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Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate

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In the Spirit of Crazy Horse[1] is dedicated to "all who honor and defend those who still seek to live in the wisdom of [the] Indian way."[2] True to the book's dedication, author Peter Matthiessen strives to tell the Native American side of the rise of the American Indian Movement (AIM),[3] its occupation of Wounded Knee in the early 1970's, and a shootout at Pine Ridge Reservation, South Dakota, that left two FBI agents dead.[4] In so doing, however, Matthiessen upset FBI agent David Price, who was assigned to the reservation during the shootout and occupation and investigated both incidents.[5] Price claimed that Matthiessen's account of his role in the incidents was defamatory, alleging in particular that Matthiessen repeated libelous statements accusing him of misconduct in the investigation of the FBI agents' deaths, in the prosecution of their suspected killers, and in the investigation of an AIM activist's death.[6] Consequently, Price brought libel actions against Matthiessen and publisher Viking Penguin.[7] The sub-

1. P. MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1983).

2. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1436 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

3. The American Indian Movement (AIM) began in Minneapolis, Minnesota in 1968. R. WEYLER, BLOOD OF THE LAND 35-40 (1982). "AIM was an indigenous, land-based spiritual movement, a call to Indian people to return to their sacred traditions and, at the same time, to stand firm against the tide of what they call European influence and dominance." *Id.* at 36. Within several years of its founding, this militant movement became active throughout the United States and Canada and a target of investigations by governmental authorities. *Id.* at 36-37. AIM increased its prominence when, in 1973, several hundred members took over the South Dakota village of Wounded Knee with the support of many of the residents. *Id.* at 76-77. This crisis ended when two FBI agents were executed by members of the movement. *Id.* The uprising and resulting violence became the subject of Peter Matthiessen's book, *In the Spirit of Crazy Horse.*

4. *See Viking Penguin*, 881 F.2d at 1429, 1434.

5. *Id.* at 1429.

6. *Id. See infra* notes 110, 128 and accompanying text (describing Mathiessen's book and the statements at issue).

7. Price originally claimed defamation, intentional infliction of emotional

stance of the litigation resulted in *Price v. Viking Penguin, Inc.*, in which the Eighth Circuit affirmed the district court's grant of summary judgment to defendants Matthiessen and Viking Penguin.[8]

In reaching its decision, the Eighth Circuit became only the second federal court of appeals to adopt the first amendment protection afforded by the neutral reportage privilege.[9] The privilege has various permutations, all of which allow a republisher[10] to publish with impunity statements made by a person or entity.[11] The republisher may republish such statements only when the public's interest in the statements outweighs the reputational interests of the statements' target.[12] To justify the privilege, commentators have advanced the public's interest in

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distress, false light invasion of privacy, and prima facie tort. *Id.* at 1429. He sought compensatory damages of $25,000,000, punitive damages, costs, and fees. *Id.* The district court, in successive rulings, narrowed the claims to specific defamation claims. *Id.*; *see also id.* n.1 (listing the district court's decisions relating to Price's claims). These district court rulings also are reported. *See* Price v. Viking Press, Inc., 654 F. Supp. 1038, 1041 (D. Minn. 1987) (dismissing state law claim against defendant Ellison on ground of res judicata); Price v. Viking Press, Inc., 625 F. Supp. 641, 646-51 (D. Minn. 1985) (dismissing claims asserted under state law against Viking Penguin and Matthiessen); *see also* Price v. Viking Press, Inc., 115 F.R.D. 43 (D. Minn. 1987) (discovery orders); Price v. Viking Press, Inc., 115 F.R.D. 40 (D. Minn. 1987) (same); Price v. Viking Press, Inc., 113 F.R.D. 585 (D. Minn. 1986) (same).

Price originally brought the actions against author Peter Matthiessen, publisher Viking Penguin, Inc., and Bruce Ellison, an alleged source for the books. Price v. Viking Penguin, Inc., 676 F. Supp. 1501, 1502-03 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990). The claims against Ellison were dismissed in an earlier proceeding on the basis of res judicata. *Id.* at 1504 (citing Price v. Viking Penguin, Inc., 654 F. Supp. 1038 (D. Minn. 1987)). Ellison's counterclaims against Price, however, remained in the case. *Id.* (Ellison alleged prima facie tort, abuse of process, conspiracy to interfere with civil rights, as well as constitutional violations). In addition, Ellison litigated an action against Price in South Dakota state court. 676 F. Supp. at 1504. This Comment focuses only on Price's actions for defamation against Matthiessen and Viking Penguin, Inc.

8. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1429 (8th Cir. 1989), *aff'g* 676 F. Supp. 1501, 1515 (D. Minn. 1988), *cert. denied*, 110 S. Ct. 757 (1990).

9. *Id.* at 1434. The Second Circuit also recognizes the protection afforded by the neutral reportage privilege. *See infra* note 94 and accompanying text.

10. As used in this Comment, the terms "publisher" and "reporter" refer to *any* person or institution that publishes, or causes to be published, their own statements. The term "republisher" refers to *any* person or institution that publishes, or causes to be published, the statements of another person or institution. The typical republisher is the media.

11. *See infra* notes 94-98 and accompanying text.

12. *See infra* note 103 and accompanying text; *see also infra* note 27 (setting forth justification for common law privileges for publishers).

receiving information.[13]

The Eighth Circuit, however, expanded the neutral reportage privilege beyond its usual confines to protect any statements that criticize the conduct of a public official.[14] In doing so, the *Viking Penguin* court relied on the robust, wide open debate theory that undergirded *New York Times Co. v. Sullivan*.[15] When both the robust, wide open debate theory and the informational theory[16] shape the neutral reportage privilege, the privilege provides the republisher reporting a matter of public concern much greater protection from liability for libel.[17]

This Comment sets forth guidelines for a neutral reportage privilege that incorporates both the robust, wide open debate theory and the informational theory. Part I examines the protection afforded publishers by the common law,[18] by the Supreme Court's constitutional libel law,[19] and by the neutral reportage privilege.[20] Part II analyzes the *Viking Penguin* decision.[21] Part III examines the theory implicit in the *Viking Penguin* decision[22] and proposes guidelines for a neutral reportage privilege shaped by that theory.[23] Such a privilege protects the republisher whenever the republication relates to a matter of public concern. This Comment concludes that the theory undergirding the *Viking Penguin* decision calls for a privilege that will provide the republisher stronger first amendment protection than the current versions of the neutral reportage privilege.

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13. *See infra* note 100 and accompanying text.

14. *See infra* notes 146, 149-60 and accompanying text.

15. 376 U.S. 254 (1964). In *New York Times* the Supreme Court advanced the actual malice standard, which protects publishers that inadvertently publish defamatory falsehoods about a public official. *See infra* notes 62-66 and accompanying text (setting forth the need for robust, wide open debate of public issues in *New York Times*); *see also infra* notes 149-61 and accompanying text (examining theory implicit in the *Viking Penguin* court's use of the neutral reportage privilege).

16. The informational theory traditionally undergirds the neutral reportage privilege. *See infra* notes 99-103 and accompanying text.

17. *See infra* notes 162-64 and accompanying text.

18. *See infra* Part I. A.

19. *See infra* Part I. B.

20. *See infra* Part I. D.

21. *See infra* Part II.

22. *See infra* Part III. A.

23. *See infra* Part III. B.

I. PROTECTION OF PUBLISHERS

A. COMMON LAW PRIVILEGES

At common law, a publisher of a defamatory falsehood incurs strict liability.[24] To alleviate the harsh rule of strict liability, courts have developed a complicated system of privileges.[25] The privileges protect a publisher when relief from mistakes encourages the free flow of information and ideas.[26] Each time courts find that a privilege applies, courts in effect have determined that the flow of information and ideas outweighs the reputational interest of the person defamed.[27]

Traditionally, courts have recognized two types of privileges: absolute[28] and conditional.[29] Two of the conditional priv-

24. R. SMOLLA, LAW OF DEFAMATION § 1.03[1] (1986). *But see* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 113, at 803 (5th ed. 1984) [hereinafter W. KEETON] (noting that when publication was neither intentional nor negligent, courts would not impose liability). Truth is a complete defense to a civil action for libel. W. KEETON, *supra*, § 116, at 840; RESTATEMENT (SECOND) OF TORTS § 581A (1977) [hereinafter RESTATEMENT (SECOND)]. *But see* R. SMOLLA, *supra*, § 5.01[2] (about a dozen states modified the common law to limit truth as a defense).

25. *See generally* W. KEETON, *supra* note 24, §§ 114-115 (describing the common law privileges); RESTATEMENT (SECOND), *supra* note 24, §§ 583-612 (same).

26. W. KEETON, *supra* note 24, § 114, at 815; RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note; R. SMOLLA, *supra* note 24, § 8.01[1].

27. W. KEETON, *supra* note 24, § 114, at 815; RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B; R. SMOLLA, *supra* note 24, § 8.01[1]. Courts will also privilege communications when the communicator's interests outweigh the reputational interests of the person defamed by the communication. W. KEETON, *supra* note 24, § 114, at 815; RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B; R. SMOLLA, *supra* note 24, § 8.01[1]. For example, when a radio station is required by law to allow a political candidate to air a speech, the radio is absolutely privileged to republish the speech. W. KEETON, *supra* note 24, § 114, at 824 (citing Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959)); *see* R. SMOLLA, *supra* note 24, § 8.06[2]; RESTATEMENT (SECOND), *supra* note 24, § 592A.

28. Absolute privileges afford the actor complete protection, without regard to purpose, motive, or reasonableness. RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note; *see* W. KEETON, *supra* note 24, § 114, at 815-16. Although absolute privileges are not in fact privileges, but immunities, courts always have characterized them as privileges. RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note. Absolute privileges reflect the belief that certain persons, because of their role in society, must be free to act without fear of incurring liability for their statements. RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note; *see* W. KEETON, *supra* note 24, § 114, at 815-16. Absolute privileges protect these people in a limited number of situations, all of which demand complete freedom of expression. W. KEETON, *supra* note 24, § 114, at 816. The *Restatement (Second) of Torts* accords the following actors an absolute privilege to

ileges, the fair report privilege[30] and the fair comment privilege,[31] have shaped the constitutional privilege of neutral reportage.

1. Fair Report

The fair report privilege[32] allows a publisher to *republish* defamatory statements on certain occasions, even if the pub-

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publish defamatory statements when acting in their official role: judicial officers (§ 585), attorneys at law (§ 586), parties to judicial proceedings (§ 587), witnesses in judicial proceedings (§ 588), jurors (§ 589), legislators (§ 590), witnesses in legislative proceedings (§ 590A), executive and administrative officers (§ 591), and husband and wife (§ 592) ("[a] husband or wife is absolutely privileged to publish to the other spouse defamatory matter concerning a third person"). RESTATEMENT (SECOND), *supra* note 24, §§ 585-592.

29. *See generally* W. KEETON, *supra* note 24, §§ 114-115 (describing the common law privileges); RESTATEMENT (SECOND), *supra* note 24, §§ 583-612 (same). Conditional privileges are also called qualified privileges. *See* W. KEETON, *supra* note 24, § 115. This Comment will refer to them as conditional privileges.

