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NOTE

THE NEWSWORTHINESS REQUIREMENT OF THE PRIVILEGE OF NEUTRAL REPORTAGE IS A MATTER OF PUBLIC CONCERN

Justin H. Wertman*

INTRODUCTION

The constitutional privilege of neutral reportage protects media defendants from liability for defamation for publishing neutral and accurate accounts of newsworthy charges made by responsible and prominent organizations against public figures.1 The privilege is an exception to the common law rule that one who repeats defamatory statements of another is liable for defamation. The basis for the privilege is that, in the case of some statements, it is essential to public debate on important controversies that the public be aware that the statements were made, regardless of the possibility that the statements themselves are false. Thus, although the original defamers may be liable for defamation, the media is afforded protection to inform the public of these statements, without fear of liability for defamation should the statements prove to be false.

Because of the strong public interest in protecting reputations through defamation law, the privilege applies only in circumstances where the speech is of high First Amendment value. The elements of the privilege seek to ensure this. First, the media must report the charges neutrally and accurately.2 Second, the charges must have been made by a responsible and prominent speaker.3 Third, the subjects of the accusations must be public figures.4 Finally, the charges must be newsworthy.5

The first requirement, that the report must be neutral and accurate, ensures that the Constitution will not protect the media's veiled attempts at launching its own defamatory attacks under the guise of informing the public of important controversies. The requirement that the charges be made by a prominent and responsible speaker increases the likelihood that the accusations are true and, if false, at least limits the privilege to speech that the public has a strong interest in hearing. Limiting the privilege to accusations against public figures

* This Note is dedicated to my wife, Geula, and the rest of my family for their patience and support throughout the preparation of this Note.

2. Id. at 120.
3. Id.
4. Id.
5. Id.
serves to foster debate on important public issues, as attacks on the reputations of public figures often involve issues in which the public has a strong interest. Finally, the requirement that the charges must be newsworthy also attempts to limit the privilege to charges in the context of public debate that the public should be informed about, even if false.

Analysis of this newsworthiness requirement, however, reveals that it is broader than necessary to achieve that goal. Ultimately, the requirement affords the media a privilege to defame in contexts in which it should not.

In 1983, the Supreme Court recognized that speech on "matters of public concern" lies at the heart of the First Amendment. Consequently, courts have since afforded such speech constitutional protection against claims of invasion of privacy and defamation. The fact that speech was of public concern has also protected a plaintiff making a claim of wrongful termination after being terminated for controversial speech in the workplace. Case law indicates, however, that the category of speech on matters of public concern is narrower than the category of newsworthiness which is sufficient to trigger the privilege of neutral reportage. Only by limiting the privilege of neutral reportage to charges of true public concern will the privilege accurately reflect the goals of the First Amendment it seeks to further.

Part I of this Note provides a basis for understanding the privilege of neutral reportage. The first subpart catalogues basic defamation law. The subsequent subparts discuss several common law and constitutional defenses and privileges to defamation, and provide the constitutional basis for the privilege of neutral reportage.

Part II provides a comprehensive analysis of the neutral reportage privilege. Part II begins by discussing Edwards v. National Audubon Society, the Second Circuit case that created the privilege. The first subpart of part II examines the creation of, and constitutional justifications for, the privilege. The following subparts discuss various interpretations of the elements of the privilege, concluding that the elements provided in Edwards, as opposed to those provided by other cases applying the privilege, best further the aims of the First Amendment which support the privilege. The final subpart discusses several of the leading cases opposed to the privilege.

Part III argues that the privilege of neutral reportage, and more specifically the requirement that the privileged speech be newsworthy, is overbroad in light of the constitutional goals the privilege seeks to

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7. See Lee v. Calhoun, 948 F.2d 1162, 1166 (10th Cir. 1991).
further and current Supreme Court treatment of different categories of speech under the First Amendment. Part III also discusses the valued category of speech on matters of public concern, concluding that it is more limited than mere newsworthiness.

Finally, part IV proposes limiting the privilege of neutral reportage to cases implicating speech deserving of constitutional protection. Specifically, part IV urges that the privilege should apply only to speech on matters of public concern, as the Supreme Court and Circuit Courts of Appeals have defined that category of speech. Part IV concludes by illustrating how, under the proposed limitation, the privilege would no longer attach in some situations in which it would presently apply.

I. THE PRIVILEGE OF NEUTRAL REPORTAGE

A comprehensive analysis of the privilege of neutral reportage necessarily entails an understanding of basic defamation law. This part, therefore, defines defamation, its contours, and some of its common law and constitutional privileges. This part concludes by providing a constitutional basis for the privilege of neutral reportage discussed in greater length in part II.

A. Basic Defamation Law

A defamatory communication is commonly defined as a communication tending "to harm the reputation of another as to lower him in the estimation of [his] community or to deter third persons from associating or dealing with him." 11 Another frequently cited definition of defamation is "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. New York Evening Journal, 186 N.E. 217, 218 (N.Y. 1933); see, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts §73 & n.17 (5th ed. 1984) (hereinafter Prosser and Keeton) (criticizing the Kimmerle definition as too narrow); Laurence H. Eldredge, The Law of Defamation 34 & n.14 (1978) (focusing on "right-thinking persons" requirement); Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel 3 (1986) (offering definition as a rough guide to problems of defamation law).

Traditionally, defamation has been separated into the categories of libel and slander. Libel is permanently written, printed, or broadcast statements, and slander is "transitory" spoken statements. First Indep. Baptist Church v. Southerland, 373 So. 2d 647, 648 (Ala. 1979); Matherson v. Marchello, 100 A.D.2d 233, 239 (N.Y. App. Div. 1984); Restatement Second, supra §§ 568, 568A. Significant differences exist between libel and slander regarding various issues such as the necessity of proving special damages. Marcone v. Penthouse Int'l, Ltd., 533 F. Supp. 353, 361 (E.D. Pa. 1982), rev'd sub nom. Marcone v. Penthouse Int'l Magazine for Men, Ltd., 754 F.2d 1072 (3d Cir.), cert. denied, 474 U.S. 864 (1985); Restatement Second, supra §§ 569-70, 575. For the purposes of this Note and the analysis of neutral reportage, however, this distinc-
well if they imply "the allegation of undisclosed defamatory facts as the basis for the opinion." 12

To create liability for defamation, the defamatory statement must be: (1) false; (2) concerning another; (3) not privileged; and (4) conveyed to a third party. 13 The defamer is liable for the reputational harm caused by his statement, as well as for any harm resulting from a third party's authorized or foreseeable repetition of the defamation. 14

The rule against republication dictates that one who repeats, or "re-publishes," defamation is subject to liability as if he had originally published it. 15 Under this rule, each new publication of the defamation provides another basis for liability. 16 Generally, this is true even if the "republisher" names the original publisher, attributing the statement accordingly. 17 For example, if X falsely accused Y of theft, Z would be liable for defamation for stating either that Y stole, or that X accused Y of stealing.

In a majority of jurisdictions, the degree of fault necessary for recovery by private individuals as defamation plaintiffs is at least negligence by the publisher. 18 Thus, if the defamer reasonably believed a

12. Restatement Second, supra note 11, §§ 565-66; see also Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) (quoting § 566 of the Restatement Second); Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 225, 226 (2d Cir. 1985) (discussing the distinction between protected and unprotected opinions); McDowell v. Paiewonsky, 769 F.2d 942, 946 (3d Cir. 1985) (discussing the rule that generally, only factual assertions are actionable).

13. McDowell, 769 F.2d at 946; Restatement Second, supra note 11, § 558; Robert D. Sack & Sandra S. Baron, Libel, Slander, and Related Problems § 2.1 (2d ed. 1994). The recipient of the defamation must also understand the communication to refer to the plaintiff. Restatement Second, supra note 11, § 564 cmt. a.; see McDowell, 769 F.2d at 946; Church of Scientology v. Flynn, 744 F.2d 694, 697 (9th Cir. 1984).

14. Tavoulareas v. Piro, 759 F.2d 90, 136 n.56 (D.C. Cir. 1985); Bolduc v. Bailey, 586 F. Supp. 896, 901 (D. Col. 1984); Restatement Second, supra note 11, § 576; Sack & Baron, supra note 13, at 125-27. The term "authorized" denotes an authorization by the defamer to the third party to repeat the defamation. If the defamer does not expressly authorize repetition but under the circumstances may reasonably expect the third party to repeat the defamation, the repetition is impliedly authorized and the original defamer is similarly liable for any repetitions. Prosser and Keeton, supra note 11, at 801.

15. Lee v. Dong-A Ilbo, 849 F.2d 876, 878 (4th Cir. 1988); Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir. 1988); Restatement Second, supra note 11, § 578; Sack & Baron, supra note 13, § 6.

