of newsworthiness but merely a showing that, first, the plaintiff is a public figure willfully involved in a public

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[93] *Id.* at 1508.

[94] *E.g.*, PRACTISING LAW INSTITUTE, CONSTITUTIONAL PRIVILEGE IN LIBEL LAW, PLI Order No. 64-3821, § IX (1988) ("The elements necessary to establish the neutral reporting privilege are: (a) serious and newsworthy charges. . . .").

[95] *See supra* note 25 and accompanying text.

[96] *Edwards*, 556 F.2d at 120. "Succinctly stated, when a responsible, prominent organization. . .makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . .*What is newsworthy about such accusations* is that they were made" (italics added) (citations omitted).

[97] The analysis of what is a public controversy under *Gertz* is not the equivalent of a determination of newsworthiness. Smolla, *supra* note 79, at 1541. The public-controversy analysis is primarily a consideration of whether the plaintiff, through his own conduct, thrust himself into the public eye (and thus became a public figure for the purposes of libel law), whereas the newsworthiness analysis looks primarily to the characteristics of the publication or broadcast itself. *Id.* A person may thrust himself into the public eye and thereby meet the requirements of the public-controversy analysis under *Gertz*, but a given story about him may be unnewsworthy. Under *Gertz*, the newsworthiness of the story is of course irrelevant.

[98] 584 F. Supp. 1110 (N.D. Cal. 1984).

[99] *Id.* at 1125. ("Contrary to the conclusion of some courts the privilege, as defined, does not call into play the kind of *ad hoc* determinations of 'newsworthiness' that concerned the *Gertz* court.") (emphasis in original).

controversy (as required by *Gertz*) and, second, the report is accurate and neutral.[100] It may well be that a court would find the story to be lacking in newsworthiness -- however that is defined -- but that is a decision left to editors and readers under both *Gertz* and *Edwards*.

In the final analysis, then, *Gertz* and *Edwards* are not incompatible. *Gertz's* disapproval of judicial determinations of newsworthiness is not relevant because newsworthiness is not an essential element in the *Edwards* privilege. While the validity of *Edwards* as constitutional doctrine requires further inquiry into First Amendment theory, it need not be ruled out merely on the issue of newsworthiness.

NEUTRAL REPORTAGE AND FIRST AMENDMENT THEORY

Even if Supreme Court precedents do not preclude the neutral reportage privilege, two further questions must be asked. Is it necessary to give life to the First Amendment guarantee of press freedom? Does it provide adequate protection for the reputation of the individuals who are subjects of the publication or broadcast?

A libel action is the intersection of two competing rights: the constitutional right of a free press and the common-law right of reputational protection. Beginning with *Times v. Sullivan*,[101] the Supreme Court recognized that the Constitution places limits on how far the states can go in providing a remedy for those individuals whose reputations have been harmed by a story published or broadcast.[102] Central to that recognition is the further recognition that some defamation must be tolerated to provide journalists with the necessary "breathing space"[103] -- the freedom to err -- to exercise fully their First Amendment liberty.[104]

Most of the Court's deliberations in the area of defamation has been aimed at fashioning constitutional protection through the fault standard to be met by the plaintiffs (e.g., actual malice in the case of public figures). What *Edwards* proposes is that constitutional protection be supplemented not by further altering the fault standard of the *prima facie* case but by recognizing a new privilege

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[100] *Id.*

[101] 376 U.S. 254 (1964).

[102] *Gertz*, 418 U.S. at 342-343.

[103] *Id.* at 342.

[104] *Id.*

doctrine, to be asserted by the media defendants.[105] As a practical matter, the privilege's usefulness, if any, would come either in cases in which the *Times-Gertz* standards did not afford protection (e.g., there was a finding of actual malice on the part of the media defendants) or in cases in which both *Times-Gertz* and the neutral reportage privilege would apply but the latter would allow for quicker, less burdersome disposition of the litigation.

As with any attempt to ascertain whether a certain rule of law has value, this one requires that we determine what conduct would be encouraged or discouraged by the proposed rule, assess who will bear the costs associated with the conduct, and evaluate whether the prompted conduct and cost distribution conform with broader public purposes.[106]

The serious flaw in the neutral reportage privilege, as currently contoured, is its advocates' failure to define what constitutes "neutrality" -- in other words, to define what conduct by the reporter should legitimately give rise to immunity from libel actions. What level of reportorial diligence is required? What state of mind? What must be published in the story? No coherent scheme for answering these questions appears in the decisions or literature supporting the privilege. Until that scheme is presented, and anchored in the underlying policies of the First Amendment, the privilege remains open for abuse by journalists who can act with actual malice under the claim of neutrality. Absent any clear standard to govern the reporter's conduct, the privilege allows the reputational interest of public figures in public controversies to go underprotected without providing any reasonable guarantee that such harm will be offset by the public benefits that arise from the advancement of First Amendment interests.

