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Constitutional Privilege to Republish Defamation

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COMMENT

CONSTITUTIONAL PRIVILEGE TO REPUBLISH DEFAMATION

INTRODUCTION

Underlying the development of the law of defamation is a tension between two broad societal interests: protecting the reputation of individuals and safeguarding the free flow of discussion and information. The common law heavily favored the protection of reputation, offering only limited concessions to the competing interest. In recent years, however, the Supreme Court has refashioned the law of defamation to conform to a first amendment mandate that "debate on public issues should be uninhibited, robust and wide-open."¹ In *New York Times Co. v. Sullivan*² and subsequent cases, the Court established that public officials³ and public figures⁴ may not recover in defamation unless the defendant knew the published statement was false and defamatory or was reckless with regard to these matters.⁵ In *Gertz v. Robert Welch, Inc.*,⁶ it held that private figures, or public figures defamed in their private capacity, could recover only upon a showing that the plaintiff was at "fault."⁷

1. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

2. 376 U.S. 254 (1964).

3. *Id.* at 283.

4. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Public figures are generally those who have assumed "especial prominence in the affairs of society" or have "thrust themselves to the forefront of particular controversies in order to influence the resolution of issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The Court has recently interpreted the public figure category narrowly, indicating that media coverage does not determine who is a public figure. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (socially prominent figure involved in notorious divorce case held private figure).

5. This degree of fault is sometimes referred to as "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). This standard is in essence subjective; it requires that the defendant have a "high degree of awareness of . . . probable falsity" or "serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1211 n.19 (1976).

The actual malice standard must be distinguished from the "malice in fact" standard of ill will used to defeat a common law qualified privilege. The "malice in fact" standard is not used in first amendment analysis because debate would be inhibited if the speaker fears a later judicial determination that he spoke out of hatred. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

6. 418 U.S. 323 (1974).

7. *Accord, Time, Inc. v. Firestone*, 424 U.S. 448 (1976). The Court in *Gertz* did not indicate what it meant by "fault" other than that strict liability would be inadequate. 418 U.S. at 347-48. The American Law Institute and several state courts have concluded that negligence is sufficient. *See, e.g., Thomas A. Malony & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); RESTATEMENT (SECOND) OF TORTS § 580B, Comment c (1976).

Some states, however, have required more than negligence in the private figure context. *See, e.g., Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

The tension between individual reputation and free speech also informs the rules governing liability for the republication⁸ of the defamatory statements of another. At common law, the republisher was considered as liable as the original defamer.⁹ Special protection was afforded only by a limited privilege for accurate¹⁰ reports of official proceedings or public meetings.¹¹

Similarly, under first amendment analysis, with its broader protection of speech, the republisher of defamation is treated much like the originator of the libel. Certainly, *New York Times* would protect a republisher of defamation about a public figure who neither knows nor believes the republished accusation to be false.¹² There is, however, one situation in which *New York Times* fails adequately to protect a first amendment interest in republication. Some defamatory accusations are of legitimate public interest merely because they are made, regardless of whether they are true or false.¹³ Even if the republisher knows such an accusation to be false—and is therefore unprotected by *New York Times*—he should still be constitutionally privileged to repeat it. Thus a supplemental privilege is needed to safeguard this special first amendment interest.

Recent Supreme Court decisions imply the existence of at least a limited republication privilege.¹⁴ The issue has been more squarely faced by the lower federal courts.¹⁵ In the most comprehensive decision, *Edwards v. National Audubon Society, Inc.*,¹⁶ the United States Court of Appeals for the Second Circuit held that “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.”¹⁷

This Comment examines the scope of the republication privilege articulated in *Edwards*. After examining prior protections for republication under the common law and the Constitution, it describes the *Edwards* case in detail. It then seeks to analyze the scope of the *Edwards* privilege,

8. This Comment uses “republication,” not in its usual sense as a term of art, but to refer to any instance in which one party repeats or disseminates the statement of another. It is broad enough to include unattributed quotations, paraphrases, paid advertisements, or live statements made over radio or television.

9. See, e.g., *Lorillard v. Field Enterprises, Inc.*, 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965); *Cavalier v. Original Club Forest*, 59 So. 2d 489 (La. App. 1952) (“Talebearers are as bad as talemakers.”); RESTATEMENT (SECOND) OF TORTS § 578 (1976).

10. “Accuracy” here refers to the correctness of the republisher’s account of the defamatory statements of others. “Truth” will be used to denote the veracity of the defamatory statement itself.

11. See notes 21-25, & 27 and accompanying text *infra*.

12. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968); note 35 and accompanying text *infra*.

13. See *Edwards v. National Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 98 S. Ct. 647 (1977) (“What is newsworthy about such accusations is that they were made.”).

14. See notes 29-40 and accompanying text *infra*.

15. See notes 41-45 and accompanying text *infra*.

16. 556 F.2d 113 (2d Cir.), cert. denied, 98 S. Ct. 647 (1977).

17. *Id.* at 120.

and the means whereby it can be defeated, in light of the special first amendment interest in republication which is not protected by the *New York Times* standard.

I. PRIOR PROTECTIONS FOR REPUBLICATION OF DEFAMATORY STATEMENTS

A. *The Common Law Record Privilege*

Despite the common law's heavy emphasis on protecting reputation¹⁸ and relative insensitivity to free speech considerations,¹⁹ the so-called "record privilege" has traditionally afforded a narrow exception to the rule that the republisher was as liable as the original defamer.²⁰ This privilege has long protected²¹ republication of defamatory statements arising from government proceedings.²² More recently, the privilege has been extended to non-

18. The elements of the cause of action against the defamer reflect this bias. Thus, although the common law required the plaintiff to prove that the statement defamed him and had been communicated to a third party, *see* W. PROSSER, *LAW OF TORTS*, §§ 111, 113 (4th ed. 1971), it presumed the statement to be false and placed upon the defendant the burden of proving its truth as a defense. *See, e.g.,* *Ripps v. Herrington*, 241 Ala. 209, 1 So. 2d 899 (1941); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (1934). The defendant could be held liable even for innocent conduct resulting in the publication of a defamatory statement. *RESTATEMENT OF TORTS* §§ 579, 580 (1934). The only limitations upon this liability were the requirements that the defamatory meaning be understood by others, *see, e.g.,* *Haynes v. Haynes*, 29 Me. 247 (1848); *Taylor v. Standard Oil Co.*, 184 Miss. 392, 186 So. 294 (1939), and that the defendant intended that the defamation be conveyed to a third party. *See, e.g.,* *Weidman v. Ketcham*, 278 N.Y. 129, 15 N.E.2d 426 (1938); *Barnes v. Clayton House Motel*, 435 S.W.2d 616 (Tex. Ct. App. 1968). For detailed discussions of common law defamation, *see* C. GATLEY, *LIBEL AND SLANDER* (2d ed. 1938); C. GREGORY & H. KALVEN, *CASES ON TORTS* 1013-1158 (2d ed. 1969); 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 5.1 (1956); M. NEWELL, *THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES* (4th ed. 1924); W. ODGERS, *LIBEL AND SLANDER* (6th ed. 1929); W. PROSSER, *supra* at § 111; P. WINFIELD, *LAW OF TORTS* §§ 72-89 (2d ed. 1943).