Conditional privileges are triggered by certain occasions. *See* W. KEETON, *supra* note 24, § 115, at 824-25; RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note. In these situations the privileges accord some margin for error to further the actor's own interests, the interests of a third party, or the interests of the public. RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 2, tit. B introductory note; *see* W. KEETON, *supra* note 24, § 115, at 825. The margin for error allows the actor to provide information free from the fear that misstatements will incur liability for defamation. RESTATEMENT (SECOND), *supra* note 24, ch. 25, topic 3, tit. A scope note. The following occasions give rise to a conditional privilege to publish defamatory statements: when the publisher seeks to protect its own legitimate interests, to protect the interests of others, to protect its own interests and the interests of the recipient of the publication, to protect its family relationships, or to protect the general public when the publication is either to one who may act in the public interest or fair comment on a matter of public interest. W. KEETON, *supra* note 24, § 115; RESTATEMENT (SECOND), *supra* note 24, §§ 594-598; R. SMOLLA, *supra* note 24, § 8.08; *see also* RESTATEMENT (FIRST) OF TORTS §§ 606-610 (1938) [hereinafter RESTATEMENT (FIRST)] (describing fair comment privilege); *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 925-28 (1956) [hereinafter *Developments in Defamation*] (same). This list is certainly not exhaustive and is subject to a multitude of permutations. *Compare* Morton v. Knipe, 128 A.D. 94, 98-99, 112 N.Y.S. 451, 454 (1908) (finding information volunteered to further interest of another is privileged) *with* Henderson v. Teamsters Local 313, 90 Wash. 2d 666, 672-73, 585 P.2d 147, 151 (1978) (finding volunteered information not similarly privileged). The actor may lose the privileges' protection for a variety of reasons, among them ill will; knowledge of falsity, reckless disregard for the truth, or negligence; excessive publication; and irrelevancy. *See* W. KEETON, *supra* note 24, § 115, at 832-35; RESTATEMENT (SECOND), *supra* note 24, §§ 599-605A; R. SMOLLA, *supra* note 24, § 8.09.

30. *See infra* notes 32-45 and accompanying text.

31. *See infra* notes 46-61 and accompanying text.

32. The fair report privilege also is called the reporter's privilege and the privilege of record libel. *See generally infra* note 33.

lisher knows the statements are false.[33] The privilege protects the fair and accurate reporting of any statement uttered in judicial, legislative, or executive proceedings.[34] Most jurisdictions

33. *See* W. KEETON, *supra* note 24, § 115, at 836-38; RESTATEMENT (SECOND), *supra* note 24, § 611; R. SMOLLA, *supra* note 24, § 8.10; Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 471-87 (1979); *Developments in Defamation*, *supra* note 29, at 928-29 (describing fair report privilege). Apparently, commentators have labelled the fair report privilege a special conditional privilege because, unlike the other conditional privileges, knowledge that the published defamatory statement is false does not forfeit the privilege. *See* RESTATEMENT (SECOND), *supra* note 24, § 611 comment a; W. KEETON, *supra* note 24, § 115, at 838; R. SMOLLA, *supra* note 24, § 8.10[1]. The press often has invoked the fair report privilege; it is, however, available to anyone. W. KEETON, *supra* note 24, § 115, at 836; RESTATEMENT (SECOND), *supra* note 24, § 611 comment c.

Many states have codified the privilege. *See* ALA. CODE § 13A-11-161 (1982); ARIZ. REV. STAT. ANN. § 12-653 (1982); CAL. CIV. CODE § 47 (West 1982); GA. CODE ANN. §§ 51-5-7, 51-5-9 (1987); IDAHO CODE §§ 6-710-11, 6-710-13, 18-4807-08 (1987); KY. REV. STAT. ANN. § 4-11.060 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. § 14:49 (West 1986); MICH. COMP. LAWS ANN. § 600.2911 (West 1975); MINN. STAT. ANN. § 609.765(3) (West 1987); MONT. CODE ANN. §§ 27-1-804, 45-8-212 (1985); N.J. STAT. ANN. § 2A:43-1 (West 1987); N.Y. CIV. RIGHTS LAW § 74 (McKinney 1976); OHIO REV. CODE ANN. § 2317.04-05 (Page 1981); OKLA. STAT. ANN. tit. 12, § 1443.1 (West Supp. 1990); OKLA. STAT. ANN. tit. 21, § 772 (West 1983); OR. REV. STAT. § 163.605(2)(b) (1981); R.I. GEN. LAWS § 8-16-11 (1985); S.D. CODIFIED LAWS ANN. § 20-11-5 (1979); TEXAS CIV. PRAC. & REM. CODE ANN. § 73.002 (Vernon 1986) (formerly § 5432); UTAH CODE ANN. §§ 45-2-3, 45-2-4, 45-2-10 (1981); UTAH CODE ANN. § 76-9-504 (1978); VA. CODE ANN. § 2.1-37.14 (1979); WASH. REV. CODE ANN. § 9.58.050 (1988); WIS. STAT. ANN. § 895.05(1) (West 1983); WYO. STAT. §§ 1-29-104, 1-29-105 (1977); *see also* D. ELDER, THE FAIR REPORT PRIVILEGE app. at 397-409 (1988). The states' codified versions of the privilege lack uniformity. *Compare* CAL. CIV. CODE § 47 (West 1982) (extending privilege to proceedings of a public meeting or publications for the public benefit) *with* MONT. CODE ANN. § 27-1-804 (1985) (limiting privilege to judicial, legislative, or other public official proceeding).

The *Restatement (Second) of Torts* defines the privilege:

> § 611 Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

RESTATEMENT (SECOND), *supra* note 24, § 611.

34. W. KEETON, *supra* note 24, § 115, at 836; RESTATEMENT (SECOND), *supra* note 24, § 611 comment d; R. SMOLLA, *supra* note 24, § 8.10[2]. A few jurisdictions and the *Restatement (Second) of Torts* extend the privilege to public proceedings that deal with matters of public concern. RESTATEMENT (SECOND), *supra* note 24, § 611 comment i; D. ELDER, *supra* note 33, § 1.11; W. KEETON, *supra* note 24, § 115, at 836; R. SMOLLA, *supra* note 24, § 8.10[2][d]; Sowle, *supra* note 33, at 482, 526; *see, e.g.*, Borg v. Boas, 231 F.2d 788, 795 (9th Cir. 1956) (holding fair report privilege protects report of public meeting called to induce judge to call grand jury); Pulvermann v. A.S. Abell Co., 228 F.2d 797,

strip the republisher of the privilege's protection if it publishes the defamatory falsehoods with an improper motive.[35]

Commentators have pointed to three theories to justify the fair report privilege.[36] The first is the agency theory,[37] which rests on the notion that the republisher should attend public proceedings as an agent of the public and should report those

802 (4th Cir. 1956) (holding newspaper privileged to report comments by presidential candidate); Barrows v. Bell, 73 Mass. (7 Gray) 301, 313 (1856) (arguing fair report privilege must be extended to protect reports of "municipal, parochial and other public corporations, . . . [and] large voluntary associations"). *But see, e.g.*, Venn v. Tennessean Newspaper, Inc., 201 F. Supp. 47, 56 (M.D. Tenn. 1962) (finding that fair report privilege does not protect a quote from a campaign speech which was used in conjunction with editorial statements), *aff'd*, 313 F.2d 639 (6th Cir.), *cert. denied*, 374 U.S. 830 (1963).

Courts also require that the report be fair and accurate. This requirement demands that the republisher report the proceedings in an impartial manner, without misrepresenting the proceedings or misleading the reader. *See* RESTATEMENT (SECOND), *supra* note 24, § 611 comment f; R. SMOLLA, *supra* note 24, § 8.10[3]; Sowle, *supra* note 33, at 483. Because the republisher must condense most proceedings, courts have interpreted the accuracy requirement to call for substantial accuracy. *See* RESTATEMENT (SECOND), *supra* note 24, § 611 comment f; R. SMOLLA, *supra* note 24, § 8.10[3][b]; Barrows v. Bell, 73 Mass. (7 Gray) 301, 315 (1856). A one-sided report will incur liability, as will a report in which the republisher implies that it agrees with the defamatory statements or makes charges of its own. *See* R. SMOLLA, *supra* note 24, § 8.10[3][a]; RESTATEMENT (SECOND), *supra* note 24, § 611 comment f.

35. Sowle, *supra* note 33, at 541; *see* W. KEETON, *supra* note 24, § 115, at 838; *Developments in Defamation*, *supra* note 29, at 929-30; *e.g.*, *Pulvermann*, 228 F.2d at 802; Shiver v. Valdosta Press, 82 Ga. App. 406, 412, 61 S.E.2d 221, 225 (1950); Bausewine v. Norristown Herald, Inc., 351 Pa. 634, 645, 41 A.2d 736, 742, *cert. denied*, 326 U.S. 724 (1945); *see, e.g.*, Medico v. Time, Inc., 643 F.2d 134, 138 (3d Cir.) (stating that if the plaintiff shows that the republisher acted for sole purpose of injuring the plaintiff, she defeats the fair report privilege), *cert. denied*, 454 U.S. 836 (1981).

The *Restatement (Second) of Torts* and a few jurisdictions protect the republisher without regard to motive. W. KEETON, *supra* note 24, § 115, at 838 (commenting that the *Restatement (Second) of Torts* takes the position that improper motive or purpose does not forfeit the fair report privilege, even if the republisher believes that the defamatory statement is false); *cf.* RESTATEMENT (SECOND), *supra* note 24, § 611 comment b (stating that if the report is fair and accurate, it is privileged); *cf. id.* comment f (interpreting fairness requirement to only encompass misrepresentations or misleading statements without mentioning the role of the republisher's motive); *see, e.g.*, Read v. News-Journal Co., 474 A.2d 119, 121 (Del. 1984) (stating that the motive of the republisher is irrelevant).

36. *See generally* D. ELDER, *supra* note 33, § 1.00, at 3-4 (setting forth the agency, supervision, and informational theories); Sowle, *supra* note 33, at 483-87 (same); Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102, 1103-17 (1964) [hereinafter Note, *Republish Privilege*] (same).

37. D. ELDER, *supra* note 33, § 1.00, at 3; Sowle, *supra* note 33, at 483-84; Note, *Republish Privilege*, *supra* note 36, at 1116-17.

proceedings in the public's absence.[38]

The supervision theory,[39] in contrast, stresses the right and the duty of the public to supervise official conduct and policy.[40] Public supervision encourages public officials to perform their duties scrupulously.[41] The republisher's reports of official proceedings provide the public with the information necessary to exercise this right and fulfill its duty.[42]

Finally, the informational theory[43] stresses the public's general need to have information that concerns raging public controversies.[44] It allows the republisher to provide such information in the hope that an informed public will participate in those controversies and thus contribute to the public good.[45]

2. Fair Comment

The fair comment privilege[46] protects the publisher who

38. D. ELDER, *supra* note 33, § 1.00, at 3; Sowle, *supra* note 33, at 483; Note, *Republish Privilege*, *supra* note 36, at 1116. In this sense, the republisher acts as the public's agent, for it attends and reports in the public's stead.