But the present deficiencies in the neutral reportage doctrine need not be fatal. What is needed is a "reader-centered" definition of neutral reportage -- one

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[105] In a sense, neutrality can be seen as a variation of a fault standard in so far as it posits a type of intent or a level of care. Dealing with it as an issue separate from actual malice, however, is not only consistent with the way it has been handled by the courts beginning with *Edwards* but also underscores a basic difference between the *Times-Gertz* approach and the neutral reportage concept: The former are largely concerned with journalist's *reporting* conduct (e.g., decisions about whom to interview and about what) while the latter focuses primarily on the journalist's *writing* conduct (e.g., decisions about what to include in the publication and how). *See infra* note 154 and accompanying text.

[106] Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven Jr.*, 43 U. CHI. L. REV. 69, 70 (1975) (Modern tort analysis has taken on a functional approach that asks "how the law of torts determines what injuries are worth avoiding, how it controls what categories of people bear the burden of those injuries that do occur and the related burden of avoiding those injuries deemed worth avoiding, and how it serves to encourage or require the spreading of such burdens." These goals must then be considered in terms of some concept of justice). *Id.* Schauer notes that the rule to be drawn need not actually achieve its underlying purposes in every case, but that there be a probablistic connection between the rule and the purpose. Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 9 (1989). He cites the example of the *Miranda* warning to criminal suspects. Although the warning may not serve the underlying policy of protecting a suspect's rights in every instance, we believe that such a purpose will be served in most cases. *Id.*

in which the courts look at what readers could reasonably believe about the parties mentioned in the story, based on the story itself. That approach, contrary to the modern trend in libel litigation since *Times*, focuses attention not on a reporter's conduct in *gathering* information (e.g., did the reporter act with actual malice?) but on the reporter's conduct in *selecting and presenting* information in the story. In short, it asks what the story said, not what the reporter did prior to writing the story. The reader-centered approach returns the focus of libel litigation to the often-overlooked question that should rightfully be at the center of the tort: Did the story cause reputational harm?

By placing that question at the center of any attempt to shape a neutral reportage privilege, one is better able to ensure that reputations will be adequately protected while at the same time forwarding the public's legitimate interest in knowing about public matters. Equally important, the intrusive and uncertain inquiry into editorial decision-making that necessarily follows from the *Times* rule will be substantially curtailed. A well-crafted version of the neutral reportage privilege offers the hope of more efficient adjudication of claims and greater certainty for media decision-makers who must weigh the risk of litigation.

Shaping Conduct: Actual Malice v. Neutral Reportage

The facts of *Harte-Hanks Communications, Inc. v. Connaughton*[107] provide a useful context for assessing both the neutral reportage privilege and the *Times* approach and for understanding the particular limitations of each in their allocation of costs and regulation of conduct. Daniel Connaughton, a Hamilton, Ohio, lawyer, found himself in the fall of 1983 in a heated election campaign against an incumbent judge, James Dolan.[108] That September, Connaughton and some campaign workers met with two sisters, Patsy Stephens and Alice Thompson. Stephens claimed during the tape-recorded meeting that she had participated in a bribery scheme involving Judge Dolan's clerk.[109] Armed with that information, Connaughton notified local law enforcement officials, who began a grand jury investigation that ultimately led to bribery charges against the clerk.[110]

In early November, with the election only days away and the grand jury investigation continuing, the local newspaper was approached by an attorney who was representing the judge's aide and who wanted the newspaper to interview Alice Thompson.[111] Thompson had testified before the grand jury and she was

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[107] 491 U.S. 657 (1989).

[108] *Id.* at 660.

[109] *Id.* at 668-69.

[110] *Id.* at 660.

[111] *Id.* at 670.

now claiming that candidate Connaughton had improperly offered her and her sister a vacation and other gifts in appreciation of their role in initiating the investigation of his opponent's office.[112] It was Thompson's charges that came to be printed in the newspaper and prompted Connaughton's suit for defamation.

Although the newspaper interviewed Connaughton at length and published his denials of Thompson's charges, the Supreme Court upheld the trial court's finding that the paper acted with actual malice.[113] The Court took special note of evidence showing that the newspaper declined to interview Thompson's sister, Patsy Stephens, a source well-placed to assess the accuracy of Thompson's charges against Connaughton, and refused to listen to Connaughton's tape of his conversation with Thompson and Stephens.[114] At trial, the newspaper defendant had claimed a neutral reportage privilege but the lower court ruled that the accuser, Thompson, did not qualify as a responsible source, a requirement of the state's neutral reportage doctrine.[115] On appeal, the newspaper chose not to press its claim under neutral reportage.[116]

Despite Justice Blackmun's apparent sympathy with the neutral reportage privilege in his concurrence,[117] it cannot be assumed that the Court would have found the privilege applicable in *Harte-Hanks* and established it as constitutional law. Nevertheless, the factual setting of the case suggests that the neutral reportage is not merely coextensive with the protection of the actual malice standard, that it may reach cases that *Times* and its progeny do not. In a jurisdiction governed by *Barry*, which dispensed with the qualification that the accuser be responsible,[118] the newspaper defendant in *Harte-Hanks* would appear to have had a reasonably good chance of prevailing on neutral reportage grounds. The operative question, though, is whether that result would be more desirable, in terms of the underlying purposes of both the First Amendment and the law of defamation, than a result holding the paper liable in this case and similar ones.[119]

It is useful to begin by looking at what kind of conduct regulation and cost allocation takes place under libel law as it is currently constitutionalized through the actual-malice standard. In *Harte-Hanks*, the Court found that the newspaper's

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[112] *Id.* at 670-72.