19. Aside from the record privilege, the common law has few rules which accommodate the interest in the free flow of discussion and information. Truth is a defense in civil suits, possibly because of the feeling that awarding damages would be unfair when the plaintiff does not merit a good reputation. *See* H. NELSON & D. TREETER, *LAW OF MASS COMMUNICATIONS* 164 (2d ed. 1973). A qualified privilege of "fair comment" protects statements of opinion about the conduct and qualifications of public persons. Finally, certain public officials have a privilege, usually absolute, to make defamatory statements in the course of their duties. *See* U.S. CONST. art. 1, § 6 (privileging members of Congress for speech or debate in either house); *Bradley v. Fisher*, 80 U.S. 335 (1871) and *Ginger v. Bowles*, 369 Mich. 680, 120 N.W.2d 842 (1963) (privileging members of the judiciary); *Barr v. Matteo*, 360 U.S. 564 (1959) and *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952) (privileging executive officials). *See generally* W. PROSSER, *supra* note 18, § 114; Note, *Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of Barr v. Matteo*, 77 COLUM. L. REV. 625 (1977).

20. *See* note 9 *supra*.

21. The privilege was apparently a response to the abuses of the seventeenth century Star Chamber, which carried on secret trials resulting in cruel and unjust punishment. *See generally* F. SIBBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776* (1952).

22. The privilege applies to reports of all statements and documents from state and municipal legislative proceedings, acts of administrative or executive officials, and judicial proceedings. *See* W. PROSSER, *supra* note 18, § 118, at 830; *RESTATEMENT (SECOND) OF TORTS* § 611 (1976); Barnett, *The Privilege of Defamation by Private Report of Public Official Proceedings*, 31 ORE. L. REV. 185 (1952); Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102 (1964) [hereinafter cited as *Privilege to Republish*]. Some official action other than the filing of a complaint is usually necessary for the privilege to attach to judicial proceedings because of the fear of malicious suits begun purely for the purpose of defamation. *See* Bryan, *Publication of Record Libel*, 5 VA. L. REV. 513, 515 (1918);

official meetings of public concern open to the public.²³ The privilege is lost if the report is made with ill will²⁴ or if it is not a fair and accurate representation of what was said.²⁵ The record privilege protects interests similar to those underlying the first amendment: its primary purpose is to facilitate self-government by encouraging dissemination of statements relevant to that end.²⁶ Yet the record privilege in one respect gives an even broader protection to speech than does the *New York Times* standard: it protects the republisher even if he knows or believes the underlying statement to be false.²⁷ The record privilege thus implicitly recognizes that the statements republished have value to self-government merely because they are said, without regard to whether they are true or false.²⁸

B. Constitutional Protection

1. *The Supreme Court.* The Supreme Court has seemingly given constitutional stature to at least a limited version of the record privilege.²⁹ In *Cox Broadcasting Co. v. Cohn*,³⁰ a television station accurately reported the name of a rape victim obtained from public court records. The Court,

Nadelmann, *The Newspaper Privilege and Extortion by Abuse of Legal Process*, 54 COLUM. L. REV. 359, 364-73 (1954). The privilege to report judicial proceedings is further limited to public proceedings. See 37 BROOKLYN L. REV. 250 (1970).

23. See, e.g., *Borg v. Boas*, 231 F.2d 788 (9th Cir. 1956) (public meeting about local law enforcement); *Jackson v. Record Publishing Co.*, 175 S.C. 211, 178 S.E. 833 (1935) (political rally); RESTATEMENT (SECOND) OF TORTS § 611, Comment i (1976).

24. See *Gordon v. News-Journal Co.*, 176 A. 657 (Del. Super. Ct. 1935); *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill. 2d 112, 214 N.E.2d 746 (1966); RESTATEMENT OF TORTS § 611(b) (1938).

25. See *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968) (dictum); *Bannach v. Field Enterprises, Inc.*, 5 Ill. App. 3d 692, 284 N.E.2d 31 (1972); RESTATEMENT (SECOND) OF TORTS § 611, Comment f (1976). The account need only be substantially correct to be protected. See *Pulverment v. A. S. Abell Co.*, 228 F.2d 797, 803 (4th Cir. 1956) (semble); *W. PROSSER*, *supra* note 18, § 118; RESTATEMENT (SECOND) OF TORTS § 611, Comment f (1976).

26. See *Privilege to Republish*, *supra* note 22, at 1111-16 (calling this justification the "informational rationale"). The author also identifies two other justifications. The "supervisory rationale" supports the privilege with the argument that the public must review the acts of its elected officials. *Id.* at 1103-11. This justification, however, seems secondary since it does not support extension of the record privilege to non-official public meetings. See note 23 and accompanying text *supra*. The "agency rationale"—given little weight by the author—rests on the idea that any member of the public, if he were present, might see for himself what is happening. See *Privilege to Republish*, *supra* at 1116-17.

See also *Barnett*, *supra* note 22, at 31; *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 925 (1956).

27. See, e.g., *Hurley v. Northwest Publishing, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); RESTATEMENT (SECOND) OF TORTS § 611, Comment a (1976). See generally *Rokentnetz v. Woburn Daily Times, Inc.*, 294 N.E.2d 579 (Mass. App. Ct. 1973). *Contra*, *Snider v. Leatherwood*, 49 S.W.2d 1107 (Tex. Ct. App. 1932).

The record privilege is also broader than *New York Times* in that it protects defamation about private as well as public figures. *Cf.* *Brunn v. Weiss*, 32 Mich. App. 428, 188 N.W.2d 904 (1971) (school teachers); *Lehner v. Berlin Publishing Co.*, 245 N.W. 685 (Wis. 1932) (attorney in divorce action); *Bryan*, *supra* note 22, at 519-20 (criticizing record privilege's protection of defamation of private persons in judicial proceedings).

28. See also notes 66-70, 72 and accompanying text *infra*.

29. At least one commentator has argued that the record privilege is "undoubtedly mandated by the first amendment," probably in a broader form than is traditional. *Hill*, *supra* note 5, at 1219-20.

