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Comments


In Edwards v. National Audubon Society, Inc., the Second Circuit recognized a first amendment constitutional privilege to republish newsworthy defamatory falsehoods irrespective of the second publisher's subjective awareness of the statement's falsity. At common law, republication of a known falsehood is privileged as a fair report only when the calumny reported was made at an official proceeding or public meeting. The Edwards "neutral reportage" privilege, however, would protect a "fair" and "accurate" report of any defamatory falsehood made by a "responsible" and "prominent" organization or person, even if the first publication was made in a private conversation. Thus, the Edwards decision would subsume the common law privilege.

Although the Edwards decision purported to follow the Supreme Court's first amendment theory, a careful analysis of first amendment theory indicates that Edwards was inappropriately decided. This Comment briefly examines the nature and theoretical bases of the common law privilege of fair report. Next, it examines Edwards and suggests that it incorrectly relied on the Court's opinion in Time, Inc. v. Pape for its holding. The Comment then analyzes first amendment theory as enunciated by the Supreme Court. A comparison of the Supreme Court's first amendment analysis in defamation actions with the Edwards court's neutral reportage analysis reveals the incongruity between the Edwards rationale and the first amendment rationale developed by the Supreme Court in the area of defamation. The Supreme Court has recognized that protection of freedom of expression must be tempered by the state's legitimate interest in protecting the reputation of its citizens. The Edwards neutral reportage privilege, however, gives a reporter absolute immunity for reporting a newsworthy,
defamatory statement and gives insufficient weight to the counter-vailing state interest in protecting the reputation of its citizens. The Comment, therefore, concludes that the neutral reportage privilege established in Edwards is inconsistent with first amendment theory and gives inadequate protection to the individual's reputation.

Common Law Defamation and the Privilege of Fair Report

The law of civil defamation embodies the public policy that one should enjoy one's reputation unimpaired by defamatory attacks. At common law, defamation is defined as a false communication that "tends so to harm [one's] reputation . . . as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Each publication of a defamatory communication constitutes a separate cause of action. Thus, even if one merely repeats what was heard and identifies the source of the communication or adds such qualifying words as "it is alleged," one is liable for


9. RESTATEMENT (SECOND) OF TORTS § 559 (1977) [hereinafter cited as Second Restatement]. This statement is, perhaps, the best modern definition of a defamatory communication. A more eloquent, but less inclusive, definition is found in 1 E. Seelman, THE LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK § 18 (1964).

10. Publication is necessary for harm to result to one's reputation. "Publication" is the technical term used to describe the communication that gives rise to actionable defamation. Publication results when the defamatory falsehood is communicated to a third person. Unless the defamation is repeated to someone other than the defamed, there can be no harm to reputation, and there is no publication. See generally Eldredge, supra note 8, § 35, at 205; Prosser, supra note 8, § 113, at 766.


the unprivileged republication of a defamatory utterance. Liability is
based upon the principle that one who repeats a defamation adopts it
as one's own.

A common law exception to this rule is the privilege of fair re-
port. Although the scope of the privilege varies, it generally pro-

14. See, e.g., Cianci v. New Times Publishing Co., 639 F.2d 54, 66-67 (2d Cir. 1980);
16. Under the common law, there are three types of privilege: the absolute privilege,
the conditional privilege, and the special privilege. The absolute privilege provides absolute
immunity from civil liability for libel and slander. It is immaterial that the individual com-
dunicating the defamation was motivated solely by common law malice—ill will or spite—or
was aware that it was false. See ELDREDGE, supra note 8, §§ 72-77, at 339-418; 1 A.
HANSON, LIBEL AND RELATED TORTS ¶¶ 108-112, at 85-93 (1969); PROSSER, supra note 8,
§ 114, at 776-85. The conditional or "qualified" privileges are based "upon a public policy
that recognizes it is essential that true information be given whenever it is reasonably neces-
sary for one's interest, the interest of third persons or certain interests of the public." Sec-
ond Restatement, supra note 9, § 592A, at 258, topic 3. Under the common law, however,
the conditional privilege exists only when certain requirements are met. It can be destroyed
when the publisher does not believe the statement to be true or lacks reasonable grounds for
believing it to be true. Id. § 593 comment c. See generally ELDREDGE, supra note 8, §§ 83-
94, at 447-542; 1 A. HANSON, LIBEL AND RELATED TORTS ¶ 123-141, at 95-110; PROSSER,
supra note 8, § 115, at 785.

The special privileges often are called conditional privileges by commentators. See,
e.g., 1 A. HANSON, LIBEL AND RELATED TORTS ¶ 133, at 100 (1969). The special privileges
("fair report" privileges), like the conditional privileges, exist only when certain require-
ments are met. Unlike the conditional privileges, however, the special privileges of fair re-
port often immunize from liability the reporter who knows his or her defamatory
communication is false. See ELDREDGE, supra note 8, § 78, at 420; Second Restatement,
supra note 9, § 611 comment a.

17. Because this privilege has developed at common law, it lacks uniformity in its ap-
lication. Each state has determined the degree to which its citizens' interests in their repu-
tation will be subordinated to the public interest in the availability of information about
official proceedings. There are at least three approaches among the jurisdictions in apply-
ing the fair report privilege. First, some jurisdictions extend the privilege to fair and accurate
reports of proceedings upon which no official action has been taken. See Hayward v. Wat-
sonville Register-Pajaronian & Sun, 265 Cal. App. 2d 255, 71 Cal. Rptr. 295 (1968); Campbell
Pulsifer, 137 Mass. 392, 50 Am. Rep. 318 (1884); Second Restatement, supra note 9, § 611
comment a.