[113] *Id.* at 690-92.

[114] *Id.* at 682-83.

[115] *Id.* at 660 n.1.

[116] *Id.*

[117] *See supra* notes 9 and 10 and accompanying text.

[118] Barry v. Time, Inc. 584 F.Supp. 1110, 1127 (N.D. Cal. 1984).

[119] As Schauer points out, there need not be a perfect fit between the rule and the policy to be served in every case. *See supra* note 106.

conduct in gathering information was insufficient.[120] Had the newspaper taken additional steps in its reporting (e.g., interviewing Thompson's sister and listening to the plaintiff's tape of his meeting with the two sisters),[121] it conceivably would have been immunized from the libel action. Yet it is not clear that the story would have been so different from the one that actually ended up in print. Connaughton's competing account of the events was already part of the story. While the Court's majority argues that a denial from Thompson's sister "would quickly put an end to the story,"[122] that proposition is arguable. Six witnesses--Connaughton and five others connected to him -- had already denied Thompson's charges in interviews with the newspaper, but the Court reasons that Thompson's sister, as someone not allied with Connaughton, would have done what the others did not: kill the story.[123] Yet, given the nature of the charges (that the plaintiff was "buying off" testimony) and the fact that Thompson had already appeared before a grand jury, the paper might reasonably conclude that her charges were convincing enough and of enough public interest to go forward with the story. With the election only days away, the story was unusually timely. Thus, essentially the same story, causing essentially the same damage to reputation, would have been published, yet, had the newspaper taken the extra steps, the outcome of the libel litigation would have been reversed, with a decision for the defendants. The clear lesson is that the reportorial conduct required by *Times* can have little to do either with providing the public with useful information (the First Amendment interest to be served) or with protecting reputation (the competing common law interest).

In that way, *Harte-Hanks* is emblematic of the problem of current libel litigation when looked at in the traditional tort terms of conduct regulation and cost allocation. The constitutional structuring of libel litigation by *Times* has typically left the malice issue as the first and primary question to be litigated[124] and may be detrimental to both plaintiffs and defendants. Research from the Iowa Libel Project shows that plaintiffs with little chance of winning are able to inflict a substantial financial burden on media defendants as part of discovery on the issue of actual malice.[125] On the other hand, the rules will often work to place the full cost of actual reputational injury on an innocent plaintiff when the media defendants can show that their conduct in reporting did not constitute actual malice (a reckless disregard for the truth).[126] In short, rather than

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[120] 491 U.S. at 691-93.

[121] *Id.*

[122] *Id.* at 682.

[123] *Id.* at 682-83.

[124] Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 229-30 (1985).

[125] *Id.* at 231.

[126] *Id.* at 229-31.

insulating media defendants from litigation, *Times* and its progeny have largely transformed the tort of libel into a forum on media conduct, reporting methods, and editorial decision-making.[127]

Those issues rarely shed light on whether First Amendment purposes were served by the information published in the story or whether reputation has been damaged. In *Harte-Hanks*, the reporters arguably could have avoided liability -- thereby shifting the costs of reputational damage to Connaughton -- by engaging in reporting conduct that neither would have changed the published story (one possible way in which damage to reputation could have been mitigated or eliminated) nor would have furthered any discernible First Amendment purpose, such as providing to readers information useful to self-government.[128] Schauer is correct in arguing that the rules governing defamation need to be drawn in such a way as to err in favor of greater press freedom[129] and that there need not be perfect correlation between the rule and accomplishment of the underlying purpose in every case,[130] but libel reformers have rightfully come to doubt the ability of the *Times* line of cases to guard adequately either press freedom or reputation.[131]

While the neutral reportage privilege would be applicable in only a limited number of cases -- essentially those arising from public controversies -- it offers a strikingly different approach to the conduct and cost questions than does *Times*. Rather than looking primarily at the conduct of reporters in *gathering information*, as the actual-malice standard does, it shifts the focus to reporters' conduct in *presenting the information*. In cases like *Edwards* and *Barry*, the court places substantial weight on what information was actually provided to readers: e.g., denials and information relevant to evaluating the credibility of the parties to the dispute.[132] The value of such an approach is that the conduct required of the defendants is directly linked to the conveyance of information to the public and to the protection of reputation -- the two competing interests underlying the litigation. Its rules, properly drawn, could encourage journalists to take steps that actually increase the amount of public information and limit reputational harm

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[127] *Id.* The Supreme Court has ruled that the First Amendment does not bar plaintiffs' inquiries into the editorial process as part of discovery. Herbert v. Lando, 441 U.S. 153 (1979).