30. 420 U.S. 469 (1975).

in a privacy suit, held that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records."³¹ In *Time, Inc. v. Firestone*,³² the Court indicated in dictum that the rule of *Cox Broadcasting* was equally applicable in defamation suits.³³ Hence, the first amendment at least protects from defamation liability the accurate republication of material contained in public court records.³⁴

The Court has avoided the need to articulate any general republication privilege, however, by relying on less controversial grounds. It has used the ordinary *New York Times* standard when the defendant neither knew nor believed the republished statement to be false³⁵ or when the defendant asserted the truth of the republished statement.³⁶ In *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*,³⁷ it held for the defendant on the ground that the republished statement was not defamatory in context.³⁸ Although the Court referred to a newspaper's "legitimate function"³⁹ of accurately reporting on public meetings, this dictum merely emphasized that the defendant had made the non-defamatory context clear to the reader and was not meant to create a special republication privilege.⁴⁰

2. *The Lower Courts Prior to Edwards.* Without extensive guidance from above, a few lower courts have implicitly created a republication privilege on their own. In *Medina v. Time, Inc.*,⁴¹ the plaintiff sued a magazine for republishing a statement about his involvement in the My Lai tragedy. The United States Court of Appeals for the First Circuit upheld

31. *Id.* at 491.

32. 424 U.S. 448 (1976).

33. *Id.* at 457 (*Cox Broadcasting* substantially protects the "public interest in accurate reports of judicial proceedings.").

34. A cautionary note about the extent of this privilege may have been sounded in *Firestone*, when the Court noted that "[t]he details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*." *Id.*

35. See *Rosenbloom v. Metroinedia, Inc.*, 403 U.S. 29 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), *Time Magazine* was sued for its defamatory and inaccurate account of the Civil Rights Commission's report on police brutality. The Court noted that a difference exists between *Time's* independent account of an episode of police brutality and its account of the Commission's report of the episode. *Id.* at 285-86. Nevertheless, the Court applied the *New York Times* standard to this case, reaching the confusing conclusion that *Time's* story was not so inaccurate as to constitute reckless disregard for the truth. Apparently, the Court asked whether *Time* believed its account of the Commission's report to be false, rather than asking whether *Time* believed the Commission's report to be false.

36. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 136-37 (1967).

37. 398 U.S. 6 (1970). The case involved a public meeting at which citizens characterized plaintiff's negotiating position with the city as "blackmail."

38. The Court found that "blackmail" was used only as political hyperbole and not to impute a crime, *id.* at 14, and that the republisher's account had been premised on this interpretation. *Id.* at 12-13.

39. *Id.* at 13.

40. See *id.* at 23 (White, J., concurring) (no special reporter's privilege created). But see Note, *Greenbelt Cooperative Publishing Ass'n Inc. v. Bresler: The Expanding Right to Publish*, 32 U. PITT. L. REV. 450, 456 (1971).

41. 439 F.2d 1129 (1st Cir. 1971).

summary judgment for the defendant on the grounds that *Time* had not asserted the truth of the accusation and had accurately republished it.

In *Oliver v. Village Voice, Inc.*,⁴² the defendant republished an allegation by Watergate figure E. Howard Hunt, Jr., that the plaintiff had been involved with the Central Intelligence Agency. In granting summary judgment for defendant on the issue of "actual malice," the district court noted that even if Hunt were an unreliable source, "the mere fact of his making a statement, given his prominent position in the Watergate controversy, would be a legitimate news story."⁴³

In *Novel v. Garrison*,⁴⁴ *Playboy* magazine was sued for accurately reporting defamatory statements by the principal figure in a sensational investigation of President Kennedy's assassination. In granting summary judgment for the defendants, the district court noted,

[I]t is clear that the *Playboy* article described not what in its opinion *Novel* did but rather what someone else (*Garrison*) said he did. In view of the sensationalism surrounding the *Garrison* investigation I can phantom [*sic*] no way in which this defendant can be held accountable for "actual malice" in accurately printing the actual statements of an important elected official engaged in this controversy of international significance.⁴⁵

Each of these cases, read broadly, implicitly creates a republication privilege. *Medina* could be said to privilege republication so long as the republisher does not endorse the underlying statement.⁴⁶ *Oliver* and *Novel* seem to privilege republication of statements which are especially newsworthy merely because they were made. But none of these cases provides a comprehensive account of the contours of the republication privilege. The United States Court of Appeals for the Second Circuit attempted such an account in *Edwards v. National Audubon Society, Inc.*⁴⁷

II. *Edwards v. National Audubon Society, Inc.*

A. Background

The Environmental Protection Agency's 1972 investigation of the insecticide DDT excited increased debate over the controversial substance.⁴⁸

42. 417 F. Supp. 235 (S.D.N.Y. 1976).

43. *Id.* at 238.

44. 338 F. Supp. 977 (N.D. Ill. 1971).

45. *Id.* at 982-83.

46. *But see* note 76 and accompanying text *infra* (*Medina* consistent with newsworthiness criterion).

47. 556 F.2d 113 (2d Cir.), *cert. denied*, 98 S. Ct. 647 (1977).

48. For fifteen years, environmentalist and naturalist groups had contended that DDT was highly hazardous to birds and other wildlife, while DDT proponents had argued that without the pesticide millions of people would die of insect-carried diseases and famine caused by the destruction of crops by insects. Accusations of bad faith came from both sides. Naturalists contended that DDT proponents were selfishly motivated, and DDT advocates accused their opponents of supporting genocide. *Id.* at 115-16.

In the April, 1972 issue of *American Birds*, a National Audubon Society publication, editor Robert Arbib, Jr., claimed that some scientists had been paid to offer distorted analyses of the results of the Society's Christmas Bird Count as evidence of DDT's harmlessness.⁴⁹ A *New York Times* reporter, John Devlin, Sr., called Arbib to obtain the names of the scientists the Audubon Society considered paid liars. Arbib turned to Roland Clement, the Audubon Society's Vice President, who provided the names of those scientists who in his view most consistently misused the data, emphasizing that none of them were known to have been paid to lie. Arbib relayed the names to Devlin, and ten days later, his story appeared in the *Times*, accurately reporting the allegations in the *American Birds* foreword, the scientists named by Arbib, and the scientists' denials.⁵⁰

Three of the scientists sued for defamation. The trial court found the plaintiffs to be public figures and thus subject to the *New York Times* rule.⁵¹ The jury rendered a verdict in favor of defendants Arbib and the National Audubon Society, but against defendants Clement and the *Times*. Defendants' motion for judgment notwithstanding the verdict was denied,⁵² since the trial court considered the jury justified in concluding that the article, while accurate, was written with a reckless disregard for whether the claims were true or false, thereby satisfying the actual malice requirement of *New York Times*.

B. *The Second Circuit Opinion*

On appeal, the Second Circuit reversed.⁵³ Writing for a unanimous panel, Chief Judge Kaufman began by noting that a democracy cannot survive unless the people are provided with the information they need to form the judgments required for intelligent self-government.⁵⁴ The court found that the Audubon Society's defamatory statements were newsworthy in themselves, and that the public interest in being fully informed demanded that the press be allowed to print these charges without assuming responsibility for them.⁵⁵ The court then articulated what it called the "press's right of neutral reportage":⁵⁶ "when a responsible, prominent organization

49. The Annual Audubon Society Christmas Bird Count is a count by Audubon members of the birds they sight in the field during the year. DDT proponents pointed to the steady increase in birds sighted to support their argument that DDT is not harmful to bird life. The Audubon Society considered the pesticide industry's interpretation of its data misleading, contending that the figures resulted only from more birdwatchers, better access to the count areas, better knowledge of where to find the birds, and increasing sophistication in their identification. *Id.* at 116.