39. D. ELDER, *supra* note 33, § 1.00, at 3-4; Sowle, *supra* note 33, at 484-87; Note, *Republish Privilege*, *supra* note 36, at 1103-11.

40. D. ELDER, *supra* note 33, § 1.00, at 3-4; Sowle, *supra* note 33, at 484-86; Note, *Republish Privilege*, *supra* note 36, at 1103-04. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, stated the classic formulation of the theory:

> [T]he privilege and the access of the public to the courts stand in reason upon common ground. It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it 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.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (citation omitted).

41. D. ELDER, *supra* note 33, § 1.00, at 3-4.

42. *See* D. ELDER, *supra* note 33, § 1.00, at 3-4; Sowle, *supra* note 33, at 485-86; Note, *Republish Privilege*, *supra* note 36, at 1103-04.

43. D. ELDER, *supra* note 33, § 1.00, at 4; Sowle, *supra* note 33, at 531-33; Note, *Republish Privilege*, *supra* note 36, at 1111-16.

44. Sowle, *supra* note 33, at 531-32.

45. *See id.*

46. *See* RESTATEMENT (FIRST), *supra* note 29, § 606 comment a; RESTATEMENT (SECOND), *supra* note 24, § 566 comment a; W. KEETON, *supra* note 24, § 115, at 831-32. One court summarizes the breadth of the privilege's application:

> Traditionally, fair comment concerned persons, institutions or groups who voluntarily injected themselves into the public scene or affected the community's welfare, such as public officials, political candidates, community leaders from the private sector or private enterprises which affected public welfare, persons taking a public position on a

expresses a defamatory opinion on a matter of public concern.[47] To invoke the privilege, the publisher must base the opinion on true facts.[48] Some courts, however, allow the publisher to invoke the privilege when the publisher bases the opinion on misstatements of fact, provided the opinion is published without ill will, knowledge of falsity, or reckless disregard of falsity.[49]

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matter of public concern, and those who offered their creation for public approval such as artists, performers and athletes.

Mashburn v. Collin, 355 So. 2d 879, 882 (La. 1977).

47. W. KEETON, *supra* note 24, § 115, at 831; RESTATEMENT (SECOND), *supra* note 24, § 566 comment a; RESTATEMENT (FIRST), *supra* note 29, § 606 comment a; R. SMOLLA, *supra* note 24, § 6.02[1]. The *Restatement (First) of Torts* defines the privilege:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon, (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public, and (b) represents the actual opinion of the critic, and (c) is not made solely for the purpose of causing harm to the other.
>
> (2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b), and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.

RESTATEMENT (FIRST), *supra* note 29, § 606. The *Restatement (Second)* assumes that the Supreme Court has constitutionalized the fair comment privilege in a line of cases beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and thus omits the sections that set forth the fair comment privilege in the *Restatement (First)*. *See* RESTATEMENT (SECOND), *supra* note 24, § 566 comment c. Like the fair report privilege, anyone may claim the protection of the fair comment privilege. Foley v. Press Publishing Co., 226 App. Div. 535, 548, 235 N.Y.S. 340, 355 (1929).

48. R. SMOLLA, *supra* note 24, § 6.02[1]; *see also* RESTATEMENT (FIRST), *supra* note 29, § 606 comment B (the publisher's opinion may be "reasonable" or unreasonable, but also must be based on true facts).

49. *E.g.*, Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 307, 27 S.E.2d 837, 844 (1943); Friedell v. Blakely Printing Co., 163 Minn. 226, 227, 203 N.W. 974, 975 (1925); Coleman v. MacLennan, 78 Kan. 711, 741, 98 P. 281, 292 (1908). Many courts refused to allow the publisher the protection of the fair comment privilege if the publisher based its comments on defamatory misstatements of fact. *E.g.*, Post Publishing Co. v. Hallam, 59 F. 530, 539-40 (6th Cir. 1893); A.S. Abell Co. v. Kirby, 227 Md. 267, 273-74, 176 A.2d 340, 343 (1961); Foley v. Press Publishing Co., 226 A.D. 535, 547, 235 N.Y.S. 340, 354 (1929). *See generally* Annotation, *Doctrine of Privilege or Fair Comment as Applicable to Misstatements of Fact in Publication (or Oral Communication) Relating to Public Officer or Candidate for Office*, 110 A.L.R. 412 (1937) (examining minority and majority position). Those courts that follow the minority rule generally reserve its broader protection for commentary on public officials and political candidates. R. SMOLLA, *supra* note 24, § 6.02[3]. The minority position rested on the theory that publishers needed some margin for error if they were to avoid unhealthy self-censorship. *Cf. Friedell*, 163 Minn. at 231, 203 N.W. at 975

Although the opinion need not be reasonable,[50] it must have some relation to the facts on which the publisher bases the opinion.[51] Courts withhold the privilege's protection when the publisher issues its opinion with ill will or does not sincerely hold the opinion.[52]

Whereas the fair report privilege protects the public's right to be informed, the fair comment privilege protects the public's right to participate in public debate.[53] Public debate furthers the political processes and fosters the public good,[54] for it provides a medium through which the public can exercise its rights as citizens.[55] To this end, the fair comment privilege allows criticism of matters of public concern and encourages public debate.

At common law, however, courts stopped short of providing the protection now demanded by modern times. Except in a few jurisdictions,[56] a publisher that inadvertently published a defamatory falsehood when it reported a matter of public concern exposed itself to liability for defamation.[57] Fear of such liability compelled publishers to err on the side of suppressing newsworthy stories.[58] To eliminate this self-censorship, the United States Supreme Court entered the defamation field in 1964.[59] The landmark case it heard was *New York Times Co. v. Sullivan*,[60] in which the Court handed down the "actual mal-

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(arguing "[i]f the liberty of the press must be exercised under a responsibility that is always threatening, it will never be used for the public good").

50. RESTATEMENT (FIRST), *supra* note 29, § 606 comment c; RESTATEMENT (SECOND), *supra* note 24, § 566 comment a; R. SMOLLA, *supra* note 24, § 6.02[1].

51. RESTATEMENT (FIRST), *supra* note 29, § 606 comment c; R. SMOLLA, *supra* note 24, § 6.02[3].

52. RESTATEMENT (FIRST), *supra* note 29, § 606 comment d; RESTATEMENT (SECOND), *supra* note 24, § 566 comment a; R. SMOLLA, *supra* note 24, § 6.02[1].

53. Comment, Edwards v. National Audubon Society, Inc.: *Right to Print Known Falsehoods*, 1979 U. ILL. L.F. 943, 953 [hereinafter Comment, *Right to Print Falsehoods*].

54. Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942); Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

55. *See Coleman*, 78 Kan. at 719, 98 P. at 284.

56. *See supra* note 49 and accompanying text.

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

58. New York Times Co. v. Sullivan, 376 U.S. 254, 277-79 (1964).

59. *Id.* at 279-80. Before *New York Times* the Court accorded publishers no first amendment protection. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (arguing that libelous ideas "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").

60. 376 U.S. 254 (1964). *New York Times Co. v. Sullivan* arose when the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" (Committee) took out a full page advertisement in the *New York*

ice" standard of first amendment protection for publishers of defamatory falsehoods.[61]

Times. *Id.* at 256-57. In the advertisement the Committee accused state authorities in Montgomery, Alabama, of harassing students who were demonstrating to protest the treatment of blacks in Alabama. *See id.* at 257-58. L. B. Sullivan, the Montgomery Police Commissioner, concluded that even though he was not mentioned by name in the advertisement, the statements implied that he was responsible personally for the harassment. *Id.* at 258. Consequently, Sullivan filed a libel suit in the Alabama courts against four members of the Committee and the *New York Times*. *Id.* at 256. The case came to the Supreme Court on appeal from the Alabama Supreme Court, which had upheld a circuit court decision for Sullivan. *Id.*

61. *New York Times*, 376 U.S. at 279-80. The Court set forth the standard:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves 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.

Id.

This Comment will refer to the Court's standard as either the "actual malice standard" or the "*New York Times* standard."

The cases since *New York Times* generally fall into two categories: cases that develop the "reckless disregard" element of the *New York Times* standard, *e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 67 (1964), and cases that apply the standard to different classes of persons, *e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44-45 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967); Rosenblatt v. Baer, 383 U.S. 76, 84-86 (1966). More recently, the Court has examined the correct standard of review and its proper scope. *E.g.*, Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2695 (1989) (holding that appellate courts must apply the evidentiary standard of clear and convincing proof independently to review findings of actual malice); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (holding that the evidentiary standard of clear and convincing proof applied to the issue of actual malice in a motion for summary judgment and to the review of the lower court's grant of the motion); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984) (holding that appellate judges must independently review the record to determine whether the plaintiff established actual malice).

The Supreme Court has held repeatedly that the "reckless disregard" element is a subjective element. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964). The element embodies not a rigid but an evolving concept. *See Bose Corp.*, 466 U.S. at 502-03. The Court decides case-by-case whether a publisher acted with reckless disregard. *Id.* at 503. The Court focuses on whether the publisher entertains serious doubts as to the defamatory statement's veracity. *St. Amant*, 390 U.S. at 731. In *St. Amant*, the Court stated the test: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* In *Garrison*, the Court stated that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison*, 379 U.S. at 74. For an excellent discussion of the standard's development up to 1974, see Gertz v. Robert Welch, 418 U.S. 323, 334-36 n.6 (1974).

B. FIRST AMENDMENT PROTECTION

The *New York Times* Court advanced a standard that protects publishers who inadvertently publish defamatory falsehoods about a public official.[62] In effect, the Court in *New York Times* granted constitutional dimension to the minority common law position that protects fair comment even when based on an inadvertent misstatement of fact.[63]

Along with granting constitutional dimension to the minority common law position, the Court adopted its theoretical underpinnings.[64] To justify protecting a publisher who inadvertently published defamatory falsehoods, the Court pointed out the need for "uninhibited, robust, and wide-open" debate of public issues.[65] The Court argued that to fail to protect publishers from inadvertent falsehoods would stifle public debate

62. *Id. See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191 (examining *New York Times*). The standard provides that a public official may recover damages only upon showing with "convincing clarity," *see New York Times*, 376 U.S. at 285-86, that the publisher made the statement with "actual malice," *id.* at 279-80. The Court finds actual malice when a publisher makes a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The Court has repeatedly distinguished this definition from common law "malice, ill will, evil motive, intention to injure," which does not suffice to protect first amendment values. *E.g.*, Rosenblatt v. Baer, 383 U.S. 75, 84 (1966) (applying actual malice standard); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (applying the same).

In later cases the Court characterized the standard as a balancing test. *E.g.*, *Rosenblatt*, 383 U.S. at 86. The test weighed the first amendment interest in guaranteeing uninhibited public debate against the important social interests in preventing and redressing attacks on personal reputation. *Id.* at 85-86. When there was great need for public comment and debate, the interest in protecting personal reputation only went so far as to protect it from attacks falling within the embrace of the actual malice standard. *Id.* at 86.