[128] Blasi proposes that First Amendment analysis has found four core values underlying the First Amendment: providing for self-government, allowing individual autonomy, encouraging a check on government, and creating a marketplace of diverse ideas. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

[129] *See supra* note 85.

[130] *See supra* note 106.

[131] *E.g.*, Bezanson, *supra* note 124; Smolla & Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989); Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

[132] *Edwards*, 556 F.2d at 120; *Barry*, 584 F. Supp. at 1127.

(e.g., publishing competing accounts) unlike the actual-malice approach, which frequently prompts behavior designed not so much to change the story but to buttress a showing of no malice in anticipation of litigation (e.g., proving that the reporter made reasonable attempts to contact a source).

The Neutral Reportage Privilege and Self-Governance

Whatever the differences in approaches between *Times* and *Edwards*, both decisions can be justified as constitutional interpretation only to the extent that they serve the underlying values of the First Amendment. The concern with neutral reportage, of course, is that it allows reporters to act with reckless disregard for the truth, as defined by *Times* -- more plainly, it allows them to print allegations even if they know those allegations are false.[133] In the view of the Second Circuit in *Edwards*, untrue allegations have value by the mere fact that they were uttered.[134] In a case such as *Harte-Hanks*, the argument would go, voters should not be kept in the dark about the fact that allegations were being made against a candidate about to stand for election. Several justifications might be offered:

1. The allegations, while far-fetched to the journalists, could conceivably contain some truth and therefore should be allowed into the public forum. This might be especially true in cases in which minority voices are seeking to be heard and find themselves being eliminated by the legal judgment of journalists more attuned to majoritarian sentiments and prejudices.

2. The allegations, while probably false, reflect on the accuser rather than the accused and therefore help readers understand what kind of irresponsible person the accuser is.[135]

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[133] *Edwards*, 556 F.2d at 120.

[134] *Id.*

[135] This rationale apparently explains some media editors' decision to publish or broadcast dubious accusations by controversial activist Al Sharpton. After Sharpton claimed former law enforcement officials in Dutchess County, N.Y., had ties to the Irish Republican Army, a media executive was quoted as saying: "Editors and producers should look at a piece of outrageous tape and say, "'Put it on the air. Let our viewers see how foolish this is.'" Diamond, *The Sound Bites and the Fury*, N.Y. MAG. 36, 39 (March 28, 1988).

In discussing its coverage of Sen. Joseph McCarthy, The New York Times made a similar argument: "It is difficult, if not impossible, to ignore charges by Senator McCarthy just because they are usually proved false. The remedy lies with the reader." R. ROVERE, SENATOR JOE MCCARTHY 166 (1959).

3. The allegations, while probably false, shed light on the controversy itself (e.g., its intensity, its viciousness, or its baseness).[136]

4. The allegations, while dubious, cannot be proved or disproved in a reasonable amount of time or effort by the journalist. If true, though, they would be of great public significance. On balance, the public is best served by alleviating the journalist's risk of litigation (and elevating the accused's risk of reputational damage) by allowing the allegations to be made public.

The Supreme Court has long held that "[t]here is no constitutional value in false statement of facts."[137] Yet, under *Times*, false statements, when not the product of actual malice (in cases involving public plaintiffs), have enjoyed protection. The rationale for that result is that "overprotection" is required, lest journalists fearing either their own error or errors on the part of juries and judges decide not to do certain socially valuable stories.[138] Neutral reportage differs, though, in one important way: Under neutral reportage, what is being protected is not erroneous falsity but known falsity. Advocates of neutral reportage would appear to be arguing not that the press needs breathing space to make errors as they pursue legitimate stories but that the falsity in and of itself has value.

If that were the case, there could be little justification for the neutral reportage doctrine. But understanding the potential value of the privilege requires an understanding that republication is not the same as publication. In republication cases, there are two tiers of truth or falsity. At one level is the truth or falsity of the defamatory remark itself and, at a second level, the truth or falsity of the report of the defamatory remark. In most neutral reportage cases, the underlying defamatory remark may be false but the newspaper is accurate in its report about what was said and who said it. It is the truthfulness of the latter, and not the falsity of the former, that advocates of the privilege seek to bring under the umbrella of First Amendment protection for purposes like those enumerated above.

To the extent that the allegations arise in the context of a matter of legitimate

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[136] In defending press republication of Sen. Joseph McCarthy's dubious allegations of communist influence in government agencies, Walter Lippmann wrote: "McCarthy's charges of treason, espionage, corruption, perversion are news which cannot be suppressed or ignored. They come from a United States senator and a politician. . .in good standing at the headquarters of the Republican Party. When he makes such attacks against the State Department and the Defense Department, it is news which has to be published." R. ROVERE, SENATOR JOE MCCARTHY 166 (1959).