50. *N.Y. Times*, Aug. 14, 1972, at 33, col. 1.

51. *Edwards v. National Audubon Soc'y, Inc.*, 411 F. Supp. 744, 745 (S.D.N.Y. 1976).

52. *Edwards v. National Audubon Soc'y, Inc.*, 423 F. Supp. 516 (S.D.N.Y. 1976).

53. 556 F.2d 113 (2d Cir.), *cert. denied*, 98 S. Ct. 647 (1977).

54. *Id.* at 115.

55. *Id.* at 120.

56. It is unclear whether the court intended the right of neutral reportage to extend to non-media defendants. The word "reportage" and the court's frequent reference to the "press" as the recipient of the privilege indicate a focus on the media. Dissemination by non-media defendants, however, is often a precursor to republication in the media, as when

like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity."⁵⁷

The court took pains to qualify this privilege. Thus, although literal accuracy is not prerequisite, it is at least necessary that the journalist believe, "reasonably and in good faith, that his report accurately conveys the charges made."⁵⁸ Although the press need not "take up cudgels against dubious charges in order to publish them without fear of liability for defamation,"⁵⁹ the court hinted that a totally one-sided account might not be protected.⁶⁰ Finally, "a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own . . . cannot rely on a privilege of neutral reportage."⁶¹

Applying these principles to the case before it, the court found the *New York Times* entitled to the neutral reportage privilege. The Audubon Society's accusations were newsworthy and were accurately reported. The *Times* did not espouse the allegations; indeed it included the outraged denials of the defamed scientists in the same article. The judgment against the *Times* was therefore reversed and the complaint dismissed.⁶²

III. ANALYSIS OF REPUBLICATION PRIVILEGE

A. First Amendment Interest in Republication

The public interest in "robust" debate⁶³ underlying the *New York Times* privilege is present with no less force when a statement is republished than when it is originally uttered. If freedom of public debate is to be meaningful, the dissemination of such debate must also be privileged to insure that it is heard by all. Thus, as *New York Times* and other cases have seemingly recognized, the republisher is entitled to at least the same protections as the original speaker.⁶⁴

the radio or television station hears the information second-hand or verifies it with another source. More importantly, non-media republishers can also satisfy the interest in disseminating the fact a newsworthy statement has been made. Cf. RESTATEMENT (SECOND) OF TORTS § 611, Comment c (1976) (record privilege not limited to media). If the dissemination of first amendment information by the non-media defendant is on a smaller scale, so is the damage to the plaintiff's reputation. And particularly because citizens often do not have access to the media, they should be permitted to disseminate debate that the media, for political or institutional reasons, have decided to ignore. See Hill, *supra* note 5, at 1224.

57. 556 F.2d at 120.

58. *Id.*

59. *Id.*

60. See notes 113-22, & 130 and accompanying text *infra*.

61. 556 F.2d at 120.

62. The court also found, as an alternative ground, that there was insufficient evidence to support the jury's finding that Devlin showed reckless disregard for the truth. *Id.* at 120.

63. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

64. See cases cited at note 35 *supra*. In *New York Times*, the Supreme Court implicitly adopted this analysis, since it applied the actual malice standard to both the originator of the debate and the republisher. 376 U.S. at 285-86.

There is, however, a special first amendment interest in republication requiring a broader privilege than that afforded the original speaker.⁶⁵ Assume, for example, that a prominent labor leader falsely accuses a United States senator of graft. Such an accusation, being intentionally false, has no independent first amendment value that would justify protecting the original speaker.⁶⁶ Nevertheless, *the fact that it is made*⁶⁷ is information relevant to self-government⁶⁸ with sufficient first amendment value to warrant protecting the republisher and to override the competing interest in safeguarding reputation.⁶⁹ This information, for instance, would probably affect one's evaluation of the labor leader. It may support more general judgments about the labor movement or political parties.⁷⁰ And, in evidencing a rift between the senator and the labor leader, it provides useful data about the current political climate.

If what is newsworthy is the fact such accusations are made, a reporter should be privileged to republish them even when he knows them to be false.⁷¹ The *New York Times* actual malice standard is thus an inadequate protection in the republication context. By allowing liability for republication of newsworthy charges which are known to be false, the *New York Times* standard could easily chill the dissemination of valid first amendment information. It is this special first amendment interest, not protected by

65. *But see* Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 599 (1964) (suggesting that the first amendment interest in facilitating free dissemination of ideas does not require a distinction between paid advertisements, a news report accurately reporting information, and ideas offered for public consideration by a responsible person). *See also* *Privilege to Republish*, *supra* note 22, at 1119 (recognizing policy differences between publication and republication, but arguing against making the latter broader because of the danger of increased litigation).

66. The Supreme Court has repeatedly stated that false statements of fact deserve no first amendment protection. *See* *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Nevertheless, some erroneous publications are protected by the *New York Times* standard, because otherwise the publication of true statements might be chilled. *Id.*

67. *See* *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 98 S. Ct. 647 (1977) ("What is newsworthy about such accusations is that they were made.").

68. *See id.* at 115; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

69. The private interest in reputation is arguably less pressing in the republication context. Although republication can aggravate a defamation by disseminating it more widely, the defamed person can often recover the full extent of his damages from the original defamer—assuming he is neither judgment-proof nor privileged—on a proximate cause theory. *See* RESTATEMENT (SECOND) OF TORTS § 576(c) (1976); W. PROSSER, *supra* note 18, § 112, at 762. Moreover, republication will often be accompanied by rehabilitating information obtained from other sources. As to whether the press must include such information to qualify for a republication privilege, see notes 113-36 and accompanying text *infra*.

70. The validity of these evaluations will depend on whether the audience knows the underlying charges are false. *See* text accompanying note 123 *infra*.

71. It might be argued that the original defamer should be entitled to the same privilege, since making the defamatory statement also communicates the fact that it was made. It would seem grossly improper, however, to permit such a "bootstrap" privilege, especially one created by the individual's own wrongdoing. *Cf.* RESTATEMENT (SECOND) OF TORTS § 611, Comment c (1976) (record privilege cannot be self-conferred either directly or through collusion).