Second, some jurisdictions hold that the privilege is defeated, although the report is
both fair and accurate, when the republisher was motivated solely by malice—ill will or
spite. See American Dist. Tel. Co. v. Brink's, Inc., 380 F.2d 131 (7th Cir. 1967); Fairbanks
34 III. 2d 112, 115, 214 N.E.2d 746, 748 (1966); Sciandra v. Lynett, 409 Pa. 595, 187 A.2d 586
(1963); Gerlach v. Gruet, 175 Wis. 354, 185 N.W. 195 (1921); see also Restatement
(First) of TORTS § 611 comment a (1938). Others extend the privilege regardless of the
Cal. Rptr. 135, 143-44 (1965); see also Second Restatement, supra note 9, § 611.

Third, a few jurisdictions extend the privilege to reports of public, nongovernmental
proceedings. Penn v. Lawson, 72 F.2d 742, 744 (D.C. Cir. 1934) (church meeting); Morin v.
tects the publication of fair and accurate reports of public meetings and judicial proceedings. This protection is extended even when an individual is defamed during the proceeding or action.

The fair report privilege does not alter the public policy of protecting an individual's reputation interest. Rather, the privilege accommodates a countervailing public or social interest in the availability of information about official proceedings and public meetings. Because the public or social interest being accommodated is the public's interest in receiving information from public meetings and official proceedings, the privilege is unaffected by the republisher's knowledge of the falsity of the statement reported.

18. The report must be complete; it must give the reader the same impression of the meeting that the reader would have had, had he or she attended the meeting. Curtis Publishing Co. v. Vaughan, 278 F.2d 23, 29 (D.C. Cir.), cert. denied, 364 U.S. 822 (1960); Brush-Moore Newspapers v. Pollitt, 220 Md. 132, 151 A.2d 530 (1959); Second Restatement, supra note 9, § 611 comment f.

19. It is not necessary that the report be accurate in every detail as long as it conveys a substantially correct account of the proceedings to those who read it. See, e.g., Hartzog v. United Press Ass'n, 202 F.2d 81 (4th Cir. 1953); Brush-Moore Newspapers, Inc. v. Pollitt, 220 Md. 132, 151 A.2d 530 (1959); Scandra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963); see also Second Restatement, supra note 9, § 611 comment f.


22. The fair report privilege also extends to fair and accurate reports of official documents issued by the government. E.g., Cresson v. Louisville Courier-Journal, 259 F. 487 (6th Cir. 1924); Scandra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963). It is applicable to the report of any proceeding, action, or document of governments at the local, state, or federal level, or of bodies authorized by law to perform a public duty. Second Restatement, supra note 9, § 611 comment d.

23. Second Restatement, supra note 9, § 611 comment a.

24. Id. See note 16 supra. Some courts have ruled that, when one republishes solely for the purpose of causing harm to the person defamed, the fair report privilege is defeated because one is not publishing to further any societal interest. The fairness or accuracy of the report is immaterial. See, e.g., American Dist. Tel. Co. v. Brink's, Inc., 380 F.2d 131 (7th
Although the fair report privilege immunizes one who repeats a defamatory statement, it does not destroy the actionable character of the defamation.\textsuperscript{25} Rather, it is used as a defense.\textsuperscript{26} But for the privilege, the republisher would be liable for his or her repetition of the defamation.\textsuperscript{27}

**Theories Underlying the Common Law Fair Report Privilege**

Two theories have been articulated to justify subordinating the defamed individual's interest in his or her reputation to the public’s interest in the information: the agency and supervision theories. The agency theory rationalizes protecting the reporter because he or she acts as a substitute or agent for the public.\textsuperscript{28} As any member of the public lawfully can attend a public meeting or official proceeding, the reporter, in a fair and accurate report, merely communicates to the public what it would have seen or heard had it been present.\textsuperscript{29} The public’s right to the information, therefore, arises from its right to attend the meeting.\textsuperscript{30}

The supervision theory subordinates the individual’s reputation

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\textsuperscript{26} Short v. News-Journal Co., 58 Del. 592, 212 A.2d 718 (1965); see also Yowe v. New Hampshire Ins. Co., 11 A.D.2d 663, 218 N.Y.S.2d 198 (1960) (discovery of insurance company’s records to disclose a defamatory report not disallowed by privilege, which is a defense, not a bar to the action).

\textsuperscript{27} See notes 11-13 & accompanying text \textit{supra}.


\textsuperscript{29} \textit{See, e.g.}, American Publishing Co. v. Gamble, 115 Tenn. 663, 678, 90 S.W. 1005, 1008 (1906).

\textsuperscript{30} The agency theory inadequately justifies the privilege of fair report. The agency theory rests on the assumption that, simply because a member of the public could have witnessed the defamatory falsehood, he or she should be informed of it. \textit{See, e.g.}, Borg v. Boas, 231 F.2d 788 (7th Cir. 1956). This assumption, however, confuses those elements that justify extending the fair report privilege to republication of defamation with those that merely indicate the situations in which the privilege may exist. \textit{See generally Note, Privilege to Republish Defamation, 64 Colum. L. Rev. 1102, 1116-17 (1964)}. At common law, each publication of a defamatory falsehood is actionable. See notes 12-15 & accompanying text \textit{supra}. The agency theory merely explains the situations in which a republication is not actionable, but does not explain why the reporter is not liable for the republication. The
interest to the public's need for information for the purpose of supervising official conduct. Justice Holmes explained this theory in *Cowley v. Pulsifer*:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. . . . The chief advantage [of the publication] is the proper administration of justice . . . . [I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Although Justice Holmes's discussion was in the context of the privilege for a fair and accurate report of a judicial proceeding, the rationale of the supervision theory applies with equal force to fair and accurate reports of all types of official proceedings and public meetings. The disclosure of such information allows the public to oversee the performance of public functions.