[137] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[138] Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 707 (1978).

public concern,[139] protection of the media's right to republish them accurately would seem to be consistent with the First Amendment's core value of self-government, as articulated by Meiklejohn.[140] In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*,[141] the Court was confronted with a libel action arising from the republication of a citizen's use of the term "blackmail" at a public meeting to describe the activities of a local real estate developer.[142] While the Court found for the defendant on other grounds,[143] Professor Blasi has written: "One would think that an accurate report of what transpired at a city council meeting would be a paradigm case for protection under the Meiklejohn theory despite the common-law adage that 'tale-bearers are as bad as tale-makers.'"[144] Meiklejohn himself distinguishes between a verbal attack on a private businessman and the same verbal attack on a political candidate: "If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment."[145]

While the precise boundaries of self-government may be unclear, its extension to public controversies outside official governmental activity via the neutral reportage privilege would appear to be in keeping both with the realities of modern American political life and with the Supreme Court's view of the self-government concept during the formative years of the *Times* doctrine.[146] Even more clearly within the bounds of self-government is a case like Connaughton's, one involving the fitness of a candidate for public office.

To the extent that the *Times-Gertz* protection does not reach republication of defamatory allegations important to self-government, the core value of the First Amendment is frustrated in two ways. First, the press is less likely to share with its public the substance of the controversy and perhaps the controversy itself. Second, those who wish to publicize allegations that have some utility but may

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[139] Accordingly, *Edwards* limited its use to public controversies involving public figures. Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

[140] For a discussion of self-government as the underlying purpose of the First Amendment and of *Times v. Sullivan*, see A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 203; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*," 79 HARV. L. REV. 1 (1965).

[141] 398 U.S. 6 (1970).

[142] *Id.* at 7.

[143] *Id.* at 9-11, 14.

[144] Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 570 (1977).

[145] Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259.

[146] "Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971).

be only partially true or simply unverifiable may not have effective alternative means of placing their message before the public. In media-intense polities, republication by established media outlets may be the sole effective channel. Thus, the additional protection provided by a neutral reportage privilege would appear to advance the precise interests *Times v. Sullivan* sought to further, if both the controversy and the defamatory viewpoint are indeed relevant to self-government.

Even in cases like *Edwards* in which the actual-malice standard would provide grounds for finding for the defendant, neutral reportage would nonetheless be valuable in that it would allow courts to more quickly dispose of claims at the pre-trial stage or by summary judgment early in the proceedings.[147] Avoidance of costly litigation, in and of itself, serves the purposes set forth in *Times* by reducing the fear of liability that often prompts self-censorship.[148]

Neutral Reportage Privilege and Reputation Protection

Protection of First Amendment liberty, however, is not the sole touchstone of constitutional litigation in the area of defamation. As the *Gertz* majority wrote: "If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation."[149] In *Edwards*, the Second Circuit held that society's interest in protecting against reputational harm was served by publishing the denials of the accused.[150] If *Harte-Hanks* were to be considered as a neutral reportage case, similiar denials from Connaughton would be offered as providing the required balance.

Examined from the perspective of cost allocation and conduct regulation, the notion that mere publication of a denial is adequate reputational protection is troubling. Whatever the limitations of the actual-malice approach, it nevertheless forces reporters to engage in conduct designed to elicit the truth. When false stories that damage a reputation are published, and there is no finding of actual malice, the cost of the reputational damage is shifted in its entirety to the plaintiff, but only after the reporter has been required, by the operation of the actual-malice standard, to engage in at least marginally responsible conduct. No equivalent tradeoff is present under neutral reportage as defined by *Edwards*. Soliciting denials from the person under attack not only requires little reportorial initiative but in effect shifts the behavioral burden to the person whose reputation is on the

[147] Bowles, *supra* note 17, at 16.

[148] Smolla & Gaertner, *supra* note 131, at 31.

[149] *Gertz*, 418 U.S. 323, 341 (1974) (citations omitted).

[150] Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

line. It is up to that person to provide a denial, no matter how absurd the charges. One needs only to recall the anti-Communist witch hunts of the 1950s to envision the sort of abuse such a rule could sanction.

Equally important, it is difficult to assert that the mere publication of denials leads to a story that can actually be characterized as a truthful republication. Under the *Edwards* scheme, a story could present the two sides as having equally valid claims (the charges on the one side and the denials on the other) and qualify for legal immunity. Yet such a story would seem to be, on its face, deceptive if those claims do not in fact have equal validity. If a highly plausible denial is presented as nothing more than an equally meritorious alternative to a highly unlikely accusation, the story cannot fairly be said to be true, at least as far as the truth is known to the reporter. If the *Edwards* rule leads neither to truth nor to conduct that is socially valuable despite the falsity of the story, as is the case with *Times*, then the reputational injury to the plaintiff is unjustly denied remedy.