63. *See supra* note 49 and accompanying text. Other courts and commentators have accepted this proposition. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS ch. IV, at 4.1 (1980); R. SMOLLA, *supra* note 24 § 6.03[1]; *see, e.g.*, Mashburn v. Collin, 355 So. 2d 879, 882 (La. 1977); Kapiloff v. Dunn, 27 Md. App. 514, 529-30, 343 A.2d 251, 262-63 (1975), *cert. denied*, 426 U.S. 407 (1976).

64. *Compare* Coleman v. MacLennan, 78 Kan. 711, 740, 98 P. 281, 291 (1908) (setting forth theory underpinning minority position) *with New York Times*, 376 U.S. at 292 (setting forth theory underpinning *New York Times* privilege); *see also supra* note 49 (setting forth theory underpinning minority position).

65. *New York Times*, 376 U.S. at 269-71. The Court characterized this notion as "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

and instigate self-censorship.[66]

Following *New York Times*, the Court has held that the actual malice standard applies to elected officials[67] and government employees who control government affairs.[68] The Court has expanded the standard's reach to include "public figures" as well as public officials.[69] In *Rosenbloom v. Metromedia, Inc.*[70] the Court broadened this base to include any person involved in an event of public or general interest.[71] In *Gertz v. Robert Welch, Inc.*,[72] however, the Court retrenched, restricting

66. *See id.* at 271-72. The Court labeled this margin for error as the "breathing space" that freedoms of speech needed to survive. *Id.* In any free exchange of ideas, the participants would make erroneous statements. *Id.* The erroneous statements deserved protection to insure that the speech continued. *Id.* Because the press played a vital role in maintaining the public debate, it was especially deserving of a "breathing space." *Id.* at 275 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 570 (1876)).

In other contexts, the Court labels this type of self-censorship the "chilling effect." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 863 (2d ed. 1988).

67. *E.g., New York Times*, 376 U.S. at 292; Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

68. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

69. Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967). The Court proffered two types of public figures. First, those persons whose position alone renders them subject to public scrutiny. *Id.* at 155. Second, those persons who thrust themselves "into the 'vortex' of an important public controversy." *Id.*

70. 403 U.S. 29 (1971).

71. *See id.* at 52. The Court premised its conclusion on the observation that:

> 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. The public's primary focus is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

Id. at 43 (footnote omitted).

In reaching its holding, the Court discounted the argument that a private individual does not have access to the media to counter a defamatory falsehood. *Id.* at 46-47. The Court noted that using the media to counter defamatory statements is simply ineffectual. *Id.* at 46.

The Court dismissed the argument that a private individual assumed no risk of defamation as having little bearing on the first amendment guarantee at issue. *Id.* at 47. All individuals are " 'public' men to some degree." *Id.* at 48. So-called "public officials" and "public figures" deserved as much protection to their reputations as "private individuals." *Id.* at 48.

Finally, the Court argued that private individuals' interest in protecting their reputation did not outweigh the need for a "breathing space." *Id.* at 49-50. They could only recover upon showing that the publisher acted with actual malice. *Id.* at 52.

72. 418 U.S. 323 (1974).

the standard to public officials and public figures.[73]

C. CUMULATIVE PROTECTION AFFORDED PUBLISHERS

Although common law and first amendment protection combine to provide publishers a wide range of protection when reporting matters of public concern, gaps still exist that prevent publishers from fully reporting such matters. For example, imagine that a controversy swirls around use of the pesticide DDT. The insecticide industry defends the use of DDT while such groups as the National Audubon Society vehemently oppose it. The insecticide industry calls forth prominent scientists to defend its position.. The National Audubon Society attacks the scientists as "paid liars." When the *New York Times* prints the accusations, the scientists respond by suing the *New York Times* for libel.

The common law and constitutional protection discussed above will be of no avail to the *New York Times*. The newspaper cannot rely on the fair report privilege because the statements were not uttered at a public proceeding.[74] The fair comment privilege will protect the newspaper only if a court construes the phrase "paid liars" as a statement of opinion, not a statement of fact.[75] A few courts might apply the fair comment privilege to protect the newspaper if it published the phrase without ill will, knowledge of its falsity, and reckless disregard of its falsity, even if the court finds the phrase "paid liars" to be a statement of fact.[76] The first amendment will protect the newspaper if a court finds that the scientists are

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73. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-48 (1974). The Court reasoned that public officials and public figures did have better means for self-help. *Id.* at 344. Because private individuals were more vulnerable to injury, a state could protect them. *See id.* Both public officials and public figures sought public notoriety and thus assumed the risk of defamation. *Id.* at 344-45. Private individuals took no such action and thus relinquished none of their interest in their private reputation. *Id.* at 345. Again, private individuals deserve protection. *Id.*

The *Rosenbloom* extension not only failed to protect private individuals but also forced judges to determine what is of "general or public interest." *Id.* at 346. The Court refused to leave such determinations to the judges. *Id.*

Consequently, the Court entrusted the states with the responsibility of setting the defamatory standard as long as they did not impose liability without fault. *Id.* at 347.

74. *See supra* notes 32-34 and accompanying text.

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

76. *See supra* note 49 and accompanying text. Most courts that protect inadvertent misstatements of fact will not protect the *New York Times* because the scientists are neither public officials nor political candidates. *Id.*

public figures and if the scientists fail to prove actual malice.[77] Thus, if the *New York Times* knows that the National Audubon Society's charges are unfounded or has serious doubts regarding their foundation, the newspaper cannot republish the accusations without exposing itself to liability for libel.

Suppose, however, the *New York Times* believes that the mere fact that a responsible, prominent organization, such as the National Audubon Society, made such outrageous, unfounded charges is itself newsworthy and, consequently, that the newspaper has a duty to inform the public. Alternatively, suppose that the newspaper seriously doubts that the charges are true yet believes that because the DDT controversy is a matter of public concern, the newspaper has a duty to submit the charges to the public so that the public can decide for itself. Finally, suppose the newspaper knows the charges are false, and even malicious, but wants to comment on this episode and believes that its commentary will have meaning only if it reproduces the charges for the public. In each of the above scenarios, the public's interest seems to warrant the republication of the charges. Yet to do so will incur liability. Such results reveal a gap in the common law and first amendment protections for the republisher. The neutral reportage privilege is designed to fill this gap by seizing on first amendment values to provide the republisher first amendment protection.[78]

D. THE NEUTRAL REPORTAGE PRIVILEGE

Commentators have hailed the advent of the neutral reportage privilege as one of the most significant developments in the constitutional law of libel.[79] They regard such a first amendment shield as indispensable if republishers, especially the press, are to report the most common form of public affairs journalism, the attacks that participants in public controversies launch against one another.[80]

1. *Edwards v. National Audubon Society*

The neutral reportage privilege has its genesis in *Edwards*

77. *See supra* notes 61-63, 67-73 and accompanying text.

78. *See generally* R. SMOLLA, *supra* note 24, § 4.14[1] (explaining the need for the neutral reportage privilege and its role in first amendment law).

79. *E.g.*, Hart, *The Right of Neutral Reportage: Its Origin and Outlook*, 56 JOURNALISM Q. 227, 227 (1979); *see, e.g.*, R. SMOLLA, *supra* note 24, § 4.14[4].

80. *See, e.g.*, Hart, *supra* note 79, at 227; R. SMOLLA, *supra* note 24, § 4.14[1].

v. National Audubon Society,[81] which remains the leading case on the privilege.[82] In *Edwards*, the Second Circuit created the neutral reportage privilege to protect the *New York Times* and its reporter after the newspaper, facing the dilemma discussed in Part I. C. above, printed the phrase "paid liars" and was sued for libel.[83]

The *Edwards* court's neutral reportage privilege allows a republisher to report serious charges that a responsible, prominent organization makes against a public figure.[84] The court premised the privilege on the public's interest in being fully informed about controversies.[85] In the *Edwards* court's view, the republisher should report some newsworthy statements at their mere utterance.[86] Serious doubts as to the truth of such statements, or even knowledge of their falsity, must not suppress their publication.[87] The court argued that suppressing these newsworthy statements unduly restricts public debate.[88]

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81. 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

82. *See generally* Comment, *"The Privilege of Neutral Reportage"* — Edwards v. National Audubon Society, Inc., 1978 UTAH L. REV. 347 (1978) [hereinafter Comment, *Edwards Privilege*] (examining *Edwards*).

83. *Edwards*, 556 F.2d at 120. The *New York Times* had compiled an article in which the National Audubon Society accused five scientists of being paid to lie by the DDT industry. *Id.* at 118. In the same article, the newspaper printed the scientists' denials. *Id.* The court found that the *New York Times* had recited the charges accurately and neutrally, and thus, the first amendment protected the newspaper. *Id.* at 120. The court also held that the plaintiffs failed to prove "actual malice." *Id.* Consequently, the reporter and republisher were not liable for defamation. *Id.* at 121. Although the alternative holding detracts from the weight to accord the newly fermented neutral reportage privilege, it by no means is intended to supersede it, for the *Edwards* court is careful to hold that the neutral reportage privilege protects the article at issue. *See id.*

84. *Id.* at 120. The *Edwards* court stated the privilege: "[W]hen 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." *Id.*

85. *Id.*

86. *Id.* The court wrote: "What is newsworthy about such accusations is that they were made." *Id.*

87. *Id.* The court wrote: "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. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Id.* Thus, when a reporter believes, in good faith, that the report conveys the charges, the privilege protects the reporter who doubts the charges are true. *See id.*

88. *See id.*

The *Edwards* privilege, however, is not without limits.[89] Providing information in a neutral fashion underpins the privilege.[90] When neutrality is breached, the republisher loses the privilege's protection.[91] The privilege, therefore, does not protect a republisher who espouses or concurs in the republished charges.[92] Nor does it protect a republisher who distorts the charges to attack their subject.[93]

2. The Neutral Reportage Privilege Generally

Courts that have adopted the neutral reportage privilege generally require that the republisher satisfy four conditions to invoke its protection:[94]

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89. *Id.*
90. *Edwards*, 556 F.2d at 120.
91. *Id.*
92. *Id.*
93. *Id.*
94. The courts are not in accord as to the requirements. *Compare, e.g.*, Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied sub nom.* Edwards v. New York Times, 434 U.S. 1002 (1977) (charges must be made by a responsible, prominent organization) *with* Barry v. Time, Inc., 584 F. Supp. 1110, 1127 (N.D. Cal. 1984) (charges must be made by a party to the controversy). *See also infra* note 100 and accompanying text (listing articles that discuss the privilege), *see generally* R. SMOLLA, *supra* note 24, § 4.14[4] (examining the courts' acceptance of the privilege).

Other federal circuit courts of appeals have not reached the issue. *See* Connaughton v. Harte Hanks Communications, Inc., 842 F.2d 825, 847 (6th Cir. 1988), *aff'd*, 109 S. Ct. 2678 (1989) (rejecting defendants' claim of neutral reportage privilege because the reporting was neither accurate nor neutral); Lee v. Dong-A Ilbo, 849 F.2d 876, 879 (4th Cir. 1988) (noting the existence of privilege), *cert. denied sub nom.* Dong-A Ilbo v. Chang Siu Lee, 109 S. Ct. 1343 (1989); Woods v. Evansville Press Co., 791 F.2d 480, 489 (7th Cir. 1986) (declining to reach issue because no showing of actual malice); Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977) (noting that *Edwards* not on point because no public figure in instant case).