16. Cianci, 639 F.2d at 60-61; Michelson v. Exxon Research & Eng’g Co., 629 F. Supp. 418, 422 (W.D. Pa. 1986), aff’d, 808 F.2d 1005 (3d Cir. 1987); Restatement Second, supra note 11, § 578 cmt. b.


statement about a private figure to be true, the defamer would not be liable for defamation. A public official plaintiff, however, has a greater burden, as he must prove that the defamer acted with knowledge of falsity or reckless disregard of the truth;\textsuperscript{19} mere negligence by the defamer regarding the truth of the statement does not afford recovery. The Supreme Court has afforded this added protection, the "actual malice" standard, to publishers of defamation of public figures, as well as public officials.\textsuperscript{20} In addition to this higher degree of fault necessary for recovery in cases involving public officials and public figures, the First Amendment\textsuperscript{21} requires a higher burden of proof in such cases as well. Specifically, the plaintiff must prove actual malice with clear and convincing evidence, rather than the mere preponderance of evidence required for most other elements of the defamation case.\textsuperscript{22}

B. Defenses and Privileges

Several defenses and privileges absolve a publisher of defamation from liability.\textsuperscript{23} Some of these defenses are absolute defenses, affording the defamer complete protection from liability based on his status or position.\textsuperscript{24} The remainder of the privileges are conditional, protecting the defamer only when specific conditions are met.\textsuperscript{25} Additionally, some privileges are creations of common law, while others are rooted in the Constitution.

\textsuperscript{19} New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). The public official must prove both knowledge of falsity or reckless disregard of the truth by the defendant, in addition to the underlying falsity of the statement. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). These burdens, however, apply only when the alleged defamation regarded the public official's conduct, fitness, or role in his official capacity. Restatement Second, supra note 11, § 580A.


\textsuperscript{21} U.S. Const. amend. I.


\textsuperscript{23} See, e.g., Rosen v. NLRB, 735 F.2d 564, 571 (D.C. Cir. 1984) (extending an absolute privilege to publish defamatory statements in judicial opinions); Medico v. Time, Inc., 643 F.2d 134 (3d Cir. 1981) (permitting the media to publish an accurate account of an official proceeding); Lee v. Paulsen, 539 P.2d 1079, 1080 (Or. 1975) (en banc) (noting that cases and scholars agree that publishing defamatory statements consented to by the defamed is absolutely privileged). See generally, Restatement Second, supra note 11, §§ 582-612 (enumerating both absolute and conditional defenses to a charge of defamation).

\textsuperscript{24} Restatement Second, supra note 11, tit. B at 243; Sack & Baron, supra note 13, §§ 7.1 - 7.2; Bruce W. Sanford, Libel and Privacy § 10.4.1 (1996 Supp.).

\textsuperscript{25} Restatement Second, supra note 11, tit. A at 259-60; Sack & Baron, supra note 13, §§ 7.1, 7.3; Sanford, supra note 24, § 10.5.1.
1. Common Law Defenses and Privileges

Voluntary consent by the defamed is a common law absolute defense, conferring an absolute privilege to the defamer. This defense is an extension of the general social policy against granting recovery to a plaintiff for conduct to which he has consented. The Restatement (Second) of Torts ("Restatement Second") lists other absolute common law privileges as well, including privileges for publications by judges and legislators in performance of their duties and publications between spouses concerning third parties.

The privilege of fair comment is a common law conditional privilege to publish defamatory opinions on matters of public concern. The privilege attaches only if the opinion is that of the publisher, and is not published solely to harm the defamed.

The privilege of fair report is another conditional privilege, protecting from liability the publisher of an accurate account of an official action or proceeding. The parameters of the privilege, however, are in a constant state of flux. The privilege of fair report permits, at minimum, the media to publish fair and accurate accounts of "official proceedings or reports," such as judicial or legislative transcripts, even though the reports may contain defamatory statements. The media is under no obligation to investigate the truth of any charges made in the official proceeding before publishing them. For fair report analysis purposes, accuracy is measured by information available in the

26. Lee, 539 P.2d at 1080; Restatement Second, supra note 11, § 583; Sack & Baron, supra note 13, § 7.2.8; Sanford, supra note 24, § 10.4.6.
27. Prosser and Keeton, supra note 11, § 114.4.
28. Restatement Second, supra note 11, §§ 585, 590, 592; Sanford, supra note 24, § 10.4.2.1. "Truth" is often referred to as an absolute privilege to defamation as well. The Restatement Second, however, omitted what was previously § 582 ("True Statements of Fact") from its chapter of defenses, and replaced it in another chapter with what is now § 581A ("True Statements"). Regardless of how it is categorized, truth remains an absolute bar to recovery for defamation. Restatement Second, supra note 11, § 581A.
31. Rosenberg v. Helinski, 616 A.2d 866, 873 (Md. 1992); Restatement Second, supra note 11, § 611; Sack & Baron, supra note 13, §§ 6.3.2.2, 7.37; Sanford, supra note 24, § 10.2. The Restatement Second's view of the privilege of fair report is actually broader than the definition provided because it also encompasses reports of public meetings dealing with matters of public concern. Restatement Second, supra note 11, § 611. This view, however, is that of the minority. See supra notes 47-50 and accompanying text.
34. Elder, supra note 32, at 5.
public record, not by what may have actually transpired prior to the proceeding.35

The two primary rationales advanced in support of the privilege of fair report provide some insight into privileges to defamation, the importance of the concerns which lead to their creation, and the urgency to protect the rights at stake. The rationales for the privilege of fair report are the agency rationale and the supervisory rationale.36 The agency rationale justifies the privilege of fair report by rooting the privilege in an individual's common law right to attend judicial proceedings.37 The press acts as an "agent of the public" in gathering and disseminating the publicly available information, "reporting only that which others could hear for themselves were they to attend the proceedings."38 Based on this rationale, the privilege arises out of practical necessity, as many individuals are often unable to travel great distances to attend official proceedings in person.39 Additionally, spatial limitations in courthouses prevent more than a limited number of persons from attending proceedings.

The supervisory rationale, on the other hand, roots the privilege of fair report in the public's "supervisory or oversight responsibilities over public bodies and officers."40 Publicizing governmental actions and proceedings through publication provides the public with a means of monitoring the conduct of elected officials.41 Additionally, the possibility of public scrutiny operates to ensure the integrity of governmental officials in performing their governmental duties,42 and furthers just administration of the law.43

Based on these two rationales, the fair report privilege was limited initially to publishing accounts of judicial and legislative proceedings.44 Gradually, courts have expanded the privilege to include accounts of administrative and executive reports as well.45 But despite

35. Id.
36. Id. at 3; see also Medico, 643 F.2d at 140-43 (discussing primary agency and supervisory rationales and secondary public interest rationale for privilege of fair report).
37. Elder, supra note 32, at 3.
40. Hogan, 446 N.Y.S.2d at 841.
42. Elder, supra note 32, at 3.
43. Medico, 643 F.2d at 141.
44. Elder, supra note 32, at 5.
The continuous expansion of the scope of the fair report privilege, each new privileged category must generally fall under the broader category of "official statements or records made or released by a public agency." 46

The Restatement Second, however, expanded the privilege beyond even that limitation. 47 Under the Restatement Second's view of the privilege of fair report, accurately publishing political speeches of public officials or candidates for public office is also privileged. 48 Additionally, the Restatement Second and several cases have held, or at least suggested, that the privilege covers accounts of some non-governmental proceedings and meetings if they are of public concern. 49 This view, however, is the minority. 50

Many state legislatures have codified the fair report privilege. 51 In doing so, a majority of those states have adopted the majority view and statutorily limited the privilege to accounts of official—as opposed to only public—actions, reports, and proceedings. 52

47. Elder, supra note 32, at 114.
48. See Restatement Second, supra note 11, § 611 cmt. i.

Comment a of § 611 of the Restatement Second also raises the issue of whether the privilege of fair report is conditional or absolute. While some states have enacted an absolute privilege of fair report, others have enacted a conditional privilege. Compare N.Y. Civ. Rights Law § 74 (McKinney 1992) (absolute) with Ky. Rev. Stat. Ann. § 411.060 (Michie/Bobbs-Merrill 1991) ("unless . . . maliciously made"). The Supreme Court's view on the absolute or conditional nature of the privilege is unclear. Elder, supra note 32, at 297.

49. See, e.g., Borg v. Boas, 231 F.2d 788, 794-95 (9th Cir. 1956) (including within the privilege a meeting to induce a judge to order a grand jury investigation); Hartzog v. United Press Ass'ns, 202 F.2d 81, 82-83 (4th Cir. 1953) (extending the privilege to a session of an executive committee of a state political party); Pinn v. Lawson, 72 F.2d 742, 743-44 (D.C. Cir. 1934) (including statements made at a meeting of a public church); Kilgore v. Younger, 640 P.2d 793, 797-800 (Cal. 1982) (involving defamatory statements made at a press conference of a state Attorney General); Restatement Second, supra note 11, § 611 cmt. i (using as an example an assembly or gathering open to the public, held for the purpose of dealing with a matter of public concern).

50. Elder, supra note 32, at 113; see, e.g., WKRG-TV v. Wiley, 495 So. 2d 617, 619 (Ala. 1986) (declining to apply privilege simply because meeting was public and matter was of public concern), cert. denied, 479 U.S. 1088 (1987).


Despite the broader view of the Restatement Second and isolated older cases, almost all courts hold that the privilege of fair report does not attach to publishing accounts of even official proceedings if the proceedings are not also public. This follows from the two rationales previously provided in support of the privilege. In the case of a nonpublic proceeding, the media cannot act as an "agent" for an individual who had no right to attend; nor should the media be permitted to provide a supervisory function for the public greater than the public's own supervisory responsibility.

2. Constitutional Privileges

In New York Times v. Sullivan, the Supreme Court declared that defamation "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." Thus, both common law and statutory state defamation law must sometimes yield to constitutional concerns.