Edwards attempted to provide reputational protection, in part, by requiring that the accuser be a "responsible" and "prominent" organization.[151] In *Barry*, on the other hand, the federal district court found no basis in the Constitution or in logic for limiting the privilege to organizations.[152] The court there preferred to forgo any standard of accuser trustworthiness.[153] The *Barry* decision gives weight to the fact that the magazine defendant included both the denials of the plaintiff and information casting doubt on the credibility of the quoted accuser.[154] In essence, the court sees inclusion of those items as indications of the defendant's neutrality, as required by the *Edwards* standard.[155]

This second approach by *Barry*, which delineates the privilege in terms of what the defendant publication actually presented to readers, begins to move toward a more sensible approach to the privilege than requiring the reporter to determine whether an accuser is responsible or trustworthy. The "responsible accuser" standard would not only necessitate a sometimes difficult judicial assessment of how the reporter evaluated the accuser (and perhaps whether that assessment was reasonable), but also would work counter to First Amendment purposes by assuming that only trustworthy accusers' accusations are of value to self-government. It is not hard to imagine a newspaper well-serving its readers by discussing the harassing charges made against a public figure by a fringe group with no claim to responsibility. On the other hand, the "responsible accuser" requirement may deny unpopular minority voices access to media

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[151] *Id.*

[152] Barry v. Time, Inc. 584 F. Supp. 1110, 1125 n.18 (N.D. Cal. 1984).

[153] *Id.* at 1127.

[154] *Id.*

[155] *Id.*

channels by a broad judicial stroke painting them as irresponsible.

Any doctrine attempting to extend the media's protection against libel actions will come at a cost to those whose reputations are injured. That can be justified either by showing that the doctrine will encourage conduct that, on balance, has greater social value than the reputational protection foregone -- the rationale of *Times* -- or by mitigating the injury. Because the neutral reportage privilege would work independently of the *Times* standard, it would provide protection to reporters who acted with actual malice, that is, reporters who believed or knew the allegation was false -- including those who simply chose not to follow leads that could have assisted in determining the truthfulness of the allegation. That result is unacceptable unless an incentive for some other socially valuable conduct or injury mitigation is built into the rule. *Edwards* saw the value of republication of the defamation arising not from the possibility that the accusation might be true but from the public's legitimate interest in being fully informed that a controversy exists.[156] Thus, requiring full presentation of the statement's context is essential both to encouraging socially valuable conduct in the way journalists present the information and, primarily, to mitigating the harm of the publication.

More specifically, a well-tailored neutral reportage privilege would require more than inclusion of denials and a clear indication to the readers that the statements are unilateral accusations, not established facts. It would also accurately reflect the reporter's knowledge about the validity of the accusations in areas such as the absence of proof, evidence casting doubts on the credibility of the accuser, and facts illuminating the accuser's perspective such as political affiliations or previous differences with the accused. In short, neutral reportage should not mean mindless neutrality, but instead fair, full, and accurate accounting not only of the allegation but also of the allegation's context.

If the concern of libel law is really protection of reputation, as it should be, then the operative fact is how any given publication changed the opinions of readers toward the plaintiff. The damage, if any, from defamation arises from the words published and read, not from the pre-publication conduct of the alleged tortfeasor. The relevant evidence, then, should primarily be found in the publication itself and not in the information-gathering conduct of the reporter prior to publication. The question to be asked by the media decision-maker at the time of publication, and by the court at the time of adjudication, is: Did the story reasonably put readers on notice that the disputed allegations were not assertions of truth by the newspaper and should not be read as such? If that test is met, the cost of reputational injury, if any, is fairly shifted from the media defendant to the plaintiff.

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[156] *Edwards*, 556 F.2d at 120.

This reader-centered approach, with its concern for the context of the allegation,[157] achieves several purposes. First, it strengthens the republisher's claim that the report of the allegation is true, even if the allegation itself is not, and thus brings it more comfortably into First Amendment protection. Second, it places a greater burden for reputational protection on the reporters, who are in a better position to bring about that protection than the accused. Third, it more clearly defines the conduct that reporters should engage in consistent with the public purposes to be served.

Neutral reportage so construed would actually provide those accused with more protection than the law affords them under the common law doctrine of fair report.[158] Under fair report, an accusation made in a governmental forum is protected as long as it is republished accurately. The fair report privilege is not encumbered by any requirement that denials be included or that the source of the accusation be responsible.[159] The danger implicit in that privilege has been widely discussed in the case of Sen. Joseph McCarthy, whose unsubstantiated attacks on individuals during Senate proceedings were disseminated by the media under the fair report privilege.[160] (The fair-report privilege, although widely accepted as a matter of statute or common law, has not been elevated to constitutional doctrine by the Supreme Court.[161])

It is also useful to compare the neutral reportage's reputational protection to that provided under the Supreme Court's decisions in the *Times* line of cases. First, both set a higher degree of protection for private plaintiffs than for those in the public spotlight, *Times* by allowing them to win on a finding of negligence rather than actual malice[162] and neutral reportage by limiting its protection of the press to cases involving public figures.[163]

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[157] *See infra* note 174 and accompanying text.