New York Times, that led the *Edwards* court to forge a new constitutional doctrine protecting republication of newsworthy defamatory statements.⁷²

B. *Newsworthiness*

The special first amendment interest in republication—that some statements are significant merely because they are made—does not exist in every instance. Malicious backfence gossip about private citizens, for example, should not be entitled to first amendment protection when republished in a local newspaper. Such gossip may satisfy a prurient curiosity;⁷³ but the fact of its currency does not rise to the level of “information relevant to self-government.” The republication privilege should thus be limited to situations in which information needed for intelligent self-government is disseminated. The common law attempted to ensure this limitation by restricting the record privilege to reports of official actions or meetings of public concern.⁷⁴ In a sense, the first amendment republication privilege can be viewed as a generalization of the record privilege⁷⁵ to other circumstances in which the fact that a statement is made is in itself information relevant to self-government.⁷⁶ *Edwards* attempted an elaborate delineation of these circumstances: a “responsible, prominent organization” must make “serious charges” against a “public figure.”⁷⁷

There is, initially, an ambiguity in *Edwards* as to whether these criteria are intended as doctrinal limitations or merely descriptions of the particular

72. The common law record privilege has long protected republication of statements known to be false. See RESTATEMENT (SECOND) OF TORTS § 611, Comment a (1976). The record privilege is far narrower than the *Edwards* privilege, however, since it protects only statements made at public meetings or official proceedings. See notes 22-25 and accompanying text *supra*. Moreover, the record privilege is an inadequate safeguard of first amendment rights because it varies in application from state to state. See, e.g., GA. CODE ANN. § 105-704 (1935) (privilege extends to arresting officer and does not mention malice); KY. REV. STAT. § 411.060 (1972) (privilege to report affidavits, pleadings and other legal documents lost if defendant fails to comply with request of defamed to publish reasonable explanation or contradiction thereof); N.J. STAT. ANN. § 2A:43-1 (West Supp. 1977) (includes statements by police department heads and county prosecutors if accepted by the publisher in good faith); TEX. REV. CIV. STAT. ANN. art. 5432 (Vernon 1958) (includes public meetings, but reports of judicial proceedings can be prohibited upon order of the court); UTAH CODE ANN. § 76-9-504 (Supp. 1975) (fair and true report of legislative, judicial or public official proceeding made without malice).

73. Cf. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) (decrying the press's publication of idle gossip).

74. See notes 22-23 and accompanying text *supra*. Arguably, the record privilege fails to ensure that all protected republication will be relevant to self-government. For example, defamatory statements by an ordinary citizen about an ordinary citizen would be protected by the record privilege if made at a trial or public meeting; yet the fact these statements are made is not of particular relevance to self-government. Cf. *Firestone v. Time, Inc.*, 424 U.S. 448, 457 (1976) (details of courtroom battles do not advance uninhibited debate).

75. Cf. *Privilege to Republish*, *supra* note 22, at 1114-16 (record privilege can be generalized to a privilege to report matters of public concern).

76. First amendment cases prior to *Edwards* do not articulate a public concern standard, but they are consistent with one. See *Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971) (accusations involved My Lai incident which crystallized public opposition to Vietnam War); *Oliver v. Village Voice, Inc.*, 417 F. Supp. 235 (S.D.N.Y. 1976) (accusations related to Watergate scandal); *Novel v. Garrison*, 338 F. Supp. 977, 983 (N.D. Ill. 1971) (accusations grew out of investigation of Kennedy assassination).

77. 556 F.2d at 120.

facts of the case. Viewed as doctrinal limitations, they have the advantage of being clear and relatively easy to apply; they have the disadvantage of being rigid and therefore overly narrow or broad in particular instances. Viewed as factual descriptions, these criteria stand for a general "newsworthiness" limitation on the republication privilege⁷⁸—a limitation with the advantage of more flexible application to particular instances, but the serious disadvantage that it has been rejected in another context by the Supreme Court as a means of identifying protected speech.⁷⁹ Therefore, this Comment treats the *Edwards* criteria as being doctrinal limitations,⁸⁰ but points out a number of instances in which they would be too narrow adequately to protect the first amendment interest in republication.

1. *Character of Original Defamer.* The first aspect of the *Edwards* criteria is that the original defamer must be a "responsible, prominent organization."⁸¹ This requirement reflects the belief that no statement is significant merely because it is said unless the identity of the speaker has some special significance. A statement that a United States senator takes bribes is obviously far more significant when uttered by a prominent labor leader than when said by an uninformed private citizen.

Nevertheless, the court's delineation of the original speaker's character seems overly narrow for first amendment purposes. The "responsibility" requirement, for instance, would exclude terrorist political groups; yet in cases such as the Patricia Hearst kidnapping, the press should arguably be entitled to republish all statements made by the kidnappers, even if they are defamatory. Moreover, it is doubtful whether a court should be asked to determine which organizations are responsible and which are not.⁸² Many would dispute, for example, the responsibility of the American Civil Liberties

78. See *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977) (*Edwards* described as protecting "neutral reportage of newsworthy material"), cert. granted, 46 U.S.L.W. 3577 (U.S. March 21, 1978) (No. 77-1105); *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 98 S. Ct. 647 (1977) ("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.").

79. The Supreme Court has rejected a "matter of public or general interest" or "newsworthiness" approach to determining when the *New York Times* privilege applies. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Contra*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (overruled in *Firestone* and *Gertz*). The *Gertz* Court warned against giving judges the discretion to determine which publications address issues of "public or general concern" and which do not. 418 U.S. at 346. Despite this repudiation, the Court's determination in *Firestone* of what type of controversies make an individual a "public figure" indicates that the "newsworthy" issue is not yet settled. See 424 U.S. at 488 (Marshall, J., dissenting); Hill, *supra* note 5, at 1214-19.

80. If the *Edwards* criteria are viewed as doctrinal, they appear to circumvent the concerns voiced in *Gertz* about the uncertain expectations caused by ad hoc resolution of competing interests in each particular case. See 418 U.S. 323, 343-44. By indicating that the serious charges of a responsible, prominent organization are by definition newsworthy, and therefore protected, *Edwards* avoids the problems of an undefined "newsworthy" standard and provides the public and the courts with a definition that helps ensure both groups of certainty.

81. 556 F.2d at 120.

82. Cf. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("Since when has the First Amendment given Government the right to silence all speakers it does not consider 'responsible'?").

Union, the Audubon Society, the Committee to Re-Elect the President and the John Birch Society. Forcing a reporter to determine the responsibility of an organization, at the risk of substantial liability, would seemingly have a chilling effect on dissemination.

Similarly, the "prominence" requirement is too narrow in that it would exclude any number of responsible but little-known organizations. This requirement might have the effect of strengthening established groups while stifling growth of new and unknown movements by denying them access to publicity—an effect at odds with the spirit of the free "marketplace of ideas"⁸³ fostered by the first amendment. The "organization" requirement is also obviously too narrow; it would exclude, for instance, statements by such responsible and well-known individuals as former President Ford.⁸⁴

The requirement that the original speaker be important creates further difficulties when the source has requested anonymity. The defamatory statements of a "high State Department official" may be extremely newsworthy; but the existence of a republication privilege would not be definitively established until the original speaker's identity was known.⁸⁵ This creates serious problems for a reporter since it is a prime tenet of journalistic ethics not to reveal the identity of confidential sources.⁸⁶ It is possible that a court would find that the privilege does not attach under these circumstances, because the republication could not satisfy the first amendment interest of reflecting on the original speaker.