Constitutional privileges are defenses to claims of defamation and are rooted in the First Amendment's guarantee of free speech. These privileges recognize that in some instances, an individual's interest in his reputation is subordinate to the constitutional right to publish information freely. For example, Sullivan's actual malice standard is a constitutional privilege to publish statements regarding public officials, that may prove to be false. In Sullivan, the Supreme Court reasoned that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions... leads to a comparable 'self-censorship.'" The Court explained that such a rule may deter criticism of official conduct, even if the would-be critic believed the criticism to be true, out of fear of the inability to prove the truth in court or the expense of doing so.

Although not yet addressed by the Supreme Court, several federal courts have adopted the privilege of neutral reportage as another con-

53. See supra notes 31-50 and accompanying text.
56. Id. at 269.
58. Id.
59. Sullivan, 376 U.S. at 279-80; McCrory et al., supra note 57, at 19.
60. Sullivan, 376 U.S. at 279.
61. Id.
The privilege derives from the same core First Amendment concerns as the actual malice standard. The privilege protects media defendants from defamation liability for neutrally and accurately reporting newsworthy charges against public figures, "regardless of the reporter's private views regarding their validity."

The constitutional privilege of neutral reportage finds support in many of the same concerns that inspired the Sullivan Court to create the actual malice standard. In Sullivan, the Court concluded that some false speech concerning public officials must be protected to ensure that the necessary "breathing space" is afforded for publishing true speech concerning public officials. Similarly, some neutrally reported false speech must be tolerated to ensure "uninhibited, robust, and wide-open" debate on public issues, the central theme of many constitutional privileges.

II. THE PRIVILEGE OF NEUTRAL REPORTAGE: EDWARDS V. NATIONAL AUDUBON SOCIETY

To understand fully the controversial privilege of neutral reportage, a brief summary of the facts of Edwards, the case that created it, is necessary. In the early 1970s, a debate raged around the use of the insecticide DDT. Proponents of the pesticide maintained that DDT was necessary to save millions of human lives. They urged that without DDT, many people would perish from insect-carried diseases while others would die of starvation caused by destruction of crops by insects. Environmental groups argued, however, that DDT endangered nearby bird life.


64. Edwards, 556 F.2d at 120.


66. For further discussion of the policy concerns driving the privilege of neutral reportage, see infra notes 93-101 and accompanying text.


68. Id. at 115.

69. Id. at 115-16. To emphasize the importance of DDT, Dr. J. Gordon Edwards went so far as to refer to a proposed ban on DDT as "deliberately genocidal." Id. at 116. Dr. Edwards was a professor of entomology at San Jose State College in California. Edwards v. National Audubon Soc'y, 423 F. Supp. 516, 517 (S.D.N.Y. 1976), rev'd, 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977).

70. Edwards, 556 F.2d at 115.
As one debate tactic, DDT advocates cited the National Audubon Society's (the "Society") annual Christmas Bird Count (the "Count") as evidence that the number of birds had actually grown despite the increased use of DDT.\textsuperscript{71} Robert S. Arbib, Jr., an editor of the Count, responded to the DDT advocates by prefacing the results of the Society's 1971 Count with a warning against what he believed was a widespread distortion of the results of previous Counts.\textsuperscript{72} He instead attributed the apparent increase in birds to a growing number of more-skilled bird watchers with better access to viewing areas.\textsuperscript{73} Arbib concluded: "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."\textsuperscript{74}

John Devlin, a nature writer for the \textit{New York Times}, was informed of Arbib's accusations and asked Arbib for the names of those scientists Arbib had termed "paid liars."\textsuperscript{75} Although Arbib and Devlin disputed the ensuing conversation at trial, they agreed that Arbib had supplied Devlin with a list of five eminent scientists, including Dr. J. Gordon Edwards.\textsuperscript{76}

After eliciting "both sides of the story to the best of his ability,"\textsuperscript{77} Devlin reported in the \textit{Times} that "[s]egments of the pesticide industry and certain 'scientist-spokesmen' [were] accused in . . . American Birds of 'lying' by saying that bird life in America [was] thriving despite the use of DDT."\textsuperscript{78} The Devlin article then attributed the accusations to Arbib and listed the five scientists Arbib had named.\textsuperscript{79} The article concluded by quoting verbatim from Arbib's foreword to the Count.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{71} Id. at 116.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 116-17.
\item \textsuperscript{74} Id. at 117. Arbib's reference to those who were "paid to lie" expressed his belief that many DDT proponents were actually pesticide industry spokesmen. Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. At trial, Arbib maintained that he had given Devlin the names of scientists along with a warning that the scientists were those that Arbib and Roland Clement, the Society's Staff Biologist and Vice-President, believed to have most egregiously distorted the statistics of past Counts. Id. Arbib also maintained, however, that he had specifically told Devlin that he, Arbib, would not refer to those scientists as "paid liars." Id. Devlin, on the other hand, denied that Arbib had so cautioned him and argued that Arbib had in fact made it clear that the named scientists were those referred to in Arbib's Foreword to the Count of 1971. Id.
\item \textsuperscript{77} Id. at 118. Devlin had tried to contact all five of the scientists named by Arbib. He was successful, however, in reaching only three of them, each of whom denied the charges. Id. at 117. This point is important as one of the elements of the privilege created in \textit{Edwards} is that the report must be neutral. See id. at 120.
\item \textsuperscript{78} Id. at 118. "American Birds" was the Society's publication containing the results of the annual Count. Id. at 116.
\item \textsuperscript{79} Id. at 118.
\item \textsuperscript{80} The Devlin article concluded:
\end{itemize}
"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird
Following the Times article, three of the five accused scientists sued the Society and the Times for defamation. The United States District Court for the Southern District of New York rendered judgment for the plaintiffs based on the jury's finding of actual malice by the Times. The jury awarded damages to the plaintiffs and the defendants appealed.

A. The Creation of, and Justification for, the Privilege

On appeal, Second Circuit Chief Judge Irving R. Kaufman reversed the damage award of the district court. He reasoned:

[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. . . . 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. . . . The public interest in being fully

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Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT. . . .

"Serious Declines" Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species . . . are suffering serious declines in numbers as a direct result of pesticide contamination. . . .

"Anytime you hear a 'scientist' say the opposite," [Arbib] continued, "you are in the presence of someone who is being paid to lie. . . ."

Id.

81. Edwards v. National Audubon Soc'y, 423 F. Supp. 516 (S.D.N.Y. 1976), rev'd, 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). Although not expressly stated in the case, in their suit against the Times, the plaintiffs presumably relied on the longstanding traditional rule that one who republishes a defamation is as guilty as the original defamer. See supra notes 15-17 and accompanying text.

82. Edwards, 423 F. Supp. at 519. Specifically, the jury was instructed that the Times could be found guilty of defamation with malice if Devlin had serious doubts about the truth of the accusations, even if he believed that Arbib had made them, and that he, Devlin, had reported them accurately. Edwards v. National Audubon Soc'y, 556 F.2d 113, 119 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). For a discussion of the "actual malice" standard, see supra notes 19-22 and accompanying text.

83. Edwards, 423 F. Supp. at 516. Dr. Edwards was awarded $21,000 and Drs. Jukes and White-Stevens were awarded $20,000 each. Edwards, 556 F.2d at 119.

84. Edwards, 556 F.2d at 122-23. Although Judge Kaufman believed that the evidence in the case could not support a finding of actual malice by the Times, id. at 120-21,—sufficient grounds in and of itself to reverse the district court's judgment—this aspect of the case, discussed in dicta, is beyond the scope of this Note. For a discussion of the burden of proof on a public figure defamation-plaintiff to prove malice, see New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (defining actual malice as knowledge of falsity or reckless disregard of truth). See also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-78 (1986) (requiring plaintiff to prove actual falsity of the statement as well as defendant's knowledge of falsity); supra notes 19-22 and accompanying text.
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.85

With this statement,86 the Second Circuit created the privilege of neutral reportage, affording the media another constitutional protection against liability for defamation.87 At least in the Second Circuit,88 the First Amendment's guarantee of freedom of speech89 permits the media to republish, accurately and neutrally, newsworthy90 defamatory

85. Edwards, 556 F.2d at 120.

86. Interestingly, the Second Circuit created the controversial privilege of neutral reportage in only one paragraph. Although several cases decided subsequent to Edwards have discussed the privilege in greater length, only one other paragraph in Judge Kaufman's opinion deals with the privilege. See id. (excluding from the privilege a publisher who "espouses or concurs in the charges made by others"). This lack of a more comprehensive explanation of the privilege further supports the arguments in parts III and IV regarding the privilege's scope. Arguably, the court did not consider sufficiently the breadth of the privilege.

87. This safeguard attempts to protect the media not only from liability, but from costly and often frivolous lawsuits as well. See Franklyn S. Haiman, Speech and Law in a Free Society 53 (1981) (discussing plaintiffs with dubious cases using the law as a "tool of harassment"). According to statistics furnished by The Libel Defense Resource Center in New York, the media is currently better protected than ever before. For example, the average number of libel trials involving the media has declined by more than half since the 1980s. Patricia G. Barnes, Who's Sorry Now?, 82 A.B.A. J. 20, 21 (Jan. 1996). Additionally, media-defendants won nearly half the jury trials in 1992-93, compared with approximately one quarter between 1980 and 1991. Id.


Subsequent to Edwards, however, the Eighth Circuit also adopted a privilege of neutral reportage. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989); see infra notes 133-140 and accompanying text.