Both the agency and supervision theories focus on the public's right to know the content of an official meeting or judicial proceeding. The republication of a defamatory falsehood under the fair report privilege, therefore, is protected because the recipients of the report, the public, have a legitimate and overriding interest in the information. The reporter, on the other hand, does not have an independent interest protected by the privilege. The reporter acts only as the conduit through which the public learns of the content of official meetings or judicial proceedings. The reporter is protected, therefore, only because the public has a right to the information republished.

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

In *Edwards v. National Audubon Society, Inc.*, the Second Circuit ruled that the public interest protected by the common law fair report privilege should be constitutionally protected under the first amend-

agency theory, therefore, reduces the fair report privilege to descriptive, rather than normative, terms.

33. *See generally* Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102, 1104 (1964) (with the growth of electoral responsibility in government, the courts, to ensure increased public supervision, have extended the privilege to reports of legislative and administrative proceedings).
34. For this reason, the privilege is inapplicable to reports of judicial proceedings when such reports are inaccurate, unfair, or published solely to harm the person defamed.
The *Edwards* litigation arose from an acrimonious dispute between the National Audubon Society and proponents of the pesticide DDT. The Society contended that the proponents of DDT misused the Society's Christmas bird count data to prove that DDT had no harmful effects on the bird population. The editor of the National Audubon Society's publication, *American Birds*, charged in the foreword to the April 1972 issue that the use of data by "scientist-spokesmen" of the pesticide industry was a "distortion of the facts for the most self-serving of reasons." He further admonished that "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."

These general accusations came to the attention of a *New York Times* reporter, who asked the editor of *American Birds* for the names of those scientists the Society believed to be "paid liars." Unable to provide the reporter with names of any individuals who could with assurance be classified as "paid liars," the editor consulted the Society's staff biologist and vice-president. According to the editor, the vice-

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36. *Id.* at 120. In its subsequent decision of Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980) (Kaufman, C.J., concurring), the court limited the breadth of the immunity conferred by the neutral reportage privilege. The Cianci court recognized that careful limitation of the privilege was required. *Id.* at 68-70. In Cianci, *New Times* magazine featured a story reporting that a public official had at one time been accused of raping a woman. *Id.* at 56. Although the article stated that the mayor denied the charge, it did not contain his version of the incident. *Id.* at 69. The court limited *Edwards* to its facts, stating that the media enjoyed the neutral reportage privilege only with respect to public officials and public figures. *Id.* at 67, 69 n.17 (dictum). It was not disputed that the mayor was a public figure. The Court further noted that, unlike in *Edwards* in which the report was "fair" and accurate, in Cianci the magazine had espoused or concurred in the charges made against the mayor. It therefore had failed to take a neutral stance. *Id.* at 69. Thus, although the mayor was considered a public figure, the Cianci court refused to apply the *Edwards* neutral reportage privilege. For a discussion criticizing the Cianci analysis, see Comment, Restricting the First Amendment Right to Republish Defamatory Statements, Cianci v. New Times Publishing Co., 69 GEO. L.J. 1495 (1981).

Although the Cianci court has retreated from the sweeping statements and analysis used in Edwards, other courts have interpreted the neutral reportage privilege to apply to private persons. See note 52 & accompanying text infra. Moreover, the Supreme Court has not addressed the question of the existence of a constitutional privilege of neutral reportage, see Cianci, 639 F.2d at 67, or determined what form, if any, such a privilege would take.

37. Dichloro-diphenyl-trichloro-ethane (DDT) is a water-insoluble crystalline insecticide that tends to accumulate in ecosystems.

38. The Society's Christmas bird count is an annual compilation by Audubon Society members of the number of birds they sighted in the field during the year. DDT proponents argued that the steady increase in the number of birds counted indicated that the pesticide did not harm bird life. The Society rejoined that the rising bird counts were caused by an increase in the number of individuals counting birds and better access to the count areas rather than by an increase in the bird population. 556 F.2d at 116.

39. *Id.*

40. *Id.* at 117.
president was able to supply him only with the names of five eminent scientists who had most frequently misused the bird count data. The published story reported that these scientists had been accused of being paid liars by the National Audubon Society, and included the denials of three of the five scientists named.

The opinion of the Second Circuit, written by Chief Judge Kaufmann, concluded that a reporter is constitutionally protected under the first amendment by a right of “neutral reportage,” the right to publish fair and accurate accounts of false, defamatory statements regardless of the reporter’s subjective awareness of the statements’ falsity.

When a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity. What is newsworthy about such statements is that they were made. 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 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.

Thus, according to the Second Circuit, the first amendment immunizes a reporter from liability for defamation even when the reporter has serious doubts concerning the truth of the republished statement. Because newsworthy defamatory statements affect the public welfare, the public has a right to hear them.

The defamatory statements in Edwards were deemed newsworthy because they were made by a “responsible” and “prominent” organization, because of the acrimonious debate surrounding the DDT controversy, and because they concerned “public figures.”

The reporter's

41. Id. The editor further testified that the vice-president had emphasized that the names were being given to the reporter with the understanding that the Society did not have knowledge of any “paid liars.” Id. The editor testified that he had conveyed these qualifications to the reporter. The reporter denied that he had been so informed, asserting that the names had been presented to him as the names of the “paid liars” referred to in the American Birds foreword. Id.
42. The court’s opinion was based on alternative grounds. 556 F.2d at 120. Judge Kaufmann also held that the plaintiffs had not satisfied their burden under the New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964), actual malice rule. See notes 75-93 & accompanying text infra. The plaintiffs in Edwards had neither proved that the Times had known the Society’s accusations were false nor demonstrated that the Times had had serious doubts about the truth or falsity of the accusations. The Times was therefore constitutionally protected by the New York Times rule. 556 F.2d at 121.
43. 556 F.2d at 120.
44. Id. at 115, 120.
45. Id. at 120. In focusing upon the newsworthiness of the defamatory statements, Judge Kaufmann stated, “What is newsworthy about such accusations is that they were
subjective awareness of the truth or falsity of the Society's accusations was irrelevant. Constitutional protection of the right to report such statements fairly and accurately, the court suggested, would ensure public awareness of important issues. The court concluded, therefore, that the public's interest in newsworthy information outweighed an individual's reputation interest, even when defamatory falsehoods were published with "actual malice."