[158] *See* Sowle, *supra* note 33.

[159] "Generally stated, the common-law rule of fair report permits the privileged publication of (1) the public proceedings of governmental bodies, (2) which are fairly and accurately reported, (3) in good faith and without malice or intent to harm, and (4) which report official activity." (citations omitted). Hogan v. Herald Co., 84 A.D.2d at 477, 446 N.Y.S.2d at 841.

[160] *See* R. ROVERE, SENATOR JOE MCCARTHY 162-70 (1959) for a discussion of McCarthy's manipulation of the press.

[161] *See* Sowle, *supra* note 33. Neutral reportage may be viewed as sharing some of the same policy underpinnings as the privilege of fair report. Fair report has sometimes been justified on what Sowle calls the supervisory rationale (the public must have means to oversee the decisions of governmental officials) or the agency rationale (the press is merely the eyes and ears of the public, which has the right to be present at the proceedings). *Id.* at 483-487. Neither would typically apply in neutral reportage, which envisions accusations made in less-structured, non-official forums. However, Sowle also proposes a rationale that would extend to cover both the fair report and neutral reportage principles: the informational rationale (the public has a legitimate interest in obtaining information important to functioning of society). *Id.*

[162] *See supra* notes 57-61.

[163] *See supra* note 23.

Second, the way litigation has come to be structured when the *Times* standard is invoked tends to downplay the crucial issue of whether actual reputational harm has been done. Because the operation of the actual-malice standard shifts judicial attention to the reporting conduct of the journalists prior to publication, inquiry into what was actually disseminated in the defendant's story and whether reputational damage actually occurred receives scant attention.[164] It is common under *Times*, then, that a story contains false and defamatory statements but the publication is not actionable because actual malice cannot be proved. Is reputational harm caused by mere negligence any less damaging than that caused by reckless disregard for the truth, for instance? Yet in the latter case there will be compensation and in the former there will not, suggesting that when core First Amendment values comparable to those present in *Times* are served, the law will place relatively little weight on reputational protection.[165] To the degree that the neutral reportage privilege serves those values,[166] its failure to provide more extensive protection to a public figure's reputation should not prohibit its acceptance as constitutional doctrine.

In summary, neutral reportage, properly tailored, also helps move libel litigation back to the issues that should logically be central to plaintiff's action: Was harm done? Can the cause of that harm be reasonably traced to the words published or broadcast?[167] Where the actual-malice approach often raises difficult evidentiary issues about reporters' conduct prior to publication[168] and opens the door for extensive judicial second-guessing of editorial decisions, neutral reportage focuses judicial attention on the most obvious evidence: the words of the story itself. More important, it raises serious questions about whether the story can be said to be defamatory at all. If the requirements of the privilege are met, and the story has clearly indicated to the reasonable reader that the accusations should not be read as assertions of truth, the claim of defamatory harm becomes impossible to sustain. The journalists have taken the necessary steps to assure that no reasonable reader would accept the allegations as fact. If the story is nonetheless read as such, the cost for that unreasonable reading can justly be placed on the accused. With the reporters having engaged in the socially desired conduct, and with First Amendment interests having been served, to hold the journalists liable all the same would be to work counter to public purposes underlying the rules.

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[164] *See supra* note 124 and accompanying text.

[165] *See supra* note 85.

[166] *See supra* notes 140-46.

[167] "[T]he legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 66 (Harlan, J., dissenting).

[168] *See supra* note 125.

TOWARD A READER-CENTERED DEFINITION OF THE PRIVILEGE

In summary, the neutral reportage privilege would appear to serve the core values of the First Amendment, offer adequate protection to reputational interests, and provide an effective alternative to litigation based on the fault standard of *Times v. Sullivan* and its progeny. Its utility, however, depends on carefully defining its elements and its reach. A review of case law shows that there are four basic elements that need to be delineated: (1) the nature of the plaintiff, (2) the nature of the accuser, (3) the nature of the subject-matter; and, most important, (4) definition of "neutrality" as it applies to the media defendant.[169]

Nature of the plaintiffs

Edwards held that the privilege should apply only in cases in which the plaintiffs are public figures. That requirement has been consistenly upheld, offers reputational protection to those who do not voluntarily involve themselves in public matters, and is consistent with Supreme Court jurisprudence from *Times* on.

Nature of the accuser

Edwards held that the accuser must be a responsible organization, but *Barry* and other decisions raise valid questions about both the requirement that the accuser be an organization and the value of the "responsibility" qualification.[170] Rather than involving courts and media decision-makers in determinations of which accusers are responsible and which are not,[171] the legitimate concern that trivial or frivolous charges will be republished with immunity is better served by requiring a fair, full, and accurate presentation of the controversy, as discussed below. Provided that other elements of the privilege are met, republication of an accusation made about a public figure in the course of a public controversy should fall within the bounds of the privilege, regardless of the accuser's status.