89. "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

90. Under the Edwards privilege, the newsworthiness requirement is actually a requirement at all in the sense that it need be proven at trial. According to Judge Kaufman, "[w]hat is newsworthy about such accusations is that they were made." Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). As such, all false accusations by prominent organizations against public figures are newsworthy, and a defendant need never prove newsworthiness: If all other elements of the privilege obtain, the accusations are inherently newsworthy; if they do not, the privilege is inapplicable despite an independent finding of newsworthiness.
statements made by responsible organizations against public figures.91 The original defamer, however, may still be found liable.92

   The Second Circuit's justification for creating the privilege was the public's interest in being fully informed about controversies surrounding sensitive issues.93 The interest is so strong that it "demands" that the press be afforded the broadest protection to report charges involving these controversies.94

   Considered against "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"95 it is evident that a constitutional privilege was necessary to protect the media in at least some neutral reportage cases. The policy concerns underlying the constitutional actual malice standard of Sullivan apply to the constitutional privilege of neutral reportage as well. Specifically, in discussing the concerns leading to the actual malice standard, the Court recognized that "freedom of expression upon public questions is secured by the First Amendment."96 In fact, constitutional protection of free speech was designed to ensure the possibility of interchanging ideas to bring about political and social changes, unimpeded by state restrictions.97

   A large part of "the news" consists of reports of statements made by persons other than news reporters. Often, the fact that those statements were made is newsworthy in and of itself, regardless of the truth or falsity of the statements.98 For example, if the President accused the Vice President of embezzling federal funds, the public should know of the accusation regardless of its truth. Reports of these types of statements, according to Edwards, are the type of speech most deserving of constitutional protection.99 One major goal of the First

91. The "public figure" requirement has been a topic of much debate. Although explicitly included in the language of Edwards, Judge Kaufman failed to explain why Dr. Edwards was in fact a public figure. See id. Perhaps owing to this omission, many cases and commentators have disregarded the public figure requirement. See, e.g., Barry v. Time, Inc., 584 F. Supp. 1110, 1126 (N.D. Cal. 1984) (extending the privilege to all republications of serious charges, regardless of the original defamer's "trustworthiness"); April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (finding "no legitimate difference" between private and public plaintiffs for purposes of applying the privilege).


93. Edwards, 556 F.2d at 120. A similar suggested purpose of the privilege is the benefit to the public from "freer reporting of raging controversies." McManus v. Doubleday & Co., 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981). The Eighth Circuit, however, bases the privilege on other grounds, leading to its application in different circumstances. See infra notes 136-40 and accompanying text.

94. Edwards, 556 F.2d at 120.

95. Id. at 269.


97. Sack & Baron, supra note 13, § 6.3.2.


Amendment is to ensure all opportunities for the public to resolve public issues. Doubts concerning whether speech that is questionably public speech should be protected must be resolved in favor of free speech, not against it. Yet, absent a privilege of neutral reportage, the common law rule against republication would render the media reporters of these newsworthy statements liable for defamation.

An argument can be made for broadening the privilege of neutral reportage even further: The media publications are true and therefore not defamation. For example, if Prominent Citizen falsely accused Politician of accepting bribes, and Newswriter wrote in a daily column: “Prominent Citizen accused Politician of accepting bribes,” although Prominent Citizen’s accusations may have in fact been false, Newswriter’s statement was true—Citizen did accuse Politician of accepting bribes. Courts that have discussed the privilege, and the Edwards court in particular, however, have not developed this argument to any significant extent.

The Constitution certainly places a premium on the right to publish true speech. The Court, however, has refused to “hold broadly that truthful publication[s] may never be punished consistent with the First Amendment.” Further, this truth argument is actually an attack on the republication rule, imposing liability on republishers who truthfully attribute defamatory statements, not on the scope of the privilege. Thus, a limited privilege, applied only to further the aims of the First Amendment, is appropriate.

B. Various Inappropriate Expansions of the Privilege

The exact parameters of the privilege of neutral reportage have been the subject of much debate, and it is unclear whether the Edwards court intended them as parameters altogether. At its inception, the requirements of the privilege seemed to be that: (1) the original declarant be a “responsible, prominent organization;” (2) the republication be “newsworthy;” (3) the republication be “accurate and disinterested;” and (4) the defamed be a public figure.

Subsequent cases and commentators, however, have questioned whether the Second Circuit intended the “elements” set forth in Edwards...
wards to serve as requirements, or merely to aid in applying the amorphous privilege to the facts of a particular case. As such, various courts have redefined the privilege. In fact, courts have either redefined or rejected each of Edwards' four apparent requirements. A closer look at the constitutional foundations of the privilege, however, leads to the conclusion that the elements delineated by the Edwards court are the proper elements to further the constitutional concerns raised in a neutral reportage context.

1. Prominence

Courts have not uniformly accepted the requirement that the original defamer must be a responsible, prominent organization. In fact, courts have rejected both the responsible and prominent component and the organization component of the requirement. As for the organization component, there does not appear to be a basis for distinguishing between defamatory statements made by organizations and those made by individuals. The term "organization" was likely included in Edwards as factual support for the privilege. Few courts, therefore, have refused to apply the privilege on grounds that an individual, rather than an organization, had made the defamatory accusations.

The Court of Appeals of Illinois properly considered the responsible and prominent requirement of Edwards to be critical. In Fogus v. Capital Cities Media, Inc., the court stated, without ruling on the validity of the privilege, that if the First Amendment required the

106. See, e.g., Cianci v. New Times Publishing Co., 639 F.2d 54, 68 (2d Cir. 1980) (stating that Edwards did not attempt to define precisely the contours of the privilege); Note, The Developing Privilege of Neutral Reportage, 69 Va. L. Rev. 853, 862 n.48 (1983) [hereinafter The Developing Privilege] (questioning whether the elements of the Edwards privilege were intended as a "doctrinal test").

107. This Note focuses primarily on only the "newsworthiness" requirement of Edwards. The following three subparts deal briefly with the treatment of the three other requirements by various courts. The analysis is included only to raise some of the issues surrounding the privilege of neutral reportage and illustrate how the Edwards version of those elements is most in line with the constitutional bases of the privilege. The discussion is not intended to be exhaustive.

108. Barry v. Time, Inc., 584 F. Supp. 1110, 1125 n.18 (N.D. Cal. 1984); The Developing Privilege, supra note 106, at 865 n.64.


privilege of neutral reportage, the privilege would nevertheless not apply to republications by the media of allegations of police misconduct made by unnamed youths who had been arrested. The Fogus court presumably reached its conclusion because the youths were not responsible and prominent.

This analysis affords the proper import to the responsible and prominent requirement in light of the purposes of the Edwards privilege. The Second Circuit created the privilege to ensure that the type of speech central to the First Amendment would be adequately protected. The prominence requirement acts as a safeguard to promote that aim by ensuring that all false speech protected by the privilege is, at minimum, made by individuals holding positions in which the public generally has an interest in hearing. Conversely, anonymous and unverifiable accusations that will not likely serve the public's interest in being informed of, or having the opportunity to comment on, matters of public concern, will not be unduly protected.

In Barry v. Time, Inc., however, a California court strayed from those aims and expanded the privilege by rejecting the trustworthiness aspect implicit in the responsible and prominent requirement. The Barry court required prominence only in the sense that the defamer's identity must be known, explaining that the Fogus court refused to apply the privilege because the defamers were "unnamed," and not because of a lack of trustworthiness. Thus, the Barry court applied the privilege to a neutral and accurate publication of the defamatory accusations of a convicted felon who failed a lie detector test.

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112. Id. at 1102.
113. But see Barry v. Time, Inc., 584 F. Supp. 1110, 1125-26 (N.D. Cal. 1984) (explaining that the Fogus court refused to apply the privilege because the youths were unnamed, rather than because of their lack of trustworthiness).
114. See supra notes 102-04 and accompanying text.
116. Id. at 1125-26; see also Ollman v. Evans, 750 F.2d 970, 989 n.39 (D.C. Cir. 1984) (questioning whether the privilege obtained when the source of the defamation was anonymous).

Expanding the privilege even further, the Barry court held that to apply the privilege when the defamed is a public figure, a court must determine only that the defamer was a party to an ongoing controversy surrounding the defamation and that the report is accurate. Barry, 584 F. Supp. at 1125, 1127. Paradoxically, however, the Barry court acknowledged that the broad ongoing-controversy requirement may in fact limit the privilege and prevent its application when it might otherwise attach. See id. at 1127. For example, under this construction of the privilege, if X and Y are embroiled in a public and newsworthy controversy, and public figure Z intervenes and defames Y, even a neutral and accurate report of Z's accusation would not be privileged. Other courts that have adopted the ongoing controversy requirement include the District Court for the Eastern District of Pennsylvania in RRZ Public Markets Inc. v. Bond Buyer, 23 Media L. Rep. (BNA) 1409 (E.D. Pa. 1995), and the Superior
Furthermore, in *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, the U.S. District Court for the District of Columbia disregarded the requirement that the original defamer be a responsible and prominent organization altogether. The court would apply the privilege whenever the statement was made by any "public official."\(^{119}\)

2. Public Figures

Controversy also surrounds the *Edwards* requirement that the defamed be a public figure. For example, the Tenth Circuit, in *Dixson v. Newsweek, Inc.*,\(^{120}\) properly limited the privilege to cases involving public figures and rejected applying it to cases involving private plaintiffs, regardless of newsworthiness.\(^{121}\) Conversely, in *Krauss v. Campaign News Gazette, Inc.*,\(^{122}\) the Appellate Court of Illinois, Fourth District, disregarded the public figure requirement and stated that the privilege applies to statements regarding all public issues, regardless of whether the defamed was a public figure.\(^{123}\)

A closer look at who is a public figure suggests that the public figure requirement also furthers the aim of protecting only the type of speech that ought to be afforded constitutional protection. Individuals deemed to have been public figures by various courts include a television entertainer,\(^{124}\) a political author,\(^{125}\) a nationally known minister,\(^{126}\) and a former military official who served on several presidential panels.\(^{127}\) Neutral reports of newsworthy accusations leveled against these public figures will likely involve issues about which the public has a strong interest in being informed. As stated in *Edwards*, "[i]t is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life."\(^{128}\)

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\(^{119}\) See *id.* at 1252 (D.D.C. 1982).