Although the theoretical justifications of the common law fair report privilege may not have these safeguards. If charges made over the telephone in a private conversation are newsworthy and republication is privileged without an effort to obtain the accused's response, the traditional meaning of "fairness" will be severely circumscribed. Although a response was printed in the article at issue in Edwards, it is not clear whether the Edwards privilege requires an opportunity for rebuttal.

The court placed great value on the public interest in a free press. In Judge Kaufmann's words: "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." 556 F.2d at 120. At the same time, individual reputation was accorded little value. Id. at 120. "Actual malice" is the term applied by the Supreme Court to a standard of knowledge of falsity or reckless disregard for the truth or falsity of a statement. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The use of the term by Justice Brennan was unfortunate, because the definition given is actually that of scienter. ELDREDGE, supra note 8, § 51, at 254 n.41. Confusion has developed because actual malice at common law requires a showing of ill will or spite. The Supreme Court, in recent cases, has ceased using the term. Id.; see, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971). See notes 68-80 & accompanying text infra.
port privilege are well developed, the theoretical underpinnings of an Edwards neutral reportage privilege are not. Decisions following Edwards demonstrate doctrinal uncertainty. Several decisions suggest that the Second Circuit intended the neutral reportage privilege to extend to all newsworthy statements. Other decisions suggest that the neutral reportage privilege is limited to newsworthy statements concerning public figures or public officials. The initial question, however, is whether the first amendment theory enunciated by the Supreme Court supports the recognition of any formulation of a constitutional neutral reportage privilege.

Time, Inc. v. Pape

In Edwards, the Second Circuit inferred from the Supreme Court decision in Time, Inc. v. Pape that a constitutional privilege of neutral reportage is consistent with first amendment theory. Reliance upon Pape to support a constitutional neutral reportage privilege, however, is misplaced.

The only major issue in Pape was whether an inaccurate report of an ambiguous government document provided "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Pape litigation arose...
from a *Time* magazine article concerning a United States Commission on Civil Rights report on police brutality. In the report, the Commission quoted at length from a complaint, filed pursuant to the Federal Civil Rights Act,\(^5\) alleging specific violations of complainant’s civil rights. The article, however, reported the alleged civil rights violations as independent findings of the Commission.\(^5\) Thus, the article represented that the Commission itself had found that the plaintiff had violated the complainant’s civil rights, when in fact the Commission report had cited a judicial complaint containing allegations that the plaintiff had violated the complainant’s civil rights.

In its decision, the Supreme Court acknowledged that press reports of what someone has said about an event are difficult to analyze, when the press report is alleged to be calumny as written.\(^6\) The Court indicated, however, that failure to attribute the statement to the correct source does not presumptively raise the issue of actual malice.\(^6\) Rather, to establish actual malice, the plaintiff must demonstrate with convincing clarity that the reporter knew of the falsity, or entertained serious doubts about the truth or falsity, of the publication.\(^6\) As the Commission report was ambiguous, the Court concluded that the reporter’s interpretation was “one of a number of possible rational interpretations.”\(^6\) The reporter’s designation of the allegations as findings of the Commission, rather than as the substance of a complaint, “was not enough to create a jury issue of ‘malice’ under *New York Times*.”\(^6\)

The Supreme Court in *Pape*, therefore, neither prescribed nor foreclosed a constitutional neutral reportage privilege. The Court decided only that an inaccurate republication of a statement attributed to another does not demonstrate that the publisher acted with “actual malice.”\(^6\) The issue before the Second Circuit in *Edwards*, however, was whether the reporter’s subjective awareness of the falsity of an ac-

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Amant v. Thompson refined this standard, holding that a showing that the defendant had entertained serious doubts about the truth of the publication was required to prove recklessness. 390 U.S. at 731.

59. 401 U.S. at 280-82, 284-85.
60. Id. at 285-86.
61. Id. at 284-85.
62. Id. at 291-92 (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).
63. 401 U.S. at 290.
64. Id. This conclusion is also supported by the testimony of the author of the *Time* article, who testified that the context of the report of the Monroe incident indicated to him “that the Commission believed that the incident had occurred as described [in the *Time* article]. He therefore denied that he had falsified the report when he omitted the word ‘alleged.’” Id. at 289.
65. Id. at 289. That is, *Pape* involved the narrow evidentiary issue of what type of evidence proves clearly and convincingly that one has published with actual malice. See Medico v. Time, Inc., 643 F.2d 134, 144 (3d Cir.), cert. denied, 102 S. Ct. 139 (1981).
curately reported, newsworthy, defamatory statement attributable to another should subject the reporter to liability for republication of the defamatory statement.\textsuperscript{66}

The distinction between \textit{Pape} and \textit{Edwards} is important. \textit{Pape}, because it involved an evidentiary rather than a substantive issue, provides an inadequate basis for the \textit{Edwards} neutral reportage privilege.\textsuperscript{67} To determine the propriety of the neutral reportage privilege, therefore, it is necessary to analyze other Supreme Court decisions enunciating the theory underlying first amendment protection for freedom of expression in defamation cases.