2. *Character of Defamation.* The second aspect of the court's "newsworthiness" standard is that the defamation itself must consist of "serious charges."⁸⁷ Although this appears to mean something more than mere defamation, it is difficult to tell what additional factor might be

83. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

84. For this reason, the courts may well find this requirement satisfied when the original speaker is a public figure. Such a standard would seem relatively satisfactory, although the public figure category was developed to define the defamed's status, not the defamer's. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court indicated that the public figure should be determined with reference to an individual's participation in a particular controversy giving rise to the defamation. *Id.* at 352. If this same definition is used to describe a public figure who is an accuser, care must be used to ensure that the individual was involved in the controversy before making the defamatory statement.

85. It is not clear under *Edwards* who would have the burden of proof as to the character of the original defamer. It seems likely that the plaintiff would have the burden of rebutting the privilege's existence. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964) (plaintiff must establish actual malice). If so, the issue of confidentiality would be raised on plaintiff's motion to discover the identity of the speaker. Cf. *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977) (reasons for editorial decisions privileged from discovery in defamation suit), *cert. granted*, 46 U.S.L.W. 3577 (U.S. March 21, 1978) (No. 77-1105). If the republisher has the burden of establishing the privilege as an affirmative defense, he would presumably be unable to carry this burden without violating the confidentiality of his source.

86. See, e.g., C. MACDOUGALL, *INTERPRETATIVE REPORTING* 28 (5th ed. 1968). Possibly, this difficulty could be overcome by having the judge determine the status of the original speaker after confidential disclosure in camera.

87. 556 F.2d at 120.

required. Possibly, the court intended to require that the defamation concern a matter directly related to self-government; this would tend to ensure that the republished statements are newsworthy merely because they are made. The charges in *Edwards*, for example, grew out of the vigorous public debate over government regulation of DDT⁸⁸ rather than some purely personal grudge.⁸⁹

3. *Character of the Defamed.* The third aspect of the *Edwards* newsworthiness standard is that the defamed must be a "public figure."⁹⁰ This requirement is based on the notion—also underlying the *New York Times* rule⁹¹—that statements about figures of public importance have more relevance to self-government than do statements about private citizens. In addition, it is felt that public figures run the risk of defamation by thrusting themselves into the limelight and that they have greater access to the media to deny the charges.⁹²

This requirement, although generally adequate, appears overly narrow in one situation. When the original defamer is a public official or important public figure, republication of his defamatory statements reflects on his character—and thereby conveys information relevant to self-government—even when the defamed person is a private figure. This information can be conveyed, however, without disclosing the identity of the defamed person.⁹³ Thus, because of the limited interest to the public of knowing the identity of the private person, republication of defamation about him that is known to be false should not be protected when it includes his name.⁹⁴

C. *Defeasance of Republication Privilege*

1. *Endorsement.* A republisher who asserts the truth of the underlying statement is not entitled to the *Edwards* privilege.⁹⁵ Most frequently, this occurs when the republisher simply decides not to attribute⁹⁶ the

88. See note 48 and accompanying text *supra*.

89. If the antagonists are important enough, of course, a personal grudge might be a matter highly relevant to intelligent self-government. An example of this might be an ongoing feud between candidates running for the offices of governor and state attorney general.

90. 556 F.2d at 120. *Accord*, *Dixon v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (*Edwards* inapplicable when republished statement defamed a private figure).

91. See 376 U.S. at 269-76.

92. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344-45. *But see* B. SCHMIDT, FREEDOM OF THE PRESS v. PUBLIC ACCESS, 74-80 (1976) (discussing the Court's inconsistent attitude toward the availability of access to the media as a justification for the "public figure" classification).

93. When a public figure is defamed, on the other hand, there is a clear first amendment interest in learning his identity. See notes 66-70 and accompanying text *supra*.

94. An alternative might be to require the republisher in such circumstances to seek out and publish rehabilitating information along with the defamatory statements. This requirement, however, may raise constitutional objections. See notes 131-36 and accompanying text *infra*.

95. "[A] publisher who in fact espouses or concurs in the charges made by others . . . cannot rely on a privilege of neutral reportage." 556 F.2d at 120.

96. Attribution would seem to occur whenever the context makes it clear that the defamatory accusation is that of another. Advertisements are almost always identified as such. For the print media, quotation marks would often be sufficient attribution. Many

defamatory remarks. Perhaps less commonly, the defendant may correctly attribute the defamatory statement at one point, but elsewhere indicate that he believes the statement to be true.⁹⁷ Even if the reporter does not explicitly endorse the underlying statement, he may be found to have done so implicitly if his account is totally one-sided, without any indication that the republished statement might not be true.⁹⁸ In such cases, the defendant "assumes responsibility for the underlying accusations."⁹⁹ The republication is in form only; in substance the defendant is the original publisher and should therefore be entitled only to the ordinary *New York Times* privilege.¹⁰⁰

2. *Ill Will*. Some language in *Edwards* can be read to imply that ill will toward the defamed is sufficient to rebut the republisher's privilege.¹⁰¹ Such a rule would find support in the fact that ill will defeated the common law record privilege.¹⁰² From the first amendment standpoint, however, such a rule would be highly undesirable.¹⁰³ Whatever his personal feelings towards the defamed, the republisher satisfies a first amendment interest so long as the underlying accusations are significant merely because they are made.¹⁰⁴ Permitting liability to turn on a finding of personal animus may have the effect of deterring desirable republication. An ill will standard is thus inappropriate for the same reason the Supreme Court has repudiated such a standard in the *New York Times* context.¹⁰⁵ Moreover, conditioning the republication privilege on the reporter's lack of ill will may entail an intrusive and constitutionally suspect investigation into subjective editorial decisions.¹⁰⁶

statements made over the airwaves would be self-attributing, as when the speaker is a celebrity whose voice or visage is well known to the audience.

A republisher may decide to omit attribution for a number of reasons: he may feel the information is common knowledge, or may desire to lend credence to sensational charges by omitting attribution to a disreputable or uninformed source. As to negligent omission of attribution, see note 99 *infra*.

97. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

98. See notes 118-22 and accompanying text *infra*.

99. 556 F.2d at 120.