\(^{120}\) 562 F.2d 626 (10th Cir. 1977).

\(^{121}\) See *id.* at 631 (limiting protection of *Edwards* to defamations of public figures).


\(^{123}\) The privilege applies to all "public issues, personalities, or programs." *Id.* at 1363; see *April v. Reflector-Herald, Inc.*, 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (rejecting *Dixson* and applying the privilege to a case of a defamed private figure).

\(^{124}\) Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976).


Conversely, a research scientist and an individual held in contempt of court for failing to appear before a grand jury investigating Soviet espionage in the United States were held not to be public figures. The Supreme Court has even deemed a litigant in a divorce proceeding who held several press conferences for the benefit of the media only a private figure. Just as the Supreme Court refused to require those private figure plaintiffs to prove actual malice, the Constitution does not afford a privilege to publish accounts of false charges against them.

The public figure requirement, however, serves only as a first hurdle. If the accusations against public figures are nevertheless not of the type that the public has a strong interest in being informed of, the requirement that the charges be newsworthy attempts to ensure that only proper speech is protected.

This public figure element of the privilege will often overlap with the newsworthiness requirement because many activities of public figures will be newsworthy. The newsworthiness of the activity, however, is not conclusive that the individual involved is a public figure.

3. Accuracy and Disinterest

Even the requirement that the report be accurate and disinterested has been applied differently in different jurisdictions. Specifically, the Eighth Circuit’s neutrality requirement, as explained below, is significantly more permissive than that of the Second Circuit, based on the slightly different rationale cited in support of the privilege.

In Price v. Viking Penguin, Inc., an FBI agent, Price, sued an author and Viking Penguin, a publishing company, for defamation. Price alleged that the author’s book on the government’s treatment of American Indians, and specifically Price’s role in a shootout in South Dakota, libelously accused him of several acts of misconduct. In adopting the privilege of neutral reportage, the court emphasized the “robust, and wide-open” debate theory underlying the Sullivan actual malice requirement, rather than the public interest in being informed of public controversies emphasized in Edwards. Because of

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132. Id.
135. Id. at 1502-03.
this slight difference in doctrinal bases, the Eighth Circuit's privilege is broader than that of the Second Circuit. The Eighth Circuit would protect from liability a one-sided report, provided the defamatory statements were reported neutrally,\(^1\) because such a report would lead to wide open debate of the issue. Moreover, the publisher could either passionately support or even zealously attack the defamed and the defamed's position, provided the defamatory statements were accurately reported.\(^1\) Thus, in *Viking*, the publication was privileged despite the author's active participation in the debate. In contrast, the Second Circuit would focus on the information's value, which would be sufficiently high only if both sides of the controversy were presented fairly. Accordingly, the Second Circuit would not protect an author who participated in a debate through his defamation.

*McManus v. Doubleday & Co., Inc.*\(^1\) raised another issue regarding the neutrality requirement. In *McManus*, the court refused to extend the privilege to a neutral republication that arose from investigative reporting.\(^1\) At least one commentator has suggested, however, that this limitation is not an additional limitation at all, rather it derives from the neutrality requirement of *Edwards*. Arguably, when a reporter investigates and actively solicits a defamatory comment, the reporter is no longer "neutrally" reporting.\(^1\)

### 4. Newsworthiness

The final element of the privilege of neutral reportage is that the neutrally reported accusations need be newsworthy.\(^1\) This requirement, however, is overbroad, and this Note therefore proposes limiting its scope. An analysis of the current scope of the newsworthiness element of the privilege follows.

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\(^1\) See *Viking*, 881 F.2d at 1434 (citing Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir. 1986)). The Eighth Circuit held that publishing a reporter's "general disposition toward his topic" is not indicative of concurrence with a particular allegation. *Id.* In *Edwards*, however, the court emphasized the facts that both sides of the story were elicited and that both sides of the controversy were presented neutrally. *See Edwards*, 556 F.2d at 117-18. Similarly, in Russo v. Padovano, 446 N.Y.S.2d 645, 647 (N.Y. App. Div. 1981), the Appellate Division of the Supreme Court of New York held that stating facts and opinions supporting the defamatory implication was not neutral reportage.


\(^1\) *Id.* at 1391. In *McManus*, a Roman Catholic priest sued an author, a coauthor, and a publisher of a book which quoted his Irish Embassy file referring to the priest as having "homicidal tendencies." *Id.* at 1385. The court refused to extend the privilege in that case because the charges by the Embassy were solicited actively by the author. *Id.* at 1391.


Somewhat circularly, the Second Circuit has stated only that "[w]hat is newsworthy about [particular] accusations is that they were made." The court gave no further guidance as to what was newsworthy other than alluding to the aims of the First Amendment. Federal cases in other areas of law, however, provide some examples of what types of issues are newsworthy, and thus protected under Edwards. Some examples of these cases follow.

In 1957, Ilya Wolston’s uncle and aunt were arrested on, and pleaded guilty to, charges of espionage. Pursuant to grand jury subpoenas to investigate Mr. Wolston’s possible connection to the espionage, Mr. Wolston travelled to Washington, D.C. While there, he failed to respond to one subpoena and was held in contempt of court. Shortly after a number of newspapers reported the incident, the publicity surrounding Mr. Wolston subsided and he resumed living a private lifestyle. But in 1974, Reader's Digest Association published a book describing the Soviet Union's espionage organization, naming Wolston as a Soviet agent living in the United States. In Wolston v. Reader's Digest Association, Mr. Wolston's libel suit against the publisher, the Supreme Court held that Wolston was not a public figure merely because he was involved in a matter that attracted public attention. The Court did allow, however, that Wolston’s failure to appear before the grand jury was newsworthy.

In Richmond v. Southwire Co., Southwire Company terminated several employees who had either admitted to drug use, refused to take a polygraph test regarding alleged drug use, or failed a polygraph test and had been seen using drugs on company property. Local newspapers ran stories of the investigation and terminations, along with a statement prepared by the company placed under the headlines in such a way as to suggest that all of the discharged employees had been terminated for drug use. The former employees sued on several grounds, including defamation. The district court applied an Arkansas qualified privilege to publish defamatory statements made in good faith to protect one’s own interests. In affirming the court’s decision, the Eighth Circuit referred to the “small-town employer’s” investigation into the conduct of its employees as newsworthy.

In Reuber v. Food Chemical News, Inc., Melvin Reuber was a scientist at a private research center affiliated with the National Can-

145. Id.
146. Id.
149. Id. at 168.
150. Id. at 167.
151. 980 F.2d 518 (8th Cir. 1992).
152. Id. at 519-20.
153. Id. at 520.
cer Institute (the "NCI"), a federal agency. At the time, the NCI's official position on the pesticide malathion was that it was non-carcinogenic. Reuber, "a self-styled whistleblower," however, disseminated his own research in a manner which created the impression that the NCI had reversed its position on the safety of malathion. In response, Reuber's supervisor reprimanded Reuber in writing for promoting inadequate research and "subverting public confidence in the NCI." Shortly thereafter, a news publication published most of the supervisor's reprimands, culled from an anonymous leak.

In Reuber's suit against the paper for defamation and invasion of privacy for publishing the supervisor's letter, the trial judge relied on the statement of the paper's editor that she would have published the reprimands even if some of them were false because it was newsworthy that a director of a federally funded research center falsely accused an employee of impropriety.

Finally, in Ault v. Hustler Magazine, Inc., the Ninth Circuit rejected a claim of wrongful appropriation of plaintiff's likeness because the article in which the defendant used plaintiff's picture was newsworthy. In that case, Peggy Ault was a member of an organization founded to oppose an adult video store, and had picketed adult stores in that capacity. A local Oregon paper featuring Ault discussed Ault's anti-pornography activities, and included a photograph of Ault "superimposed over the rear-end of a bent-over naked man."

Although these cases do not involve the privilege of neutral reportage, they do involve allegations of defamation, and were decided using defamation law analyses. The choice of the term of art "newsworthy" by each of the courts is therefore particularly insightful when considering the Edwards privilege. As the Edwards court chose the same term, the Second Circuit presumably sought to protect accurate reports of accusations leveled in these, and similar, contexts. The issues in these cases, however, do not appear to implicate the type of speech concerns underlying constitutional privileges.