In Harte Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989), the Supreme Court pointed out in a footnote that, because petitioner did not argue in its petition that the neutral reportage privilege protected its actions, the Court would not review that part of the lower court's judgment. *Id.* at 2682 n.1. Justice Blackmun, concurring, pointed out that it was unwise for petitioner to abandon the neutral reportage privilege. *Id.* at 2699 (Blackmun, J., concurring). If the Court were to adopt the privilege, the instant case may have fit within it. *Id.* In Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), the Second Circuit refused to apply *Edwards*. *Id.* at 69-70. *Cianci* involved a magazine article about an alleged rape by a former mayor of Providence, Rhode Island. *Id.* at 55-59. Without fully explaining its reasoning, the court refused to consider the privilege. *Id.* at 69-70. The court indicated that the instant case presented an inappropriate situation in which to use the privilege. *Id.* at 70. The court implied that the plaintiff's interest in personal reputation outweighed the public's interest in the information. *See id. See*

1) The republished charges must relate to a public controversy;[95]
2) The charges must have been made by a public official, public figure, or prominent organization;[96]
3) The charges must have been directed at a public figure or public

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generally Comment, *Restricting the First Amendment Right to Republish Defamatory Statements:* Cianci v. New Times Publishing Co., 69 GEO. L.J. 1495 (1981) [hereinafter Comment, *Cianci*] (criticizing the court's decision in *Cianci*).

In other cases, the Second Circuit did not fully apply the privilege. *See* Law Firm of Daniel P. Foster v. Turner Broadcasting Sys., 844 F.2d 955, 961 (2d Cir.) (no need to reach issue; case decided on other grounds), *cert. denied*, 488 U.S. 994 (1988); Reeves v. American Broadcasting Cos., 719 F.2d 602, 607 (2d Cir. 1983) (citing *Edwards* for the proposition that if the public is to learn about newsworthy events, the court must grant the press relative immunity from liability for accurate reporting of allegations).

In Dickey v. CBS, Inc., 583 F.2d 1221 (3d Cir. 1978), the Third Circuit rejected the neutral reportage privilege. *Id.* at 1226 (dictum). The court reasoned that the Supreme Court's ruling in St. Amant v. Thompson, 390 U.S. 727 (1968) (*see supra* note 58 and accompanying text), precluded the privilege. *Dickey*, 583 F.2d at 1225. Because *Edwards* accords the press a privilege to publish defamatory statements despite serious doubts as to their veracity, *Edwards*, 556 F.2d at 120, the court argued that it is contrary to the holding in *St. Amant*, which allows recovery upon a showing that the plaintiff entertained serious doubts. *Dickey*, 583 F.2d at 1225 (citing *St. Amant*, 390 U.S. at 731).

In addition, the court refused to acknowledge that the reasoning in Time, Inc. v. Pape, 401 U.S. 279, 285-86 (1971), foreshadows the neutral reportage privilege. *Dickey*, 583 F.2d at 1225-26. The court argued that *Pape* merely stood for the proposition that a court must carefully scrutinize whether a report is deliberately inaccurate. *Id.* at 1226. Thus, *Pape* does not apply to such cases as *Edwards*, where the plaintiff does not dispute the accuracy of the report. *Id.*

The court also noted that the *Edwards* court's focus on the newsworthiness of the statement is contrary to the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974), which rejects the Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971), "public or general interest" test. *Dickey*, 583 F.2d at 1226 n.5. The court pointed out that the existence of a "newsworthy" event triggered the privilege in *Edwards*. *Id.* Relying on this happening to trigger a privilege followed *Rosenbloom*, which *Gertz* repudiated. *Dickey*, 583 F.2d at 1226 n.5. The court argued that *Gertz* held that the *New York Times* standard focused on the status of the plaintiff, not the content of the defamatory statement. *Id.* The court concludes that the neutral reporting of a newsworthy event does not create a privilege for the press. *See id.* at 1226.

95. *See Edwards*, 556 F.2d at 120.; *see also* Barry v. Time, Inc., 584 F. Supp. 1110, 1126 (N.D. Cal. 1984) (stating that charges must be "serious"). The charges must be made during a public controversy or must in themselves generate a public controversy. *Edwards*, 556 F.2d at 120 (setting forth the rationale behind the privilege: "What is newsworthy about such accusations is that they were made"). *See generally* R. SMOLLA, *supra* note 24, § 4.14[3] (setting forth elements of neutral reportage privilege).

96. *Edwards*, 556 F.2d at 120; *Cianci*, 639 F.2d at 67-69. *But see Barry*, 584 F. Supp. at 1126-27 (arguing that privilege applies to parties to the controversy). *See generally* R. SMOLLA, *supra* note 24, § 4.14[3] (setting forth elements of privilege).

official;[97] and

4) The reporter must neither espouse nor concur in the charges; nor may the reporter distort them to attack the public figure.[98]

Commentators regard the neutral reportage privilege as a logical extension of the fair report privilege,[99] supported by the informational theory.[100] While the fair report privilege protects the public's right to receive information that concerns official proceedings,[101] the neutral reportage privilege extends that protection to information that concerns public controversies.[102] If the informational theory is accepted as valid, the step from the fair report privilege to the neutral reportage privilege is small.[103]

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97. Dixson v. Newsweek, Inc., 562 F.2d 626, 630-31 (10th Cir. 1977); *see Edwards*, 556 F.2d at 120; *see generally* R. SMOLLA, *supra* note 24, § 4.14[3] (setting forth elements of privilege).

98. *Edwards*, 556 F.2d at 120; *Cianci*, 639 F.2d at 67-69; *Barry*, 584 F. Supp. at 1126-27; *see generally*, R. SMOLLA, *supra* note 24, § 4.14[3] (setting forth elements of privilege).

99. *E.g.*, R. SMOLLA, *supra* note 24, § 8.10[1]; Comment, *Right to Print Falsehoods*, *supra* note 53, at 961-63.

100. *See* Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266, 1278 (1977) [hereinafter Comment, *Constitutional Privilege*] (arguing that publishing defamation uttered by public official or public figure provides information relevant to self-government); Comment, *Cianci*, *supra* note 94, at 1508-09 (examining public's right to know in neutral reportage context); Comment, *Right to Print Falsehoods*, *supra* note 53, at 961-62 (arguing that privilege must be predicated on public's right to information affecting its welfare); Comment, *Edwards Privilege*, *supra* note 82, at 354-56 (arguing that press should freely disseminate information about public issues); *see also* Bowles, *Neutral Reportage as a Defense Against Republishing Libel*, COMM. & L., March, 1989, at 3, 17 (concluding that informational rationale is sufficient to allow the privilege to apply to republishing of nongovernmental statements made by organizations or individuals involved in public controversy); Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 867-68 (1983) [hereinafter Note, *Developing Privilege*] (arguing that reporter must report charges, even if false, to cover adequately any controversy); Sowle, *supra* note 33, at 531-32 (1979) (arguing that informational theory provides rationale for privilege to report nongovernmental statements and proceedings); Note, *Republish Privilege*, *supra* note 36, at 1111-20 (1964) (explaining informational theory and applying it to reporting of defamations). *See generally supra* notes 43-45 and accompanying text (setting forth the informational theory).

101. *See supra* notes 32-34 and accompanying text.

102. R. SMOLLA, *supra* note 24, § 4.14[1]; Comment, *Right to Print Falsehoods*, *supra* note 53, at 962.

103. *E.g.*, Comment, *Constitutional Privilege*, *supra* note 100, at 1278. Given the informational theory, the need for a pre-existing public controversy is superfluous, as is the requirement that the object of the accuser be a public official or figure. *See* Note, *Developing Privilege*, *supra* note 100, at 870-72. It is the utterance of the falsehood that is newsworthy, not its object or the context within which it was said. *Id.* Acknowledging this notion, Smolla includes

II. *PRICE V. VIKING PENGUIN, INC.*

Against this backdrop, the Eighth Circuit decided *Price v. Viking Penguin, Inc.*[104] In reaching its decision, it became only the second federal court of appeals to adopt the neutral reportage privilege.

When Viking Penguin printed and distributed *In the Spirit of Crazy Horse*,[105] it spawned a controversy whose litigation

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within his elements of a fair report privilege a requirement that the charges "must either relate to a preexisting public controversy or *generate a public controversy in their own right.*" R. SMOLLA, *supra* note 24, § 4.14[3] (emphasis added).

As applied, the neutral reportage privilege provides first amendment protection on two occasions. First, the privilege provides protection when a publisher informs the public that a public official, public figure, or prominent, responsible organization has uttered defamatory falsehoods. This event is itself newsworthy. Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times, 434 U.S. 1002 (1977). Second, the privilege provides protection when a publisher informs the public of events at the heart of a public controversy. Such information is indispensable to an informed opinion. *Cf.* Barry v. Time, Inc., 584 F. Supp. 1110, 1126-27 (N.D. Cal. 1984) (arguing that the public should be "the ultimate arbiter of the truth of accusations made during the course of a public controversy"); *see* Sowle, *supra* note 33, at 531-32. To this end, the press must fully report the public controversy. *Barry*, 584 F. Supp. at 1126; Sowle, *supra* note 33, at 531-32.

When applying the privilege, the courts have sought to insure that the value of the information provided the public outweighs the harm to reputation inflicted by the accuser's defamatory falsehood. *Edwards*, 556 F.2d at 115, 120; Comment, *Right to Print Falsehoods*, *supra* note 53, at 944-45, 953-54. The courts, nevertheless, recognize that the first amendment need to inform the public overrides the individual's interest in reputation. *Edwards*, 556 F.2d at 122; Sowle *supra* note 33, at 532.

In a leading case, Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984), a federal court extended the scope of the privilege. The *Barry* court specifically undertook to evaluate whether the neutral reportage privilege applies to defamations uttered by persons who do not qualify as public officials or figures. *Id.* at 1125. In a carefully reasoned opinion, the court held that the privilege applies to all defamations that one participant in a public controversy utters to another participant in that same controversy. *Id.* at 1126. The plaintiff argued that the defendant could not claim the protection of the neutral reportage privilege because the defendant's source was not a " 'responsible, prominent organization or [individual],' but rather a convicted felon who has failed a lie detector test." *Id.* at 1125. The court argued that the rationale behind *Edwards* — "the public interest in being fully informed" — applies regardless of the utterer's identity. *Id.* at 1126. Consequently, courts must allow the press to republish the charges made by *participants*. *Id.* This republication allows the public, not the press, to make the ultimate decision as to the credibility of the sources and of their accusations. *Id.* at 1127. To this end, the court argued that the requirement of neutrality is crucial. *Id.*

104. 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 759 (1990).