Nature of the subject-matter

This Article has argued that the often-cited requirement that the subject-matter be "newsworthy" should be abandoned.[172] If the plaintiff is a public figure as defined by *Gertz*,[173] the privilege should be applicable. The effect of *Gertz* would be to extend use of the privilege to all controversies involving

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[169] *See supra* notes 42-50 and accompanying text.

[170] *See supra* notes 42-44 and accompanying text.

[171] *Id.*

[172] *See supra* notes 84-104 and accompanying text for rationale.

[173] *See supra* note 91 and accompanying text.

pervasive public figures and to those in which private individuals have voluntarily placed themselves in a public forum.

By its very terms, the privilege applies only to controversies, and courts have held that the controversy must be pre-existing and not the creation of the journalist's reportorial enterprise.[174] It could be argued that the information is either relevant to self-governance or it is not, and therefore the means by which it is generated should not matter constitutionally. That rationale fails to take into account the underlying policy of neutral reportage. The privilege is designed to free journalists to report accusations not because the accusations themselves have value but because they are part of a controversy and knowledge of the controversy serves a public purpose. If the controversy is not extant, the value of the report must arise from the accusations themselves, in which case the rules set forth by *Times* and its progeny are better able to strike the proper balance between reportorial conduct and reputational protection.

Defining neutrality

The *Times-Gertz* line of cases, because of their concern with fault, necessarily focuses on the question: What did the reporter know and do? The better question, at least for cases involving media republication of accusations, may be: What could the reader reasonably believe, based on the story?

As Justice Blackmun's concurrence in *Harte-Hanks* notes, and *Edwards* implies, there is a significant difference between reporting that X was alleged by someone to have happened and reporting that X actually happened.[175] It follows, then, that a primary consideration should be how the allegation was presented to the public, whether as a disputed allegation made by an identifiable party with known interests or as a factual assertion implicitly endorsed by the republisher. Because the concern of libel law is rightfully the protection of reputation, the first-order question should be whether the publication changed the opinions of readers toward the plaintiff. Whatever damage accrues from any defamation accrues from the words published and read, not from the reporting conduct of the alleged tortfeasor. The relevant evidence, then, should primarily be found in the publication itself and not in the reporter's conduct in gathering information for the story.

The term "neutral reportage" in itself is a problem. It suggests that a kind of mindless neutrality -- in which both sides of a controversy are treated equally

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[174] *See supra* notes 48-49.

[175] *Harte-Hanks*, 491 U.S. at 695 (Blackmun, J., concurring). Blackmun argues that the publication of the denials and clear indication that the charges are not bare assertions of truth are relevant to a finding that media defendants lack actual malice. *Id.* They would also appear to be relevant to a finding of neutrality under the neutral reportage doctrine.

regardless of their comparative merit -- is required either in the reporter's state of mind or in the story's presentation of the accusations. Implicit in the earlier discussion of story presentation[176] is the argument that what is required is not neutral reportage but fair, full, and accurate reportage. Moreover, the relevant inquiries should focus not on the reporter's state of mind but on the publication itself.

What should be required of journalists seeking the protection of the privilege is full disclosure of the context of the accusation, including such relevant factors as the absence of proof, evidence reflecting on the credibility of the accuser, the existence of a controversy, denials by the accused, and facts shedding light on the accuser's perspective and biases. While no bright line test is possible, the determinative question should be: Did the story reasonably put readers on notice that the disputed allegations were not assertions of truth by the publication[177] and should not be read as such? If that test is met, the cost of any reputational injury that may accrue can fairly be shifted from the media defendant to the plaintiff.

By conditioning the privilege in terms of what actually appeared in the publication, the courts can avoid many of the problems of discovery presented by *Times'* focus on the conduct of the journalists prior to publication.[178] Moreover, by spelling out more explicitly what the media must do in presenting the story to enjoy the benefits of the doctrine, the law reduces the media's uncertainty about liability, thereby diminishing the likelihood of self-censorship, the very evil *Times* set out to attack. At the same time, by focusing on what readers could reasonably believe based on the story published, the neutral reportage doctrine can provide safeguards to reputation and arguably more protection than is required under the actual-malice approach of *Times*.[179]

Thus, a well-tailored articulation of the neutral reportage privilege should explicitly concern itself with what the reader is told, in what context, and in what form. Such a "reader-centered" definition of the neutral reportage principle will most likely strike a balance between reputational interests and media liberty.

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[176] *See supra* notes 147-54 and accompanying text.

[177] It's important to separate the republisher's case and the original accuser's case. Even if the neutral reportage privilege protected the paper, the plaintiff would retain a right of action against the accuser.

[178] *See supra* notes 124-27 and accompanying text. Of course, there may be times where an absence of good faith on the part of the media defendant (e.g., the repetition is part of a pattern of harassment) may necessitate judicial inquiry into the journalists' conduct in a neutral reportage case, but those instances would seem to be rare.

[179] *See supra* notes 161-64 and accompanying text.