155. Reuber worked for the Frederick Cancer Research Center, operated by Litton Bionetics under a contract with the National Cancer Institute. Id. at 706.
156. Id.
157. Id. at 707.
158. Id. at 716.
159. 860 F.2d 877 (9th Cir. 1988).
160. Id. at 883.
161. Id. at 879.
162. Id.
163. Although Edwards was decided before the cases discussed above, and thus the Edwards court could not have relied on them for guidance in choosing the term "newsworthy," the cases are nevertheless instrumental, as they illustrate how the term has evolved in defamation jurisprudence since the Edwards decision. Thus, it is important that courts consider these cases, and the type of speech they protect, in applying the privilege of neutral reportage and evaluating its scope.
164. This assumes, of course, that the other elements of the privilege are present.
They are therefore undeserving of protection by a privilege of neutral reportage rooted in those concerns. Specifically, the public will be no less informed of "controversies that often rage around sensitive issues" if it does not hear about charges leveled in these so called "newsworthy" contexts.

C. Rejecting the Privilege: Dickey v. CBS Inc. 166

Despite the flexibility available in applying the privilege of neutral reportage in any of its variant forms, the privilege has been both criticized at length and rejected outright by several courts and commentators. The Third Circuit, for example, found neither the Second Circuit's nor the Eighth Circuit's justifications persuasive and rejected the privilege within one year of its creation. 167

In Dickey v. CBS Inc., 171 several congressional candidates had been interviewed and videotaped by the television program "Update." In response to a question regarding inflation, one candidate, incumbent Congressman Lawrence G. Williams, related a story that charged Sam Dickey with receiving illegal payoffs. 172 Before the program was to air, Dickey told the station through his attorney, that the charges were both false and defamatory and asked the station to postpone the broadcast until Williams' accusation could be investigated. The station refused to comply with Dickey's request and broadcast the program together with a live appearance by Dickey's attorney denying the charges and the existence of the report. 174 Dickey sued CBS for republishing Williams's defamatory comments and the district court

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166. 583 F.2d 1221 (3d Cir. 1978).
167. See supra part I.B.2.
168. See infra notes 188-91 and accompanying text.
170. See Dickey, 583 F.2d at 1225.
171. 583 F.2d 1221 (3d Cir. 1978).
172. Id. at 1222-24. The motive behind Williams' accusation was that Dickey was a member of the War Board, the Delaware County Republican organization that was endorsing Williams' opponent, Delaware County District Attorney Stephen J. McEwen. Williams maintained that District Attorney McEwen knew about the payoffs—they were allegedly in a report known as the "Sprague Report"—but was not acting on this knowledge because Dickey was McEwen's district's representative on the War Board. Id. at 1222. McEwen denied the Sprague Report's existence. Id. at 1222-23.
173. The program was to be broadcasted by CBS's Philadelphia affiliate, WCAU-TV, Channel 10. Id. at 1221.
174. Id. at 1223-24.
held that although Williams's allegations were false, Dickey had not met his burden of proving malice.\textsuperscript{176}

On appeal, the Third Circuit affirmed the judgment for CBS on the grounds that Dickey had not proven malice by the requisite standard.\textsuperscript{177} Before doing so, however, Circuit Judge James Hunter, III was quick to reject CBS's invitation to adopt the privilege created in \textit{Edwards}.\textsuperscript{178}

Judge Hunter pointed out that publishing newsworthy remarks "without fear of a libel suit even if the publisher 'has serious doubts regarding their truth' ... is contrary to the Supreme Court's ruling in \textit{St. Amant}."\textsuperscript{179} In \textit{St. Amant v. Thompson},\textsuperscript{180} the Court held that publishing with serious doubts of the truth of the publication demonstrates actual malice under \textit{Sullivan}, and invites liability.\textsuperscript{181}

The Third Circuit mentioned neither a public interest in being fully informed, nor in robust, wide open debate, and refused to extend constitutional protection to CBS's republication of Williams's accusations, regardless of their newsworthiness.\textsuperscript{182} The court recognized that often defamatory statements "are of such slight social value"\textsuperscript{183} that any

\begin{itemize}
  \item \textsuperscript{176} Dickey, 441 F. Supp. at 1141-42. The Third Circuit agreed with the district court, which read \textit{St. Amant v. Thompson}, 390 U.S. 727 (1968), to require "proof by clear and convincing evidence 'that the defendant in fact entertained serious doubts as to the truth' of the charges." Dickey, 583 F.2d at 1225.
  \item \textsuperscript{177} Dickey, 583 F.2d at 1229.
  \item \textsuperscript{178} "At the outset, we reject [CBS's] invitation to adopt Edwards [ ] as the rule of this Court." \textit{Id.} at 1225 (emphasis added).
  \item \textsuperscript{179} \textit{Id.} (quoting \textit{Edwards v. National Audubon Soc'y}, 556 F.2d 113, 120 (2d Cir.), \textit{cert. denied}, 434 U.S. 1002 (1977)).
  \item \textsuperscript{180} 390 U.S. 727 (1968).
  \item \textsuperscript{181} \textit{Id.} at 731.
  \item \textsuperscript{182} Dickey v. CBS Inc., 583 F.2d 1221, 1226 (3d Cir. 1978). In a footnote, the court further attacked the neutral reportage privilege, pointing out its inconsistency with the Supreme Court's holding in \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974). \textit{Dickey}, 583 F.2d at 1226 n.5. In \textit{Gertz}, the Court rejected the "public or general interest" test set up in \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29 (1971), and shifted the focus of defamation suits against the media from the content of the publication to the public or private status of the defamed. The \textit{Edwards} privilege, as read by the Third Circuit, however, focuses instead on the newsworthiness of the statement. \textit{Dickey}, 583 F.2d at 1226 n.5.
  \item \textsuperscript{183} Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
\end{itemize}
benefit to be derived from them is greatly outweighed by society's "interest in order and morality." 184

Three years after Dickey, the Third Circuit revisited the neutral reportage privilege in Medico v. Time, Inc. 185 In Medico, the plaintiff sued Time, Inc. for publishing a summary of an FBI report that identified the plaintiff as a member of an organized crime family. 186 The Third Circuit affirmed a summary judgment for Time, holding that the republication of FBI reports was protected by the privilege of fair report. 187 In discussing its recognition of the First Amendment interests involved in the case, the court mentioned the privilege of neutral reportage. The court, however, made it clear that it was not adopting the privilege as the law of the Third Circuit. 188

Several state cases have similarly rejected the privilege. 189 For example, in Hogan v. Herald Co., 190 the Appellate Division of the Supreme Court of New York held that:

[I]t is not possible to reconcile [the privilege of neutral reportage] with [the Supreme Court's] prior decision in Gertz . . . . 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 the publisher is free of culpable conduct under the standards stated in Sullivan and Gertz. 191

Interestingly, Hogan was decided in New York, the same state in which the Second Circuit created the privilege.

III. THE SCOPE OF THE PRIVILEGE OF NEUTRAL REPORTAGE MUST BE RECONSIDERED

As explained, the neutral reportage privilege of Edwards protects publishing neutral and accurate accounts of newsworthy speech. By

184. Id.
187. Medico, 643 F.2d at 140, 147. The court accepted the fair report privilege as it was presented in the Restatement (Second) of Torts as the law of Pennsylvania. Id. at 138. The court then expanded the privilege to include FBI reports as "official" for purposes of applying the doctrine. Id. at 138-42.
188. "We are careful to point out that we do not decide at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in connection with a matter of public interest." Id. at 145.
191. Id. at 842.
using the term newsworthy loosely without attempting to define it, the Second Circuit created a constitutional privilege that is broader than necessary to serve the purposes of the First Amendment. This part explains the First Amendment importance of speech on matters of public concern and why such speech deserves constitutional protection. Speech that is merely newsworthy, however, is not necessarily of public concern. It thus does not always deserve constitutional protection.

A. The Privilege Is in Line with the Focus of Current Supreme Court Defamation Analysis

One of the primary arguments raised against the neutral reportage privilege is that the focus of the privilege is inconsistent with the focus of current Supreme Court defamation analysis. In creating the privilege, the Edwards court focused on the newsworthiness of the accusations in holding that their republication should be protected. Judge Kaufman emphasized the public interest in being fully informed of newsworthy controversies.

In Gertz v. Robert Welch, Inc., decided three years before Edwards, however, the Supreme Court held that in defamation suits against the media, the Sullivan standard necessarily applies only when the plaintiff is a public figure. Among the justifications the Court provided for focusing on the status of the defamed, were a content analysis’ inadequate protection of the rights of private plaintiffs and the inappropriateness of having judges decide which publications were newsworthy. Although the Third Circuit in Dickey refused to adopt the Edwards privilege primarily on grounds that the privilege was inconsistent with St. Amant, the court also acknowledged this apparent inconsistency with Gertz.

194. Edwards, 556 F.2d at 120.
195. Id.
197. See id. at 345-46 (affording states broad discretion in providing a remedy for private individual-defamation plaintiffs).
198. Id. at 346.
199. Dickey v. CBS Inc., 583 F.2d 1221, 1225 (3d Cir. 1978); see supra notes 179-81 and accompanying text.
200. Id. at 1226 n.5. Other cases making this argument from Gertz against the privilege of neutral reportage include Hogan v. Herald Co., 446 N.Y.S.2d 836, 842 (N.Y. App. Div.), aff’d, 444 N.E.2d 1002 (N.Y. 1982) (arguing impossibility of reconciling Edwards with Gertz) and Newell v. Field Enters., 415 N.E.2d 434, 452 (Ill. App. Ct.}
In 1985, however, the Supreme Court refocused its inquiry once again. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a plurality of the Court permitted recovery of presumed and punitive damages absent a showing of actual malice by the plaintiff when the defamation involved a private matter. The plurality thus limited *Gertz*’s burden of proving presumed and punitive damages to cases of private figures involved in matters of public concern.