Where the endorsement or non-attribution is merely *negligent*, it is more difficult to argue that the republisher is responsible for the underlying statement. It may be that the defendant in this case would be entitled to a republication privilege if one were otherwise available. On the other hand, it could be argued that the republisher of a statement he knows to be false should be on notice of the seriousness of the story, and therefore responsible for any failure to attribute. This seems particularly fair where the non-attribution causes the story to be even more damaging than it would have been if correctly written (e.g., an unattributed story in the *New York Times* that a well-known businessman is unscrupulous would be more damaging than if the accusation were attributed to a terrorist political group).

100. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (endorsement); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) (non-attributed statements).

101. See text accompanying note 61 *supra*.

102. See note 5 *supra*.

103. See *Hill*, *supra* note 5, at 1220 & n.70 ("[It] is highly doubtful that the Court today would tolerate the common law rule which treats the [record] privilege as lost for 'malice in fact' . . .").

104. See notes 67-70 and accompanying text *supra*.

105. See *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10-11 (1970).

106. Cf. *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977) (first amendment safeguards journalist's thoughts, opinions and conclusions from compelled discovery by plaintiff in libel action), *cert. granted*, 46 U.S.L.W. 3577 (U.S. March 21, 1978) (No. 77-1105).

3. *Inaccuracy*. Unlike the common law record privilege,¹⁰⁷ the *Edwards* republication privilege is not limited to accurately republished statements. Assuming the underlying statement is newsworthy as defined in *Edwards*,¹⁰⁸ its inaccurate republication¹⁰⁹ will sometimes be protected. However, the *Edwards* court was careful to qualify the scope of this privilege: the reporter must believe "reasonably and in good faith, that his report accurately conveys the charges made."¹¹⁰

In so extending its doctrine, the court implicitly recognized the existence of a first amendment interest in protecting inaccurate republication. This interest appears twofold. First, if not egregiously inaccurate a report may still further the interest in disseminating the fact that a newsworthy statement has been made. If the actual statement, "the Senator is open to influence" is republished as "the Senator takes bribes," some information relevant to self-government is retained in the translation—the public is at least informed of a dispute between important public figures. Second, even if the report is so distorted as to have no first amendment value itself, some inaccurate reports must be protected in order that journalists not be deterred from republishing accurate accounts of newsworthy statements which they know or believe to be false.

In qualifying the privilege for inaccurate republication by requiring objective and subjective good faith, the court implicitly recognized that first amendment interests are weaker in this context. A distorted account will obviously fail fully to satisfy the interest in disseminating the fact a newsworthy statement has been made. Indeed, the inaccuracy may mislead the audience about a matter of public concern: significantly different inferences might be drawn from the accusation that the Senator takes bribes than from the more moderate charge that he is open to influence. Moreover, the danger of "chilling effect" is relatively minor in this context. If the defendant does not know or believe that the statements as inaccurately reported are false and defamatory, he will be protected under *New York Times*.¹¹¹ If the defendant does know or believe that the statements as reported are false and defamatory, he has adequate notice that he must exercise reasonable care to be accurate if he is to rely on a republication privilege. He can then easily make the minimal inquiry needed to satisfy the *Edwards* subjective and objective good faith standard of accuracy.

The *Edwards* privilege thus adequately protects the diluted first amendment interest in inaccurate republication. At the same time, the require-

107. See notes 24-25 and accompanying text *supra*.

108. See generally note 77 and accompanying text *supra*.

109. Inaccuracy could be caused by means such as misquotation, misattribution, misleading paraphrase, improper use of ellipses, or quotation out of context.

A different situation is presented when the reporter accurately republishes the defamation but fails to include rehabilitating information obtained from other sources. See notes 113-27 and accompanying text *infra*.

110. 556 F.2d at 120.

111. See *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 239 (S.D.N.Y. 1976) (alternative ground).

ment that republishers of defamatory material take some care that their report is correct protects the countervailing interest in accuracy. At the very least, this qualification will weed out cases in which the republisher seeks to abuse the privilege by deliberately distorting newsworthy statements.¹¹²

4. *Lack of Balance.* Reporters of defamatory statements frequently obtain information from other sources¹¹³ which tends to refute the republished accusations. At common law, the republisher was required to include all other relevant information that came to light during the proceedings, or else lose his protection.¹¹⁴ There was, however, no obligation to seek out information outside the proceedings, even if the republished defamatory statement was known to be false. Similarly, *Edwards* is not conditioned on strict editorial balance;¹¹⁵ the press need not "take up cudgels against dubious charges in order to publish them without fear of liability for defamation."¹¹⁶

Nevertheless, *Edwards* can be read to demand at least a minimal degree of editorial fairness. If "cudgels" are too blunt, the use of some lesser instruments of reportorial fairness may still be necessary. As noted, the "right of neutral reportage"¹¹⁷ is lost when the republisher himself asserts the truth of the underlying charge.¹¹⁸ In holding that the *New York Times* had not espoused the Audubon Society's accusations, the court emphasized that the *Times* "published the maligned scientists' outraged reactions in the same article that contained the Society's attack."¹¹⁹ Conversely, the republisher might well be held to have asserted the truth of the underlying charge if he omitted any mention of contrary information in his

112. 556 F.2d at 120. See, e.g., *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (republisher held liable for intentionally distorting results of survey).

113. "Other sources" is used herein to refer to a different individual, the same individual on a different occasion, or a different document. To the extent that this definition would include information derived from the original event, it may be somewhat difficult to distinguish "balance" from "accuracy."

114. The record privilege required that the republisher be "fair" as well as accurate in reporting what happened at a particular event. Thus,

it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or regard it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article.

RESTATEMENT (SECOND) OF TORTS § 611, Comment f (1976). Moreover, if a newspaper publishes reports of a judicial proceeding, it must publish reports of further proceedings which vindicate the person defamed. *Id.*

115. Later courts may find that republishers have the same obligation under *Edwards* as they did under the record privilege; all relevant information immediately surrounding the utterance of false, defamatory remarks must be reported to avoid giving a distorted picture of what occurred. Omission of this information might be found to be a lack of good faith belief in the accuracy of the account. See generally notes 107-12 and accompanying text *supra*.

116. 556 F.2d at 120 (paraphrasing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974)).

117. *Id.* at 120.

118. See notes 95-100 and accompanying text *supra*.

119. 556 F.2d at 120.

possession.¹²⁰ Such a totally one-sided account of a defamatory accusation could lead the public reasonably to suppose that the republisher endorses its truth.¹²¹ Hence, *Edwards* may be read to require, not strict reportorial balance, but at least the minimum fairness necessary to rebut a possible inference that the reporter has asserted the truth of the underlying charge.¹²²

Such a minimal requirement of editorial fairness would have considerable justification. The republication privilege is premised largely on the implicit assumption that the audience knows the republished statement to be false. For example, in the hypothetical discussed previously,¹²³ the labor leader's false accusation that the Senator takes bribes was thought to have first amendment value insofar as it reflected on the original speaker, supported generalized judgments about social issues, and provided useful evidence about the current political climate. Yet if the audience mistakenly believes the labor leader's accusation, it will be seriously misled about the characters of the two public figures or about labor unions or political parties in general. Perhaps the only true information conveyed would be the fact a rift had developed between the principals.