\textbf{First Amendment Theory of Defamation}

At common law, defamatory opinion or criticism of public officials that was not motivated by common law malice—ill will or spite—\textsuperscript{68}—was protected under the fair comment privilege.\textsuperscript{69} A few jurisdictions, however, extended the privilege to defamatory misstatements of fact concerning the character and qualifications of candidates for public

\textsuperscript{66} \textit{Edwards} involved the substantive issue of when liability should be imposed upon a media defendant who republishes a defamatory falsehood. 556 F.2d at 120.

\textsuperscript{67} Perhaps the court in \textit{Edwards} cited \textit{Pape} to support recognition of unique constitutional analysis for cases involving false, defamatory statements attributable to a third party. Such an ambitious interpretation of \textit{Pape} would be misguided. The Supreme Court’s statement that \textit{Time} magazine was quoting a third party merely emphasizes the difficulty in accurately interpreting and communicating a third party’s meaning without quoting the statement. \textit{Time}, Inc. v. \textit{Pape}, 401 U.S. 279, 286-92 (1971). When a party is interpreting, rather than quoting, an ambiguous report or statement, the \textit{New York Times} actual malice rule should apply. \textit{Id.} at 290-91.

\textsuperscript{68} For a discussion of the distinction between common law malice and \textit{New York Times} actual malice, see note 50 supra.


The majority rule of fair comment might be considered an absence of defamation rather than a conditional privilege. A conditional privilege protects the publisher in certain situations notwithstanding the defamatory nature of the statement. See note 16 supra. Fair comment, on the other hand, protects the publisher’s criticism of a public official that is nondefamatory. An opinion cannot be false, if the publisher believes what he or she pub-
office. In the seminal decision of *New York Times Co. v. Sullivan*, the Supreme Court adopted the common law minority position as a constitutional doctrine.

Prior to *New York Times*, defamatory statements had not been accorded constitutional protection. An individual who published a defamatory statement was strictly liable unless the publication was privileged. "It ha[s] been well observed that such [defamatory] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In *New York Times*, the Court first addressed the conflict between the state interest in protection of individual reputation and the public interest in free speech and free press protected by the first and fourteenth amendments. Positing that the first amendment freedom of speech and of the press guarantees "freedom of expression upon public questions," the Court noted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [and] may well include vehement, caustic, and some-

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70. See, e.g., Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 284 (1908). These jurisdictions held that the distinction between statements of opinion and statements of fact was often spurious. In Coleman, the Kansas Supreme Court commented "that the distinctions between comment and statements of fact cannot always be clear to the mind. Expressions of opinion and judgment frequently have all of the force of statements of fact, and pass by insensible gradations into declarations of fact." *Id.* at 737, 98 P. at 290; accord *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921).


72. *Id.* at 279-82.

73. *Eldredge, supra* note 8, § 5.

74. Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). This analysis has been characterized as the two-level approach to the first amendment. Certain well-defined and narrowly limited categories of speech, such as defamation, are not constitutionally protected because they inflict injury by their very utterance. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) ("There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on public issues.'").


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times unpleasantly sharp attacks on government and public officials.”

Because the erroneous and perhaps defamatory statement is inevitable in free debate, the statement must be protected so that freedom of expression will have the “breathing space” needed to survive.

To provide this breathing space for freedom of expression about public officials, the Court held that a public official is precluded from “recovering damages for a defamatory falsehood relating to his official conduct unless he proves [with clear and convincing evidence] that the statement was made with ‘actual malice,’ that is with knowledge that it was false or with reckless disregard of whether it was false or not.”

This standard is required, the Court noted, to avoid self-censorship and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

The Court in *New York Times*, therefore, limited the state’s power to protect public officials from calumny, but did not foreclose protection. The Court, however, did not abrogate the proposition that defamatory utterances are not essential to any exposition of ideas or recognize that defamatory communication was inherently deserving of constitutional protection. Rather, in balancing the public and state interests, the Court determined that the need to provide breathing space for freedom of expression concerning public officials outweighs the incidental harm to reputation resulting from defamatory communi-

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76. *Id.* at 270.
77. *Id.* at 271-72.
78. *Id.* at 279-80. The actual malice rule was further developed in St. Amant v. Thompson, 390 U.S. 727 (1968), in which the Court explained that “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” *Id.* at 731.
79. 376 U.S. at 279.
80. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
81. As noted by Justice Powell in Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974), societal values are being balanced. If freedom of the press were the sole value, “this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . [A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.”
82. See note 74 & accompanying text supra.
83. To accord constitutional value to defamatory statements would be to acknowledge that a state has no interest in protecting its citizens’ reputations. There is, however, a legitimate interest underlying the law of defamation. Protection of reputation “reflects no more than our basic concept of the essential dignity of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. . . . [T]his does not mean that the right is entitled to any less recognition . . . as a basis of our constitutional system.” Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); accord Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (refusing to extend actual malice standard to cases involving private persons).
cations made without actual malice.  

In striking this balance, the Court focused upon the status of the public official as one holding government office. The Court reasoned that freedom of expression concerning public officials deserves protection to ensure that citizens discuss the character and qualifications of those who serve them. Although the Court in New York Times reached its decision because of the plaintiff's status as "public official," the Court extended the actual malice requirement to defamation of "public figures" in Curtis Publishing Co. v. Butts.

In extending the requirement that a plaintiff demonstrate actual malice to defamation of "public figures," the Court again focused upon the status of the individual defamed. Chief Justice Warren explained that public figures, as well as public officials, often are "involved in the resolution of important public questions or . . . shape events in areas of concern to society at large." In Gertz v. Robert Welch, Inc., the Court further explained that public figures have assumed positions of especial prominence in the affairs of society and usually have become involved voluntarily in particular public controversies to effect their resolution. The public has a "legitimate and substantial interest in the conduct of such persons." The state's interest in protecting the public figure's reputation is lessened, however, because public figures

84. The conclusion that free criticism of government officials is supported by a substantial public interest "does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But . . . , there is a tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of New York Times is that when interest in discussions are [sic] particularly strong . . . the Constitution limits the protection afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees . . . the New York Times malice standards apply." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (footnote omitted).