Upon closer inspection, perhaps what drove the plurality in *Dun & Bradstreet* to reinstate the of public concern inquiry was that such a determination was often necessary even under *Gertz*. In *Gertz*, the Court acknowledged two types of public figures: those who had attained general notoriety, and those who were “public” only within the context of the issue surrounding the defamation suit. Inherent in most determinations that a plaintiff is a “limited-purpose public figure” is a preliminary determination that the underlying controversy is of public concern.

In *Philadelphia Newspapers, Inc. v. Hepps*, the Court added to Sullivan’s actual malice standard, requiring an appropriate plaintiff to prove not only knowledge of falsity or reckless disregard of the truth, but also the falsity of the statement. Notably, the plaintiff in *Hepps* was a private figure involved in a matter of public concern. The *Hepps* Court clearly adopted *Dun & Bradstreet*’s extension of the actual malice standard to at least some private figures. Thus, contrary to what cases such as *Hogan v. Herald Company* and *Newell v. Field Enterprises*, both decided before *Dun & Bradstreet*, suggest, the general focus of the *Edwards* inquiry is presently in line with the focus of the Supreme Court in constitutional defamation analysis.

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202. Id. at 763.

203. Whether *Dun & Bradstreet* similarly limited other aspects of *Gertz* is beyond the scope of this Note, and is therefore not discussed here.


207. 475 U.S. 767 (1986).

208. Id. at 768-69; *supra* note 19.


But despite *Dun & Bradstreet*'s mooting of the various courts' arguments from *Gertz*, the privilege of neutral reportage nevertheless remains somewhat broader than is appropriate. Particularly, the current of public concern standard of *Dun & Bradstreet* is more limited than the newsworthiness standard of *Edwards*.

B. The Privilege Is Beyond the Scope of Current Supreme Court Defamation Analysis

The Supreme Court has long recognized that "not all speech is of equal First Amendment importance." 213 Although the Court has narrowed the scope of defamation as a categorical exception to free speech, a "limited categorical approach has remained an important part of [the Court's] First Amendment jurisprudence." 214 A "right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment." 215

1. The Supreme Court and Matters of Public Concern

In 1983, *Connick v. Myers* 216 marked the first time the Supreme Court recognized matters of public concern as a "content-based category of privileged 'public issue' speech," deserving of special protections. 217 In *Connick*, Ms. Myers, an assistant district attorney, was informed that she would be transferred from one section of the criminal court to another. 218 In response, she circulated a questionnaire to her officemates inquiring about their views on, among other things,

213. Id. at 758.

Connick v. Myers, 461 U.S. 138 (1983), was the first case to explicitly demarcate "stratification at the upper reaches of the First Amendment." Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 22 (1990). Speech on matters of public concern, however, is not the only category of speech afforded a level of protection based on its hierarchical relation to other First Amendment speech. In fact, most speech is now subject to this type of stratification.

Historically, the Supreme Court focused only on whether a class of speech was protected under the First Amendment; if it was, it was entirely, if it wasn't, it wasn't at all. Currently, however, many categories of previously unprotected speech have eroded. Now, the Court's inquiry is whether particular speech within one of the historically excluded classifications is favored or disfavored. An example can clarify this distinction. Obscenity was historically an exception to free speech and fell outside of First Amendment protection. Today, however, there are gradations of obscene speech, ranging from patently obscene speech afforded little or no protection to merely offensive speech, afforded greater protection but still not the level of protection afforded matters of public concern. For a more thorough discussion of this trend in many areas of previously excluded speech, see id. at 13-28.


218. *Connick*, 461 U.S. at 140.
the transfer policy of the office. Ms. Myers’s supervisors then terminated her employment for “creating a ‘mini-insurrection’ within the office.” Myers sued and was victorious at both the district court and Circuit Court of Appeals levels on the grounds that she had been fired for exercising her right to free speech. The Supreme Court reversed, however, holding that Ms. Myers had raised no constitutional claim, as the speech in question—the questionnaire—was not on a matter of public concern.

The matters of public concern standard of Connick is more restrictive than the newsworthiness standard of Edwards. The majority of the questions in Myers’s questionnaire—those regarding “office transfer policy, office morale, the need for a grievance committee, [and] the level of confidence in supervisors”—were certainly newsworthy when viewed in light of circumstances deemed newsworthy by various Circuit Court cases. The average citizen would be at least as interested in learning of the grievances of an assistant district attorney as he would be of learning that Peggy Ault felt strongly about her views on pornography. Had Myers’s questionnaire instead been a memo of false accusations against the office supervisors, it would likely have cleared the low hurdle of newsworthiness required by Edwards. But, according to the Court in Connick, the questionnaire did not regard matters of public concern.

In a defamation context, the case in which the Court recognized the value of speech on matters of public concern was Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. In Dun & Bradstreet, a plurality of the Court held that Dun & Bradstreet’s false statement in a credit report regarding Greenmoss was a matter of purely private concern. Echoing the majority opinion in Connick, the plurality held that regarding private figure plaintiffs, matters of private concern do not implicate the First Amendment. Again, as in Connick, Dun &

219. Id. at 141.
220. Id.
223. Id. at 141.
224. See supra part II.B.4.
225. See Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988); supra notes 159-62 and accompanying text.
226. Applying the circular reasoning of Edwards, the memo would have been newsworthy if the media decided to publish it. See Edwards v. National Audubon Soc’y, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977); supra note 145 and accompanying text. Even a neutral report of the accusations, however, would probably not be privileged as the prominent speaker and public figure elements of the privilege could not likely be proven.
229. Id. at 762.
230. Id. at 761-62.
Bradstreet’s false credit report would likely be deemed newsworthy by a court applying the Edwards privilege. There would likely be a public interest in it at least equal to the public interest in a “small-town” employer’s investigation of suspected drug possession by employees, deemed newsworthy by the Eighth Circuit in Richmond v. Southwire Company. The false credit statements, however, do not reach the level of public concern necessary to be afforded constitutional protection from liability for defamation. The category of speech on matters of public concern is thus clearly more limited than the category of newsworthiness.

What derives from the above discussion is the need to define more precisely what are matters of public concern. Generally, the term pertains to “what government does or should do and how society is organized.” A more specific and workable definition can be gleaned only from cases that have applied the standard and scholarly writings regarding the aims of the First Amendment.

From Connick, one can gain some insight into what constitutes speech on matters of public concern. Included in Myers’s questionnaire was a question whether other employees “felt pressured to work in political campaigns.” The Court excepted this question from its holding that the questionnaire was not speech of public concern. Similarly, in discussing what type of speech is of public concern, the Court in Dun & Bradstreet cited cases such as Roth v. United States and Garrison v. Louisiana. The Court cited those cases for their emphasis on the importance of speech tending to bring about political change and speech that was the essence of self-government, respectively. Thus, Supreme Court case law indicates that speech with a political aspect is certainly included in matters of public concern. But the category is broader than simply political speech. Matters of public concern includes all issues or controversies affecting persons other than those directly involved in them.

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231. See Richmond v. Southwire Co., 980 F.2d 518, 520 (8th Cir. 1992); supra notes 151-53 and accompanying text.
232. Estlund, supra note 213, at 1 n.1.
234. Id. at 149.
238. Dun & Bradstreet, 472 U.S. at 759.
239. This definition, which explains the common link between all cases deemed of public concern, is adapted from the ideas of Professor W. Robert Gray in W. Robert Gray, Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values, 1 Tex. Wesleyan L. Rev. 1, 4 (1994). Professor Gray attempts to distinguish the “public” from the “private” in the free speech context. Id. His goal is to “utilize a theory of ethical and philosophical pluralism to construct ‘the broadest range of purposes or values that can [meaningfully] be thought to underlie the Free Speech Clause.’” Id. (quoting R. George Wright, A Rationale from J.S. Mill for the Free Speech Clause, 1985 Sup. Ct. Rev. 149, 149). In formulating his model of “plural-
In *Chapin v. Knight-Ridder, Inc.*, the president of a charitable organization sued a newspaper for libel for an article about the charity's program to send gift packages to soldiers in the Persian Gulf. The article accused the charity of drastically marking up the price of the gift packages before charging contributors. The court held that the paper was constitutionally protected in publishing the article because, among other reasons, the alleged libel regarded matters of public concern. This issue likely reached the level of public concern because it affected others besides those immediately involved in the dispute. All potential contributors had an interest in whether the charity was actually marking up the price of the packages significantly.

The Tenth Circuit, in *Lee v. Calhoun,* affirmed a denial of a claim of invasion of privacy based on a finding that the plaintiff was a public figure because of his involvement in a $38 million malpractice suit that had attracted the media's attention. The court explained that the suit was a matter of public concern because of the public's interest in the size of monetary damage claims and jury awards. As further support, the court noted the public's interest in "policing failures in the medical profession." As was the case in *Chapin,* many people other than the litigants in *Lee* were affected by the controversy.

*Silvester v. American Broadcasting Companies* further supports this view of matters of public concern. In *Silvester,* the Eleventh Circuit held that the public has a legitimate interest in all matters of corruption, particularly those involving gambling, a highly-regulated industry. The court focused on the effect of the corruption on the public, noting that the corruption could increase taxpayers' burdens.