105. P. MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1983).

lasted over five years, resulting in copious and expensive discovery[106] and generating numerous orders and opinions.[107] The controversy concerned statements that author Peter Matthiessen made or reported in *In the Spirit of Crazy Horse*.[108] The non-fiction book focuses on AIM and in particular on the events surrounding the June 26, 1975, killing of two FBI agents.[109] The statements forming the substance of the controversy accuse FBI agent David Price of misconduct in the investigation of the killings, in the prosecution of the suspected killers, and in the investigation of the death of an AIM activist.[110] Because of these statements, Price sued Matthiessen

106. Price v. Viking Penguin, Inc., 676 F. Supp. 1501, 1503 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990). The deposition of author Peter Matthiessen, for example, took eight days, and the transcript was over 1100 pages in length. *Id.* n.5. The defendants spent over $1,000,000 in defense of the suit. *Price v. Viking Penguin, Inc.*, 881 F.2d at 1429.

107. *Viking Penguin*, 676 F. Supp. at 1503 n.1. The district court also notes that the controversy produced suits in South Dakota state courts. *Id.* at 1504.

108. *See Viking Penguin*, 881 F.2d at 1447-51 app. (containing excerpts from David Price's complaint which constitute the statements at issue in the case).

109. According to the Eighth Circuit, *Crazy Horse* is divided into three parts. *Id.* at 1434. First, Matthiessen surveys the conditions on the Pine Ridge Reservation in South Dakota and traces the rise of the AIM. *Id.* The second part examines the 1975 killings of two FBI agents, the investigation of the killings, and the trials of the suspected killers. *Id.* at 1435. The third part argues that Leonard Peltier, whom a jury convicted of murder for the 1975 killings, deserves a new trial because new documents expose government misconduct. *Id.*; *see generally* United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (affirming Peltier's conviction of the murders); United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987) (affirming the denial of Peltier's appeal for a new trial based on the new documents).

110. *See Viking Penguin*, 676 F. Supp. at 1506. David Price was a special agent of the FBI. *Viking Penguin*, 881 F.2d at 1429. The FBI assigned Price to the Pine Ridge Reservation in the early 1970's. *Id.* The controversial statements stemmed from the Wounded Knee occupation in 1973 and the shootout on the reservation in 1975. *Id.* at 1505-06. Price considered Matthiessen's account of the occupation and shootout defamatory. *Id.* He sued Matthiessen and Viking Penguin for defamation, intentional infliction of emotional distress, false light invasion of privacy, and prima facie tort. *Id.* Price sought compensatory damages of $25,000,000, punitive damages, costs and fees. *Id.*

After extensive litigation the district court narrowed Price's claims to defamation, involving twenty statements made in *Crazy Horse*. *Id.* The Eighth Circuit divided the statements into five categories:

> Price's relation to the perjury of Louis Moves Camp and involvement in seeing that criminal charges against him were dropped; misconduct regarding the testimony and affidavits of Myrtle Poor Bear; the withholding of information or gross negligence regarding the homicide in-

and Viking Penguin for libel.[111]

vestigation of Anna Mae Aquash; harassment of Indian people; and general statements about Price's character.

Id.; *see generally id.* app. at 1447-51 (quoting the twenty disputed statements from Price's complaint).

Taking the categories in turn, Louis Moves Camp testified for the prosecution against AIM members charged with crimes stemming from the Wounded Knee incident. *Id.* at 1437. The defense proved that Moves Camp was in California when some of the events at Wounded Knee that he described occurred. *Id.* Thus, the defense impeached Moves Camp's testimony. *Id.* In addition, Matthiessen relates an incident involving Moves Camp and the investigation of an alleged rape that resulted in police detaining Moves Camp only to release him later. *Id.* at 1437-38. Matthiessen connects Price to both incidents. *Id.* Price argues that Matthiessen accuses him of suborning Moves Camp's perjury and covering-up Moves Camp's involvement in the rape. *Id.* at 1438; *see also id.* app. at 1447-48 (paragraphs 10(a), 10(b), 10(c), and 10(d) set forth the basis for this claim).

Myrtle Poor Bear testified against AIM leader Dick Marshall and signed contradictory affidavits that led the United States Attorney to extradite Peltier from Canada. *Id.* at 1440-41. The United States Attorney acknowledged that Poor Bear was incompetent to testify and that her affidavits were contradictory. *Id.* at 1440; *see also id.* at 1442 (quoting exchange between judge and United States Attorney during oral argument on Peltier's appeal). Price argues that Matthiessen suggests that he should have known Poor Bear was incompetent to testify and that he suborned perjury in securing Poor Bear's affidavits. *Id.* at 1440-42; *see also id.* app. at 1448-50 (paragraphs 10(d), 10(f), 10(n), 10(o), and 10(w) set forth basis for this claim).

Anna Mae Aquash, an AIM activist wanted by the FBI, was found dead and unidentified on the reservation during the winter that followed the 1975 shootings. *Id.* at 1443. The first autopsy attributed her death to exposure. *Id.* The authorities buried her as Jane Doe and sent her hands to Washington, D.C., for identification. *Id.* Her hands revealed her identity. *Id.* A second autopsy concluded that a bullet fired point-blank into the back of her head killed her. *Id.*

Price argued that six defamatory statements relating to this incident — read together — accuse him of murder. *Id.* The six statements allege that the death was suspicious, that Price had met Aquash before and should have been able to identify her, that rumors attributed the death to the FBI, and that some people believed Price murdered her. *Id.*; *see also id.* app. at 1448-51 (paragraphs 10(f), 10(g), 10(i), 10(k), 10(m), and 10(x) provide the basis for Price's claims).

Two statements accuse Price of harassing Indians during his investigation. *Id.* at 1445. One does so in general terms, and the other accuses Price of entering a home without a warrant. *Id.*; *see also id.* app. at 1447, 1451 (paragraphs 10(a) and 11(g) set forth the respective statements).

Finally, statements attack Price's character. *Id.* at 1445. An attorney calls Price "corrupt and vicious." *Id.*; *see also id.* app. at 1450 (paragraph 10(s)). The remaining three statements express Matthiessen's view that "Price alters facts to fit his pre-conceptions, that he would be soiled by his acts no matter whether he paid any penalties, and that he exemplified dishonest government." *Id.* at 1445; *see also id.* app. at 1450 (paragraphs 10(t), 10(u), and 10(v) respectively).

111. *Id.* at 1429.

The Eighth Circuit affirmed the district court's dismissal of Price's claims.[112] In so doing, the court granted first amendment protection to the allegedly defamatory statements published in the book.[113]

A. THE CONTOURS OF THE NEUTRAL REPORTAGE PRIVILEGE IN *PRICE V. VIKING PENGUIN, INC.*

The Eighth Circuit adopted a neutral reportage privilege that protects the accurate recitation of statements that public bodies utter even if the implications of the statements are harmful.[114] This privilege protects reporters who honestly be-

112. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446, (8th Cir. 1989), *aff'g* 676 F. Supp. 1501 (D. Minn. 1986), *cert. denied*, 110 S. Ct. 759 (1990).

113. *Id.* at 1446-47.

114. *Id.* at 1434 (citing Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985) (*Janklow I*), *rev'd in part*, 788 F.2d 1300 (8th Cir. 1986) (*Janklow II*), *cert. denied*, 479 U.S. 883 (1986)). The court states "recitation of official actions or statements by public bodies, if substantially accurate, is protected, even if the implications are harmful." *Id.* The court notes that *Janklow II* preserved this proposition in a footnote. *Id.* (citing *Janklow II*, 788 F.2d at 1301 n.2).

The *Janklow* controversy concerned an article that *Newsweek* magazine wrote about William Janklow, the governor of South Dakota, and American Indian activist Dennis Banks. *Janklow II*, 788 F.2d at 1301. The article told the story of Bank's interactions with Janklow. *Id.* Janklow sued *Newsweek* for defamation, basing his claim on one paragraph that states:

> Along the way, Banks made a dangerous enemy — William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who babysat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow — who had won his election despite the messy publicity — was prosecuting Banks. And his case — based on the 1973 Custer riot — was successful. Found guilty of riot and assault with intent to kill, Banks jumped bail before sentencing.

Id. at 1301, 1303.

The *Janklow I* court found that, because the rape allegations were in fact made, *Newsweek* could report them as "a materially accurate report of historical fact," even if the implication is harmful. *Janklow I*, 759 F.2d at 649. *Janklow II* preserved this analysis. *Janklow II*, 788 F.2d at 1301 n.2.

The *Viking Penguin* court misinterprets this language to mean not that the republisher may print the allegations even if their *implication* is harmful, but that the republisher may print all allegations even if they are *defamatory falsehoods*. The court probably misinterpreted the language because Janklow attacked the republishing of the rape allegation as libelous, for it implies that he raped his accuser. The traditional method of attack would entail joining the accuser and *Newsweek* (the republisher). Having done that, Janklow

lieve their reports accurately convey the charges that were made.[115] The privilege, however, does not protect the reporter who espouses or concurs in the charges,[116] or distorts them to attack a public figure.[117]

The *Viking Penguin* court observed that it "refined" the privilege, for it would protect a reporter even if the report were one-sided.[118] The court noted that evidence of the reporter's "general disposition to his topic" does not indicate whether the reporter in fact concurs in or espouses the particular allegation.[119] The court thus focused solely on whether the report accurately reflects what was said or done.[120]

B. THE EIGHTH CIRCUIT'S APPLICATION OF THE NEUTRAL REPORTAGE PRIVILEGE

Although the court neatly laid out the neutral reportage privilege in the background section of its opinion,[121] the court's use of the privilege is difficult to assess because it never explicitly applied the privilege to the facts of the case.[122] Instead, the court weaved the elements of the privilege into its first amendment analysis.[123] In this analysis, the court stated that the first amendment protects the accurate recitation of events, even if

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would prove that his accuser was lying and then prove that *Newsweek* printed the allegations with actual malice. Probably to avoid bad publicity and a civil trial on the merits of the rape allegation, Janklow merely sued *Newsweek*, accusing it of libelously imputing rape to him. The *Janklow I* court found that the printing of the allegations was not libelous because *Newsweek* itself did not accuse Janklow of rape. *Janklow I*, 759 F.2d at 649. Absent proof that Janklow did not in fact rape his accuser, Janklow could not hold *Newsweek* liable for libel. Thus, the proposition that the *Viking Penguin* court cited as standing for the neutral reportage privilege only applies to situations in which the allegation itself has been proved neither true nor false. The neutral reportage privilege protects the accurate recitation of allegations without regard to whether the allegation itself is true or false. *See* Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times, 434 U.S. 1002 (1977).

115. *Viking Penguin*, 881 F.2d at 1434 (quoting *Edwards*, 556 F.2d at 120).

116. *Id.* at 1434 (quoting *Edwards*, 556 F.2d at 120; citing Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980)).

117. *Id.* (quoting *Edwards*, 556 F.2d at 120; citing *Cianci*, 639 F.2d 54 (2d Cir. 1980)).

118. *See id.* (citing *Janklow II*, 788 F.2d at 1304). The court characterizes the article at issue in *Janklow II* as " 'transparently pro-Banks.' " *Id.* (quoting *Janklow II*, 788 F.2d at 1304).

119. *Viking Penguin*, 881 F.2d at 1434.