As balancing these competing interests requires the Justices to weigh intangible values or interests, the Court's approach has been criticized. See, e.g., Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962). But see Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821 (1962).

85. See 376 U.S. at 279-83.
86. Id. at 281 (quoting Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908)).
87. 388 U.S. 130 (1967). For a discussion of the actual malice standard, see note 50 supra.
88. Id. at 164 (Warren, C.J., concurring).
90. Id. at 345.
91. Curtis Publishing Co. v. Butts, 388 U.S. at 164 (Warren, C.J., concurring): "Freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and sub-
have access to the media to contradict defamatory statements\textsuperscript{92} and have “voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them.”\textsuperscript{93} The \textit{New York Times} actual malice standard, therefore, strikes the proper balance between the public’s right to information concerning the conduct of public figures and the state’s interest in the protection of a public figure’s reputation.

The Supreme Court in \textit{Gertz} addressed the issue of whether to extend the actual malice standard to defamation actions involving private persons. Because a private person, unlike a public official or public figure, has limited access to the media to contradict defamatory falsehoods and has not voluntarily exposed himself or herself to an increased risk of defamation by shaping events in areas of concern to society at large,\textsuperscript{94} the Court concluded that the \textit{New York Times} actual malice rule would be inappropriate in defamation actions involving private persons.\textsuperscript{95} The Court focused upon the private person’s status as one who “has relinquished no part of his interest in the protection of his own good name, and consequently . . . has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”\textsuperscript{96} The Court adopted the view that the states are permitted to define for themselves the standard of liability for the publication of defamatory falsehoods by media defendants concerning private persons, as long as they do not allow liability without fault.\textsuperscript{97}

The Supreme Court has established a constitutional framework for protecting freedom of expression in defamation cases in which the standard of protection applied is determined by the status of the person defamed.\textsuperscript{98} Freedom of expression, therefore, is tempered by the countervailing reputation interest. If the plaintiff is a public official or pub-

\textsuperscript{92.} \textit{Gertz}, 418 U.S. at 344.
\textsuperscript{93.} \textit{Id.} at 345.
\textsuperscript{94.} \textit{Id.}
\textsuperscript{95.} \textit{Id.} at 346.
\textsuperscript{96.} \textit{Id.} at 345.
\textsuperscript{97.} \textit{Id.} at 347.
\textsuperscript{98.} Prior to \textit{Gertz}, the constitutional standard to be applied in defamation actions involving private persons was unclear. In \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29 (1971), the Court was unable to agree upon a majority position. In his plurality opinion, Justice Brennan concluded that the actual malice standard should extend to defamatory falsehoods about private persons, if the subject matter of the statement was of general or public interest. \textit{Id.} at 43. The opinion focused upon society’s interest in learning about a particular issue. “If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.” \textit{Id.}

The \textit{Gertz} majority stated that such a subject matter analysis failed to accommodate the state’s interest in protecting individual reputation. \textit{Gertz}, 418 U.S. at 346. See notes 107-08 \textit{infra}. 
lic figure, the state may impose liability on a media defendant only if actual malice can be proved. If the plaintiff is a private individual, on the other hand, the first amendment interest is lessened and the power of the state to protect its citizen's reputation is increased correspondingly. Thus, the state may impose liability on a media defendant absent proof of actual malice.

The Edwards decision, however, bases constitutional protection upon the newsworthiness of the statement; the status of the person defamed is only incidentally important to the Edwards analysis. Under Edwards, the constitutional immunity of neutral reportage arises because the subject matter of the statement itself is a matter of public importance, not because the statement about a public official or public figure is a matter of public importance. To justify the "neutral reportage" privilege, therefore, one must determine that it is consistent with the first amendment position of the Supreme Court.\(^9\)

Application of First Amendment Theory to the Neutral Reportage Privilege

The Supreme Court's defamation analysis has not altered the basic common law rule that one who republishes a defamatory falsehood also is liable for harm to the defamed individual's reputation.\(^{10}\) In Edwards, therefore, when the Times reported that the National Audubon Society had identified the five scientists as "paid liars," the Times adopted the statement as its own.

Under the Supreme Court's first amendment theory, which emphasizes the speaker's right to criticize or to comment on the actions of public officials or public figures, the appropriate analysis is to ascertain the status of the individual defamed. If the defamed person is a public

\(^{9}\) Some commentators have suggested that the neutral reportage privilege is justified by a greater first amendment interest in the republication of a known defamatory falsehood because the fact that the falsehood is made is relevant to self-government. These commentators discount the constitutional balance between the first amendment interest in freedom of expression and the state's interest in protecting reputation. They would endorse a neutral reportage privilege even though the media defendant published negligently or with serious doubts about the veracity of the underlying statements reported. See generally Sowle, supra note 20; Comment, Constitutional Privilege to Republish Defamation, 77 Colum. L. Rev. 1266 (1977); Comment, Restricting the First Amendment Right to Republish Defamatory Statements, CiAnci v. New Times Publishing Co., 69 Geo. L.J. 1495 (1981) (criticizing CiAnci, which limits the Edwards neutral reportage privilege, and suggesting a return to the Edwards analysis); Note, Edwards v. National Audubon Society, Inc.: The Right to Print Known Falsehoods, 1979 U. Ill. L.F. 943 (1979).

official or public figure, the actual malice standard must be met before a media defendant may be held liable. If the plaintiff is a private person, the constitutional standard minimally required for liability is negligence. The neutral reportage privilege, however, would not require this analysis. If a statement were newsworthy, the reporter would be immunized from liability, even though he or she knew of or recklessly disregarded the falsity of the underlying statement. If the neutral reportage privilege were extended to all persons without regard to their status, any person would be prevented from recovering for a defamatory statement republished by a media defendant, as long as the defamatory falsehoods were “newsworthy.”