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240. 993 F.2d 1087 (4th Cir. 1993).
241. Id. at 1091.
242. Id. at 1092-93.
243. See supra note 239 and accompanying text.
244. 948 F.2d 1162 (10th Cir. 1991).
245. Id. at 1165.
246. Id.
247. Id.; see also *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (recognizing legitimate public interest in competency of licensed professionals).
248. 839 F.2d 1491 (11th Cir. 1988).
249. Id. at 1493.
250. Id.
Other examples of speech held to be of public concern include: "[I]f they go for him again, I hope they get him," stated during a discussion of President Reagan's administration, criticism of an expert witness psychologist's theories and credentials, and picketing against abortion. The first is political; the latter two certainly affect the public.

IV. The Privilege Should Be Restricted to Only Speech on Matters of Public Concern

The newsworthiness requirement of the privilege of neutral reportage must be limited solely to matters of public concern, as the term has been explained above, for only then will the privilege properly protect the core First Amendment concerns it seeks to safeguard. "[I]t is a prized American privilege to speak one's mind . . . on all public institutions." Matters of public concern rest at the heart of the First Amendment's protection, and discussion of such matters promotes the values protected by the First Amendment. Matters of general newsworthiness, as defined by various courts, however, do not lie at the heart of the First Amendment: Their discussion does not promote the same values. Thus, the appropriate demarcation between defamation afforded constitutional protection and defamation that is not, lies at matters of public concern, not general newsworthiness. Edwards may have nevertheless been decided correctly even in light of the more limited scope of the privilege proposed by this Note. The accusations against Professor Edwards were as much a matter of public concern as the controversies in the cases discussed in the following subparts, for the same reasons as explained below. The case, however, sets a dangerous precedent in that many privileged cases will not truly be deserving of a constitutional privilege. The term "newsworthy" must be replaced with the phrase "matters of public concern," interpreted with an eye towards the aims of the Free Speech Clause and the type of speech the clause is meant to protect. This change will guide courts in the future in applying the privilege to only truly "privileged" cases.

256. The Florida Circuit Court seems to have limited the privilege in this manner, although retaining the word "newsworthy." See Clark v. Clark, 21 Media L. Rep. (BNA) 1650, 1654 (Fla. Cir. Ct. 1993) (citing Edwards for the proposition that the privilege of neutral reportage protects "republishing newsworthy information about matters of public concern").
A. The Effects of the Proposal

As explained in part III, the category of matters of public concern is more limited than the category of newsworthiness. Many controversies that will be deemed newsworthy enough by the media to warrant publication will not be of public concern and deserving of a constitutional privilege. The following hypothetical examples of the privilege applied in two different cases will illustrate this distinction clearly.

1. Neutral Reportage of Defamatory Matters of Public Concern

Charity solicited members of the public to donate fifty dollars to send a Care-Pac to United States soldiers abroad. Promotional materials informed the public that the retail value of the items in a Care-Pac was forty-nine dollars. Contributor donations had totaled close to one million Care-Pacs.

During the holiday season, the Defamation Daily published an article alleging "hefty mark-ups" of the amount asked for each Care-Pac as compared to the wholesale value of the items in the Care-Pac. The article questioned "where the rest of the money [went]." Chain Paper picked Defamation Daily's story up off of a news wire and republished it, thereby exposing it nationally. Chain Paper did, however, attribute the story to Defamation Daily and published Charity's denial of the accusations. Care-Pac donations dropped precipitously and Charity lost nearly four million dollars.

Charity sued both Defamation Daily and Chain Paper for defamation. At trial, the evidence showed that the cost to Charity was actually forty nine dollars per Care-Pac and the extra dollar was used for other charitable purposes. Defamation Daily and Chain Paper were found liable for defamation as the evidence further revealed that they acted with "knowledge of falsity." The appellate court, however, relieved Chain Paper of liability under the privilege of neutral reportage because the reports were accurate and neutral, the Defamation Daily was a prominent and responsible organization, Charity was a public figure, and the story and the charges were both newsworthy and of legitimate public concern.

The Second Circuit in Edwards likely envisioned the privilege of neutral reportage to apply in situations such as the one described.

257. The facts of this hypothetical illustration are adapted from the facts of Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993). They are simplified and altered for the sake of applying the privilege of neutral reportage. The facts, however, remain similar enough to the facts of the case so that the Fourth Circuit's holdings that the president of the charity was a public figure, that the defendant was a member of the media, and that the charges were of public concern would apply to this hypothetical as well. See id. at 1092 & n.4. The only significant alterations are that: (1) in Chapin the charges were all either admitted by the plaintiff or opinions of the defendant, and thus not recoverable; and (2) in Chapin, Knight-Ridder did not attribute the statements to the Inquirer and thus neutral reportage was not an issue.

258. See supra note 257.
The public has a strong interest in "the integrity of charities soliciting funds from the public." Applying the framework for determining whether a matter is of public concern provided in part III, the controversy surrounding Charity affected others than just Charity and Defamation Daily. All potential contributors were concerned with whether Charity was mishandling funds. In such a case, the press should be constitutionally privileged to publish those charges, without fear of liability should they later prove to be false. Thus, a privilege of neutral reportage for neutral and accurate reports of charges against public figures relating to matters of public concern is appropriate.

2. Neutral Reportage of Newsworthy Defamation

Smut Sells, a pornographic magazine, published a scathing personal attack against Host, a late-night television entertainer, regarding her anti-pornographic views and activities. The column falsely accused Host of leading a "wacko group" and "engaging in censorship and intimidation tactics." The column further referred to Host as "frustrated," "threatened by sex," and a "deluded busybody" in need of "professional help."

Once again, the story was picked up off of a news wire by Chain Paper. Chain Paper published the story, attributing the charges to Smut, along with Host's vehement denials. Host sued both Smut Sells and Chain Paper for defamation. Although Smut was found liable, Chain Paper escaped liability under the privilege of neutral reportage. Smut was a prominent organization, Host was a public figure, the story was an accurate and neutral report of Smut's charges, and the controversy was newsworthy.

The result in this hypothetical situation is absurd, yet likely, under Edwards's lenient newsworthiness standard. These baseless accusations, although newsworthy, add nothing to public debate "around sensitive issues." They do not implicate the central theme of the First Amendment. Thus, they should not be afforded a constitutional privilege.

B. Reputational Balance

Two of three recognized rights compete for supremacy in the neutral reportage contexts discussed: The right to reputation, and either

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259. Chapin, 993 F.2d at 1092 n.4.

260. This hypothetical is based loosely on the facts of Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988). The subject of the attack, however, is changed to a television host for neutral reportage purposes as television hosts are public figures. See Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976). For convenience, other facts are changed as well. The similarities to Ault are primarily to ensure that the controversy and accusations are newsworthy.

the right to publish speech of public concern or the right to publish newsworthy speech. The proposed limitation of the scope of the privilege of neutral reportage—limiting it to cases of public concern speech—strikes an appropriate balance between the competing rights.

Among the three rights, the right to publish matters of public concern is of the utmost importance and deserves protection at all costs. "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents"262 or by any other rights. Thus, when a choice must be made between abridging the right to publish public concern speech on the one hand, and an individual’s right to his reputation on the other, the right to publish public concern speech must prevail. This balancing of interests dictates that the media should be afforded a constitutional privilege to neutrally and accurately report charges of public concern, despite the possibility that a reported statement may be false.

Next, however, lies an individual’s right to his reputation, not the right to publish merely newsworthy speech. Thus, the right to a reputation un tarnished by defamation must be afforded greater protection when in conflict with the right to publish speech on matters of purely private concern. “The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”263 And when the activity is not one of governing, or one at least related to the public and social change, it must yield to the reputational interest.

Referring to the privilege of neutral reportage, David McCraw, the Director of Journalism at Marist College, stated:

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 . . . by showing that the doctrine will encourage conduct that, on balance, has greater social value than the reputational protection foregone. . . . [T]he neutral reportage privilege [is thus] unacceptable unless an incentive for some other socially valuable conduct . . . is built into the rule.264

Freedom to speak on matters of true public concern is one example of such independently socially valuable conduct. The public being informed of controversies of “private” concern is not. Thus, while publishing speech on matters of public concern justifies extending the media constitutional protection against defamation actions, republishing defamation that is merely newsworthy does not.

263. Id. at 255.
264. McCraw, supra note 143, at 360.
CONCLUSION

This Note proposes limiting the scope of the overbroad and ever-changing privilege of neutral reportage to neutral accounts of matters of true public concern. This Note also provides a basis for defining what really is of public concern, concluding that the category includes controversies affecting others than solely the parties directly involved. Such a limitation of the privilege is both constitutionally appropriate and practically beneficial.

Limiting the privilege to speech on matters of public concern will align the privilege with current Supreme Court defamation law and with the constitutional protections afforded that category of speech. Additionally, this proposed privilege strikes an appropriate balance between the competing rights to free speech and reputation. It does so by recognizing that speech on matters of public concern has always been deserving of, and afforded, greater protection than other forms of speech. Thus, neutrally reporting speech on matters of public concern should be permitted despite a potential harm to the reputation of a public figure. Mere newsworthy speech, however, which has historically received less protection than speech of public concern, must yield when publication would harm a public figure's reputation.