120. *Id.*

121. *Id.*

122. *See id.* at 1437-47.

123. *See Viking Penguin*, 881 F.2d at 1439-40, 1445-46.

the reporter intentionally leaves a defamatory implication.[124] Moreover, the first amendment protects a report that accurately recites "accusations and counter-accusations"[125] made by primary sources,[126] including "personal interviews" as a primary source.[127]

The court incorporated the neutral reportage privilege into its analysis of Matthiessen's report of rumors that surrounded the death of Anna Mae Aquash, an AIM activist.[128] In this re-

124. *See id.* at 1439-40. The court includes this part of the concept in its original recitation of the concept: "We have held that the recitation of official *actions* or statements by public bodies, if substantially accurate, is protected, even if the implications are harmful." *Id.* at 1434 (emphasis added).

The first application centers around Price's claim that Matthiessen recited the events surrounding the alleged rape for which police detained Moves Camp in a manner that falsely implies that Price obstructed justice. *Id.* at 1439. The court notes that the events can be interpreted in more than one way and that Matthiessen's version mirrors other versions. *Id.* at 1439-40 & n.10 (citing trial transcript of United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974), at 21,749 through 21,754 (presiding Judge Nichol criticizing the FBI's handling of Moves Camp)); R. WEYLER, BLOOD OF THE LAND 119, 178 (1982) (noting that Price collaborated with another agent to solicit the perjured testimony of Moves Camp); Correspondence from Linda Huber of the firm of Tigar, Buffone, and Doyle, to William Webster, Director of the FBI (June 6, 1981) (stating that David Price and others developed Moves Camp's perjured testimony). The court labels as "crucial" that Price does not challenge the "essentials" of Matthiessen's version of events. *Id.* at 1439-40. Citing *Janklow II*, the court holds that the statements at issue are protected. *Id.* at 1440 (citing *Janklow II*, 788 F.2d at 1306).

At issue in *Janklow II* (*see generally supra* note 114 (quoting excerpt from article at issue)) was a defamatory implication that the prosecutor sought a conviction for personal reasons. 788 F.2d at 1303. The plaintiff argued that the defendant deliberately distorted the events to support its defamatory opinion. *Id.* The court disagreed. *Id.* at 1304. It refused to make editorial judgments about word choice, especially when the "sting" of the implication remained even if the reporter fully laid out the events. *Id.*

By relying on *Janklow II*, the *Viking Penguin* court illustrates that substantial accuracy is the only requirement needed to invoke the neutral reportage privilege. *See Viking Penguin*, 881 F.2d at 1434 (stating, "[t]hus, we focus on whether the reports were accurate reflections of what was said or done"). Although applying the neutral reportage privilege to the accurate recitation of events adds nothing new to defamation law, the court's equating of events with accusations suggests that the Eighth Circuit now affords absolute protection to the accurate recitation of statements.

125. *See Viking Penguin*, 881 F.2d at 1444-45.

126. *Cf.* 881 F.2d at 1445-46 (arguing that Price cannot claim actual malice on Matthiessen's part when Price fails to contest accuracy of Matthiessen's quotations of primary sources).

127. *Id.* at 1435 (listing the primary sources: "Primary sources included court transcripts, court decisions, F.B.I. records, congressional investigations, legislative resolutions, books, articles and personal interviews").

128. *Id.* at 1444-45. The court notes: "Rumors that talk of the F.B.I. or white people in general but fail to mention Price are irrelevant in the absence

port Matthiessen recited statements, made during personal interviews, accusing Price either of killing Aquash[129] or otherwise being involved in her death.[130] The court found that such recitation was protected.[131]

The court reasoned that authors must have leeway to report accusations and counteraccusations when writing about controversies.[132] Although the court never mentioned the need

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of a direct accusation." *Id.* at 1443. In the appendix to the case, the court includes the excerpts from *In the Spirit of Crazy Horse* that provided the basis for Price's claim:

> 10(i) An A.I.M. leader interviewed that spring said, "A.I.M. didn't kill her, the pigs got to her first. They knew we knew who she was, and they wanted to blame A.I.M. with her death." This same person thought that the F.B.I. was trying to blackmail Anna Mae by threatening to expose her as an informer, whether she was an informer or not. A continuing lack of F.B.I. interest in any serious investigation of her death [parenthetical omitted] encouraged rumors among the Indians that she had been killed in retaliation for the agents' deaths, . . .
>
> Inevitably, local suspicion focused on David Price, who was already notorious on the reservation; Price himself remarked that he had heard that A.I.M. had put a contract on his head. (*Crazy Horse* at 267).
>
> 10(k) A few days later, Kunstler took this matter up with Agent Price, whom some of the Indians, at least, had suspected of involvement in the killing: . . . (*Crazy Horse* at 306).
>
> . . . .
>
> 10(m) In all likelihood, most people feel, the original suspicions about Anna Mae were spread by Douglas Durham, who tried to discredit anyone he did not control, and these rumors intensified when David Price questioned her in March 1975; apparently Price was working with John Stewart, who may have started the rumors in Oglala. But despite occasional suggestions to the contrary and lurid articles on this case, no one I have talked to makes the serious claim that David Price killed Anna Mae Aquash; all seem to agree that whoever was responsible for the death, it was an Indian who pulled the trigger. It is sometimes said that Lakota medicine men, making their own Indian-way investigations, had received the message in the sweat lodge: an Indian had killed Anna Mae at the direction of two white men, and sooner or later the names of the killers would come out. As Red Cloud remarked of Spotted Tail's death, ". . . an Indian did it. But who set on the Indian?" (*Crazy Horse* at 445-46).

Id. app. at 1449.

129. *Viking Penguin*, 881 F.2d at 1444. Complaint paragraph 10(i) suggests that Native Americans believed that the FBI killed Aquash to retaliate for the deaths of its agents. *Id.* at 1444, app. at 1449. The same paragraph states that the Native Americans suspected Price. *Id.*

130. *Id.* Complaint paragraph 10(k) states: "Kunstler took this matter up with Agent Price, whom some of the Indians, at least, had suspected of involvement in the killing . . . ." *Id.* at 1443, app. at 1449.

131. *Viking Penguin*, 881 F.2d at 1445.

132. *Id.* at 1444.

to present both sides of the controversy,[133] it emphasized that Matthiessen gave Price a chance to respond to the accusations and that Price used the opportunity to accuse a Native American of being involved in Aquash's death.[134] In addition, Matthiessen included official FBI statements exonerating Price in the investigations of her death.[135] As evidence that Matthiessen did not espouse either side's accusations, the court noted that Matthiessen *"strongly"* indicates his belief that Price is innocent.[136]

The court also incorporated the neutral reportage privilege when it considered whether Matthiessen republished the statements with reckless disregard for their truth.[137] Although the court mentioned that Price failed to introduce evidence indicating Matthiessen doubted any particular statement was true,[138] the court did not focus on Matthiessen's state of mind when he republished the allegedly defamatory falsehoods, as traditional first amendment analysis would require.[139] Instead, the court focused on whether Matthiessen accurately quoted primary sources.[140]

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133. *See id.* at 1434.

134. *Id.* at 1444.

135. *Cf. id.* at 1444-45. Although the court does not identify the investigations, the context of the discussion and the page the court cites in *Crazy Horse* (267) indicate that the court refers to the FBI's investigation of Aquash's death. *Id.*

136. *Viking Penguin*, 881 F.2d at 1445.

137. *Id.* at 1445-46. The court also intimates this incorporation when it discusses the two concepts in an earlier section, entitled "Reckless Disregard and Neutral Reporting." *Id.* at 1433-34. The court points out that it "has added" the concept of neutral reporting to the actual malice standard. *Id.* at 1434. Whether the court means that it has added to the standard extra protection extrinsic to the standard or intrinsic in it is unclear. The court's subsequent application of the two concepts to the facts indicates that it no longer finds the actual malice standard applicable to the accurate recitation of quotations. *See, e.g., id.* at 1444-45 (finding that statements reporting accusations and counter-accusations are protected).

138. *Id.* at 1445-46.

139. *Id.*

140. This approach seems to go to the threshold issue of whether the alleged defamatory statement is true or false. *See generally* R. SMOLLA, *supra* note 24, § 5.00 (examining "Truth as a Constitutional Defense"). In this sense, the neutral reportage privilege can be conceptualized "as a modern adjunct to the truth defense." *Id.* § 5.12. As such, the privilege allows the court to split the threshold issue into two tiers. First, the court determines whether the *utterer's* statement is both false and defamatory. If so, she is liable. Second, the court considers whether the *republisher*, typically the media, accurately reported the statement. At this level of inquiry, the court does not consider the veracity of the statement's content, as traditional defamation analysis would require. Instead, it abandons the legal fiction that a republisher adopts the

In effect, the court provided first amendment protection to the accurate recitation of accusations, without regard to their truth or falsity. The actual malice standard becomes relevant only if the republisher fabricates or distorts the accusation. The court then would ask whether the republisher entertained serious doubts as to the *accuracy* of her *report* of the accusation, not whether the republisher entertained serious doubts as to the *truth* of the accusation itself. Consequently, the content of the statement becomes irrelevant; its republication is absolutely protected if reported accurately.

The *Viking Penguin* court extended the contours of the neutral reportage privilege beyond its previous confines.[141] By focusing on whether the republisher accurately conveys what was said,[142] the court relegated the requirement of neutrality solely to the presentation of particular statements.[143] Thus, the republisher may concur in or espouse the general position of the accuser, and even passionately criticize the target of the accusation,[144] yet still may invoke the privilege as long as the particular accusation is reported disinterestedly and dispassionately.[145] The *Viking Penguin* court also extended the neutral reportage privilege to statements by sources that were neither public officials, public figures, nor responsible, prominent organizations.[146]

The *Viking Penguin* court's extension of the neutral reportage privilege suggests that the theory underpinning the privilege is not only the informational theory, on which the *Edwards* court relied,[147] but also the robust, wide open debate the-

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libelous statements as its own statements and focuses on whether the statements were uttered. In this sense, the statement is "true" if uttered. *Id.*

141. *See supra* notes 94-98 and accompanying text.

142. *Viking Penguin*, 881 F.2d at 1434.

143. *See id.*

144. *Id.* at 1434-37 (explaining that Matthiessen wrote *Crazy Horse* to present the Native Americans' side of the story, to argue for a new trial for Leonard Peltier because of government misconduct; noting that *Crazy Horse* is dedicated "for all who honor and defend those people who still seek to live in the wisdom of [the] Indian way"; noting that Matthiessen depicts Price as a "casualty" of government policy but nevertheless "soiled for the rest of his days by deeds done in the belief that the end justified the means . . . ." (citing *Crazy Horse* at 471-72)).

145. *See id.* at 1434.

146. *See id.* at 1434, 1444-45.

147. *See supra* note 85 and accompanying text; *see also supra* notes 43-45 and accompanying text (setting forth informational theory).

ory of *New York Times*.[148] In fact, the Eighth Circuit's decision sets the stage for an even broader neutral reportage privilege that will ensure matters of public concern will be both fully reported and fully debated.