If the falsity of the underlying statement must be disseminated, however, there remains the question of whether and to what extent the republisher should be required to include rehabilitating information in his possession. It can be argued that a requirement of editorial balance would be undesirable because (1) the falsity of the republished charges will in any event be brought out by natural pressures; (2) desirable republication would be deterred; and (3) an impermissible interference with editorial discretion would result. As will be seen, these arguments do not undercut the value of the minimal standard hinted at in *Edwards*.

It is true that journalists will often find it equally newsworthy to print the other side of a story upon learning that the original defamer may have

120. This same evidence would also tend to establish the republisher's ill will; but as noted, *Edwards* should not be read to condition the republication privilege on lack of malice in fact. See notes 101-06 and accompanying text *supra*.

121. The fact that an account is wholly one-sided may be viewed as evidence that the public could reasonably understand the report as asserting the truth of the underlying defamation. This inference could only be drawn, however, once it was shown that the republisher knew that the defamatory statements were false. If the republisher has no information that might refute the republished charge, he will necessarily present a one-sided account that might be understood by the audience as an endorsement of the charge. Here, however, the republisher would be protected by both the *Edwards* privilege as well as by *New York Times*. *New York Times* protects the republisher who published without reckless disregard for the truth. *Edwards* would protect those who republished without actual knowledge of the truth, even if they were reckless in failing to find it, because their lack of knowledge would refute any inference that they had espoused the underlying charge.

There is some language, however, that militates against this reading. The court said that the journalist must simply "believe that his report accurately conveys the charges made." 556 F.2d at 120 (emphasis added). The court's reliance on *Time, Inc. v. Pape*, 401 U.S. 279 (1971), for the privilege of neutral reportage also suggests that both sides of the issue need not be presented, but simply that the story should not be intentionally slanted.

122. In the case of advertisements, requiring the reporter to include rebutting information would obviously be unfair and unrealistic. The public, however, expects an advertisement to be a one-sided presentation of the advertiser's views. Thus, no inference would be created that the republisher has asserted the truth of the underlying statements.

123. See generally notes 66-70 and accompanying text *supra*.

lied. Moreover, since, under *Edwards*, the defamed person must be a public figure,¹²⁴ he will enjoy somewhat greater access to the media to rebut the charges¹²⁵—especially when they are made during debates of intense public interest. It is doubtful, however, that natural pressures alone will ensure the public a balanced impression of the event. The defamed's status as a public figure does not necessarily guarantee him access to the media; as the Supreme Court has noted, such access will be unavailable "when the public official or public figure is a minor functionary, or has left the position that put him in the public eye."¹²⁶ Even where access is achieved, it is unlikely to be completely effective. The sensational charge inevitably commands far more public attention than does the humdrum denial.¹²⁷

The minimal requirement of editorial fairness hinted at in *Edwards* poses little danger of deterring desirable republication. Where the republisher neither knows nor believes the underlying charge to be false, he is protected by *New York Times* and needs no special privilege. Where he does know the charge to be false, it would not seem unreasonably burdensome to require at least some indication that the republished defamation is open to question. The danger of deterrence is further minimized since the fairness requirement is phrased in terms not unduly intrusive on editorial discretion.¹²⁸ Moreover, inclusion of information that tends to refute the defamatory charge does not detract from the newsworthiness of the fact that a charge has been made. Thus, if deterrence does occur, it probably indicates that the statements were newsworthy only in their sensationalism and not in the fact they were made. Such deterrence does not interfere with the first amendment interest in republication.¹²⁹

The strongest argument against a balance requirement—and the one explicitly recognized in *Edwards*¹³⁰—is that it might contravene the first amendment interest in editorial discretion recognized in *Miami Herald Publishing Co. v. Tornillo*.¹³¹ In striking down a statute that required a newspaper to provide political candidates space to rebut published defamatory allegations, the Supreme Court observed that

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on size and

124. See generally notes 90-94 and accompanying text *supra*.

125. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

126. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 79, 96 (1971).

127. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974); Kalven, *The Reasonable Man and The First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 300 ("For centuries it has been the experience of Anglo-American law that the truth never catches up with the lie, and it is because it does not that there has been a law of defamation.").

128. See text accompanying notes 133-36 *infra*.

129. See generally notes 67-70, 75 and accompanying text *supra*.

130. 556 F.2d at 120.

131. 418 U.S. 241 (1974).

content of the paper, and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . .¹³²

At least with respect to the print media,¹³³ *Miami Herald* probably bars any rigid requirement of editorial balance. It has been suggested, however, that narrowly drawn access statutes, requiring less than complete equality of discussion,¹³⁴ might well be upheld under *Miami Herald*.¹³⁵ If so, the minimal balance requirement discernible in *Edwards* seems clearly permissible. It requires only that the republisher who knows the defamation to be false include sufficient balance to avoid a possible inference that he has asserted the truth of the underlying claim. Moreover, unlike an access statute which requires the publisher to print what another has written, the *Edwards* standard would allow the republisher to phrase the balancing information in his own words. Finally, this standard would not unduly intrude on the discretion of editors who believe in balanced reporting.¹³⁶

CONCLUSION

Even before *New York Times*, the common law record privilege protected speech relevant to self-government against the competing interest in reputation by privileging the republication of defamatory statements made in the course of governmental proceedings. In order to promote informed self-government *New York Times* gave a constitutional protection against defamation liability, but failed fully to safeguard the first amendment interest in republication. *Edwards v. National Audubon Society* has filled this gap by privileging the republication of some statements even when the republisher knows them to be false. At the same time, the *Edwards* court carefully limited the privilege to those situations in which information relevant to intelligent self-government is at stake. The statements republished must be "newsworthy" under a new standard defined by the court, and the privilege may be lost if the report is inaccurate or if the republisher in effect asserts the truth of the defamatory statements.

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132. *Id.* at 258.

133. The Supreme Court has upheld the federal government's power to impose a right to reply to defamatory attacks made over the airwaves. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 397 (1969). Thus, a greater requirement of balance might be imposed on broadcasters seeking a republication privilege.

134. The statute invalidated in *Miami Herald* required that the rebuttal be published in "as conspicuous a place and in the same kind of type" as the original defamation. 418 U.S. at 244.

135. Compare *B. SCHMIDT*, *supra* note 92, at 246 with *Abrams*, *In Defense of Tornillo*, 86 *YALE L.J.* 361 (1976).

136. See *Ohio St. Univ. Bull., The Journalistic Code of Ethics* 5 (Journalism Series Vol. I, No. 4, 1922) ("We will interpret accuracy not merely as the absence of actual misstatement, but as the presence of whatever is necessary to prevent the reader from making a false deduction."). See also *C. MACDOUGALL*, *supra* note 86.