Courts that have either adopted or explained the neutral reportage privilege have disagreed in their interpretation of the doctrine. Some courts posit that the neutral reportage constitutional privilege would apply regardless of the plaintiff’s status as private person, public official, or public figure.101 Under this analysis, the newsworthy defamatory falsehood would be privileged, irrespective of the reporter’s subjective awareness of the statement’s falsity, if published in an accurate and disinterested report. Other courts have limited the neutral reportage privilege to statements concerning public officials or public figures.102 Both analyses conflict with the first amendment analysis applied by the Supreme Court in defamation cases.

The Neutral Reportage Privilege, the Newsworthiness Justification, and the Private Person

Application of a constitutional privilege of neutral reportage to newsworthy statements regardless of the status of the person defamed appears to be foreclosed by the Supreme Court’s decisions in Gertz v. Robert Welch, Inc.,103 Time, Inc. v. Firestone,104 and Wolston v. Reader’s Digest Association, Inc.105 These decisions repudiated the subject matter, or newsworthiness, test as a basis for determining whether the first amendment would protect a defamatory publication.106

In Gertz, the Court noted that a subject matter analysis fails to

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accommodate adequately the state’s interest in protecting a private person’s reputation. Moreover, the use of a subject matter test would require judges to decide which publications were matters of public or general interest. This test, the Court concluded, was inappropriate to determine the proper standard applicable in defamation actions.

In *Time, Inc. v. Firestone*, the respondent sued *Time* for inaccurately reporting a judicial proceeding, claiming the report was defamatory. The appellant contended that the *New York Times* actual malice rule should apply to reports of judicial proceedings. The Court rejected this argument, noting that in *Gertz*, the Court had repudiated a subject matter test and had adopted a test focusing upon the status of the plaintiff. In reaffirming *Gertz*’s rejection of the subject matter test, *Firestone* indicated the Court’s unwillingness to expand first amendment protection by giving a special privilege to reports of judicial proceedings.

In *Wolston*, which represents the Court’s most recent rejection of the subject matter test, the Reader’s Digest Association had published a book in which the plaintiff was inaccurately identified as a Soviet agent. In fact, the plaintiff had only failed to appear before a grand jury conducting investigations into the activities of Soviet agents in the United States. Because the plaintiff’s failure to appear had been reported in the media, the Reader’s Digest Association argued that the plaintiff was a public figure and was required to prove that the defamatory statements had been published with actual malice. The

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107. 418 U.S. at 346. The defamatory article in *Gertz* was about the murder trial of a police officer. Gertz was the attorney representing the victim’s family in a civil suit against the police officer. The statements defaming Gertz were not made in the course of reporting on court proceedings. The statements originated with the author of the article appearing in *American Opinion*. The article stated that Gertz was “an architect of the ‘frame-up’” of the police officer in the murder trial and charged Gertz with past communist affiliations. *Id.* at 326.

108. 418 U.S. at 346.

109. 424 U.S. at 452-53. The defamatory article erroneously reported that Mrs. Firestone’s husband had been granted a divorce on grounds of adultery and extreme cruelty. *Id.* at 452.

110. *Id.* at 455-56.

111. “[T]he suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The 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* .... There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.” *Id.* at 457.

112. 443 U.S. at 159, 160.

113. *Id.* at 162.

114. *See id.* at 165-68.
Supreme Court rejected this position, holding that a private individual is not automatically deemed a public figure merely by becoming involved in or associated with a newsworthy matter.115

Each of these decisions discredits the subject matter, or newsworthiness, test as a basis for applying first amendment protection in defamation actions.116 The Edwards neutral reportage privilege, however, gives media defendants an absolute immunity for reporting "newsworthy" defamatory statements, regardless of the status of the individual defamed.117 Because the Court continually has refused to base first amendment protection in defamation cases upon a newsworthiness analysis, the Court probably also would reject an absolute first amendment privilege triggered by the newsworthiness of the defamatory statement.118

The Neutral Reportage Privilege and the Public Official or Public Figure

Finally, application of the neutral reportage privilege to newsworthy but defamatory reports about public officials or public figures attributable to "responsible" and "prominent" persons or organizations also appears foreclosed by the Supreme Court decision of St. Amant v. Thompson.119 In that case, the Court refined its definition of actual malice, which must be proven by a public official or public figure before recovery in a defamation action.120 In New York Times, the Court had stated that actual malice exists when a reporter publishes "with knowledge that [the defamatory falsehood] was false or with reckless disregard of whether it was false or not."121 In St. Amant, the Court explained that reckless disregard of whether a statement was false could be proved by "evidence [sufficient] to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard

115. Id. at 167. The Court stated, "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times." Id. at 167-68.

116. See Comment, The Evolution of the Public Figure Doctrine in Defamation, 41 OHIO ST. L.J. 1009 (1980).

117. See notes 35-50, 99 & accompanying text supra.

118. First amendment theory in defamation cases eliminates the self-censorship that accompanies doubt as to the truth or falsity of a statement; it does not protect defamatory falsehood. See notes 68-98 & accompanying text supra. When a reporter knows the republished statement is defamatory, he or she intentionally inflicts injury to the defamed person's reputation, see notes 12-15, 100 & accompanying text supra, and should be liable under the Supreme Court's first amendment analysis. But see Sowle, supra note 20 at 519-21.


120. For a discussion of the actual malice test, see notes 75-93 & accompanying text supra.

for truth or falsity and demonstrates actual malice.\(^{122}\)

Thus, in *St. Amant*, the Court determined that subjective awareness of the falsity of a defamatory statement makes one liable under a *New York Times* actual malice standard. *St. Amant* reaffirms the Court's theory that protection is afforded defamatory speech, not because of its inherent value, but because of the potential chilling effect on truthful expression that would result if the press were subjected to liability for publication of statements that they made reasonable efforts to verify.\(^{123}\)

In *Dickey v. CBS, Inc.*,\(^{124}\) the Third Circuit recognized the distinction between the *Edwards* neutral reportage privilege and the constitutional privilege of fair comment enunciated by the Supreme Court, and rejected *Edwards* as inconsistent with *St. Amant*.\(^{125}\) In *Dickey*, a public official was defamed by his opponent in a pending election. This defamatory falsehood was later republished during a television broadcast. The television station asserted that the *Edwards* neutral reportage privilege applied to that republication. The *Dickey* court reasoned, however, that if the television station were aware that the statement was false, or had entertained serious doubts about its truth or falsity, the station would be liable for republication of the defamatory falsehood under a *New York Times* actual malice analysis.\(^{126}\) The Third Circuit noted that the newsworthiness analysis that triggers the application of neutral reportage had been specifically rejected in *Gertz*.\(^{127}\) The application of the *New York Times* standard, the Third Circuit stated, must be determined by reference to the status of the defamed, not to the content of the defamatory statement.\(^{128}\) Moreover, the court concluded that, even when the defamed person is a public official or public figure, absolute immunity is foreclosed by *St. Amant*.\(^{129}\)

\(^{122}\) St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

\(^{123}\) *St. Amant* applied the *New York Times* rationale: the first amendment protects the dissemination of truthful information through protection of freedom of expression; a reporter who entertains serious doubts about the truth or falsity of the publication does not publish with the belief that his or her report is truthful. *Id.* at 732.

\(^{124}\) 583 F.2d 1221 (3d Cir. 1978).

\(^{125}\) *Id.* at 1225-26.

\(^{126}\) *Id.* at 1227-28.

\(^{127}\) *Id.* at 1226 n.5.

\(^{128}\) *Id.*

\(^{129}\) See *id.* at 1227-28. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court rejected a claim of constitutional privilege against discovery concerning the editorial process. Discovery into the editorial processes cannot be precluded absolutely by a constitutional editorial privilege because the actual malice standard requires an inquiry into the subjective awareness of the publisher. *Id.* at 169-70. In reaching this conclusion, the Court noted that "[i]f those who publish defamatory falsehoods with the requisite culpability . . . are subject to liability, the aim being not only to compensate for injury but to deter publication of unprotected material threatening injury to individual reputation." *Id.* at 172.

This statement of the purpose underlying the actual malice standard succinctly articu-
The *Dickey* decision clearly is the better approach. By focusing upon the status of the person defamed, the *Dickey* court preserved the constitutional balance between the public's interest in freedom of expression and the state's interest in protecting the reputation of its citizens.\(^{130}\) The *Edwards* neutral reportage privilege does not preserve the constitutional balance established by the Supreme Court, and is inconsistent with the Court's approach. Although the Supreme Court has limited the state's power to protect individual reputation, the *Edwards* neutral reportage privilege requires the courts to discount totally the reputational interest of the defamed person. *Edwards*, therefore, does not provide sufficient protection to individual reputational interests and is unlikely to be adopted by the Court.\(^{131}\)

## Conclusion

The *Edwards* decision epitomizes a common misconception in constitutional law, that certain defamatory statements are inherently worthy of first amendment protection because they provide information necessary for effective self-government. Defamatory falsehoods, however, have no constitutional value and do not enhance self-government. *New York Times* and its progeny did not recognize that a defamatory falsehood has inherent constitutional value; in fact, they specifically rejected this notion. To ensure that the first amendment interest in freedom of expression is not inhibited, however, the Court has established minimum constitutional standards to limit self-censorship. To achieve this goal, the state's interest in the protection of individual reputation must be limited. *New York Times* and its progeny

lates the rationale for not adopting an *Edwards* neutral reportage privilege. *Edwards* focuses upon the public's need for information as the justification for providing absolute immunity in republication cases. *Herbert*, in rejecting the editorial privilege, stresses the countervailing consideration, protection of reputation. The first amendment theory predicated upon the status of the plaintiff balances these interests in a constitutional context and arrives at minimum standards that are constitutionally required. The state may provide any degree of protection above the minimum standards established by the Supreme Court. See note 131 infra.

130. See note 83 supra.

131. This conclusion is not intended to suggest that the common law fair report privilege has been abrogated. On the contrary, evolution of the fair report privilege by the states is consistent with the constitutional analysis employed by the Supreme Court. The Supreme Court merely has balanced countervailing interests: the public interest in freedom of expression and the state interest in protection of individual reputation. The resulting analysis—when the Court focuses upon the status of the person defamed—creates minimum standards. By acknowledging the state's legitimate interest as well as the public's interest in freedom of expression, the Court has implicitly recognized that the state may develop its fair report privilege without being inconsistent with constitutional first amendment theory. The state may provide greater protection to the publisher of the defamatory falsehood through the common law fair report privilege, because the state itself determines the degree of protection it wishes to provide its citizens.
acknowledge the state's interest in protecting individual reputation as a substantial one, even as they limit the state's power to provide such protection. The Court has created a first amendment analysis that balances the countervailing interest by focusing upon the status of the person defamed.

Viewed from this perspective, the *Edwards* decision obviously is not consistent with first amendment theory. The neutral reportage privilege does not sufficiently accommodate the countervailing interests recognized by the Supreme Court. Absolute immunity would be given to any newsworthy statement without inquiry into the status of the person defamed or into the reporter's subjective awareness of the falsehood he or she published. A neutral reportage privilege, therefore, would require a revolutionary first amendment analysis and would not sufficiently recognize the value of the individual's reputation.

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