III. ANALYSIS

A. THE PRIVILEGE EXTENDED

The *Viking Penguin* court applied the neutral reportage privilege in a manner that only incidentally increases the amount of information available to the public; the court's real concern was free access to the public forum. The genre in which the *Viking Penguin* defamations were published, that of investigative reporting,[149] does not merely report a public controversy: it plays an active role in the controversy.[150] Matthiessen, as the author of *In the Spirit of Crazy Horse*, was a participant in that controversy.[151] In short, by applying the neutral reportage privilege to Matthiessen, the court allowed Matthiessen not only to provide the public with information and the other side of the debate but it also allowed him to actively participate in the debate.[152]

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148. 376 U.S. 254 (1964). *See supra* notes 64-66 and accompanying text (setting forth robust, wide open debate theory).

149. *See generally* McManus v. Doubleday & Co., 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981) (refusing to apply neutral reportage privilege to include "reports of such journalist-induced charges").

150. *Cf.* C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974) (investigative reporting which ignited the public debate about Watergate).

151. Matthiessen did not merely republish defamatory statements. He actively solicited those statements and did so for a purpose: to give the Native American side of the story. 881 F.2d at 1434. The result of Matthiessen's inquiries constitutes *In the Spirit of Crazy Horse*.

At least one court has found that the neutral reportage privilege does not apply to investigative reporting. In McManus v. Doubleday & Co., 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981), the court rejected the plaintiff's claim in an action similar to that before the *Viking Penguin* court. *Id.* The court reasoned that:

> Since there is no indication in the *Edwards* opinion that the neutral reportage privilege was meant to cover investigative reporting, and since including reports of such journalist-induced charges within the protection of the privilege is unnecessary for promoting the purpose of *Edwards*, the freer reporting of raging controversies, this Court is constrained to find the defendant-author here unprotected by the privilege.

Id.

152. Matthiessen states in his introductory note that his goal is to tell the Native American side of the dispute. 881 F.2d at 1434 (citing the introductory note of *Crazy Horse*). He dedicates the book "for all who honor and defend those people who still seek to live in the wisdom of [the] Indian way." *Id.* at 1436.

The court focused on whether the report accurately reflected what was said.[153] But in the wider context, which the court dismissed as irrelevant,[154] an author may so distort a controversy, and may be so adept at winning the reader to his side, that a reader presented with a specific factual allegation no longer can make a neutral, disinterested evaluation. The reader's evaluation of the reported facts provides an important check in the framework of the neutral reportage privilege set forth in *Edwards* and its progeny. The *Viking Penguin* court relegated this check to the immediate context in which the defamatory falsehood is republished.[155] The court circumscribed this requirement because it valued *In the Spirit of Crazy Horse* not for the information the book provides the public, but for the role it plays in public debate.[156]

Moreover, the informational rationale[157] does not provide a strong basis for the neutral reportage privilege when no raging public controversy exists. The events at issue in *In the Spirit of Crazy Horse* occurred in 1973 and 1975.[158] Viking Penguin, however, did not publish the book until 1983.[159] The debate that raged around the events at Wounded Knee in 1973 and the shoot-out at the Pine Ridge Reservation in 1975 must have died down somewhat by 1983.[160] What was at stake in *Viking Pen-*

153. *Viking Penguin*, 881 F.2d at 1434.

154. *Id.*

155. *Id.*

156. *See, e.g., id.* at 1446-47. The *Viking Penguin* court concludes its opinion:

> Sometimes it is difficult to write about controversial events without getting into some controversy along the way. In this setting we have decided that the Constitution requires more speech rather than less. Our decision is an anomaly in a time when tort analysis increasingly focuses on whether there was an injury, for in deciding this case we have searched diligently for fault and ignored certain injury. But there is a larger injury to be considered, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated.
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> . . . .
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> . . . . In its entirety, *Crazy Horse* focuses more on public institutions and social forces than it does on any public official. The sentiments it expresses are debatable. We favor letting the debate continue.

Id.

157. *See supra* notes 43-45 and accompanying text.

158. 881 F.2d at 1434-35.

159. Price v. Viking Penguin, Inc., 676 F. Supp. 1501, 1505 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

160. *Cf.* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 169-72 (1979) (Blackmun, J., concurring) (arguing that the passing of 16 years is "sufficient

guin was not the public's right to information, but the need to maintain public debate and to keep the public forum open to participants such as Matthiessen.

Although hazy at best, the *Viking Penguin* court's use of the neutral reportage privilege suggests that not only the informational theory, but also the robust, wide open debate theory undergirds its neutral reportage analysis. Thus, the court proffered a justification for the privilege that earlier courts and commentators failed to consider.[161] The Eighth Circuit's reasoning, combined with the reasoning of courts that previously applied the privilege, suggests that the neutral reportage privilege can be expanded beyond the *Viking Penguin* court's extension.

B. THE EXPANDED NEUTRAL REPORTAGE PRIVILEGE

Courts should adopt a neutral reportage privilege whose contours are shaped by both the informational and robust, wide open debate theories. Because the theories work in concert to justify applying the privilege to many situations,[162] the expanded neutral reportage privilege will be broader than that which *Edwards*, its progeny, and *Viking Penguin* have advanced.[163]

The expanded privilege should allow a republisher to repeat defamatory falsehoods whenever they relate to a matter of public concern.[164] Ill will or even lack of neutrality should not

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to erase whatever public-figure attributes petitioner once may have possessed").

161. *See, e.g.*, Edwards v. National Audubon Soc'y, 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times, 434 U.S. 1002 (1977); Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984); R. SMOLLA, *supra* note 24; Sowle, *supra* note 33.

162. Although the informational and robust, wide open debate theories are distinct conceptually, *see supra* notes 43-45, 64-66 and accompanying text, they have at their core the premise that public debate furthers the public good. With such a common core, they work well in tandem, for the end of one equally serves the end of the other. For example, a well informed public is better able and more likely to participate in public debate while, on the other hand, public debate informs the public.

163. *See supra* notes 81-103 and accompanying text (setting forth the *Edwards* privilege and the general requirements of the privilege).

164. Although such a broad neutral privilege presents the republisher a broad avenue for abuse, the risk of abuse, and even abuse itself, cannot override the first amendment values served by the privilege. *See* Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967); *cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated").

remove the protections of the privilege. Moreover, the status of both the accused and accuser should be irrelevant. Courts should deny the privilege, however, when the republisher ceases merely to report the falsehoods and adopts them as its own statements.

Courts should determine as a matter of law whether the republished defamatory falsehoods relate to a matter of public concern. If the court determines the falsehoods relate to such a matter, the burden should shift to the plaintiff to show that the republisher adopted the falsehoods as its own statements.

1. Matter of Public Concern

When a matter of public concern arises, the public has a right to know all the information related to the matter.[165] The republisher plays a vital role as a source of such information.[166]

165. *Barry*, 584 F. Supp. at 1126-27; *cf.* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (explaining that the public is injured each time a book is pulled off a shelf or an idea is not circulated because it is arguably libelous), *cert. denied*, 110 S. Ct. 757 (1990). The neutral reportage privilege frees the republisher to report statements that the republisher otherwise would suppress because the republisher seriously doubts that the statements are true. If the republisher's doubts are unfounded, the public has been denied valuable information. If the republisher can report the statements despite its doubts, as provided by the neutral reportage privilege, the public will receive more information. In this sense, the neutral reportage privilege serves a function of constitutional magnitude. *Cf.* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) (Constitution requires the Court to place burden of proving falsity of statement at issue on plaintiff to free publisher to print speech about matter of public concern that is "*unknowably* true or false"). Even though the neutral reportage privilege also will free the republisher to report statements when its doubts were well-founded, first amendment protection still is warranted. *See id.*; St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

166. 881 F.2d at 1447. Commentators have noted that the informational theory may not be of constitutional dimension and thus may not warrant special treatment for speech that informs. *E.g.*, Sowle, *supra* note 33, at 532-33. Although the Court has not emphasized the informational theory, it has acknowledged that an informed public is indispensable to free debate. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)). Moreover, the Court has recognized the public's right to information in other contexts. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-62, 567 (1980) (commercial speech); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978) (criminal penalties for divulging confidential information); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (commercial speech); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) (invasion of privacy). Thus, when a matter of public concern arises, both the robust, wide open debate and the informational theories counsel that the public be fully informed.

Moreover, the public needs the information to participate meaningfully in debate on the issue. The *Viking Penguin* court recognized the public's need to access information by stating that when controversies arise, the Constitution requires more speech, not less.[167]

In addition, the republisher itself may wish to participate in a debate.[168] The republisher's commentary will be meaningless if it cannot report fully the particulars of the matters that form the basis of its commentary. The *Viking Penguin* court understood this notion, for it noted that to report controversies, republishers must be allowed to repeat accusations and counteraccusations.[169]

When a matter of public concern arises, the republisher should be free to report any statements related to that matter. If courts require a republisher to censor statements that it knows are false, they will stifle debate because a public controversy typically consists of attacks launched by one participant at the other.[170] Moreover, a statement still may be significant even if false.[171] In fact, falsity may increase the statement's significance.[172]

Commentators[173] and courts[174] have argued that the neutral reportage privilege is inconsistent with the Supreme Court's opinion in *Gertz v. Robert Welch, Inc.*[175] They argue that because the *Gertz* Court disapproved of courts deciding what constitutes a matter of public concern,[176] such a matter cannot trigger first amendment protection. These commenta-

167. *Viking Penguin*, 881 F.2d at 1446.

168. Matthiessen was such a republisher. *See supra* notes 149-52 and accompanying text. When a republisher participates in the debate, the commentary can be regarded as the "covered speech" that justifies allowing the republisher to print the defamatory falsehoods which formed the basis for the covered speech. Note, *Developing Privilege*, *supra* note 100, at 866-68. The "covered speech" plus the defamatory falsehoods constitute the "total speech" required to allow the republisher to participate in the debate.

169. *Viking Penguin*, 881 F.2d at 1444.

170. *See supra* note 80 and accompanying text.

171. *See* Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times, 434 U.S. 1002 (1977).

172. *See id.*

173. *See, e.g.*, Comment, Edwards v. National Audubon Society, Inc.: *A Constitutional Privilege to Republish Defamation Should Be Rejected*, 33 HASTINGS L.J. 1203, 1220-22 (1982).

174. *See, e.g.*, Dickey v. CBS, Inc., 583 F.2d 1221, 1226 n.5 (3d Cir. 1978).

175. 418 U.S. 323 (1974).

176. *See supra* note 73 and accompanying text (examining the *Gertz* rejection of the *Rosenbloom* matter of public concern test).

tors and courts misinterpret *Gertz*. Although the *Gertz* Court did reject the matter of public concern test it had advanced in *Rosenbloom v. Metromedia, Inc.*,[177] the Court did not find such matters irrelevant to first amendment analysis.[178] Instead, the Court focused on the status of the plaintiff rather than the nature of the events surrounding the defamatory falsehoods.[179] Thus, the Court did not reject *Rosenbloom*[180] completely; it merely shifted the focus of its first amendment analysis.

Moreover, the Court has retreated from its opinion in *Gertz*, shifting its focus back to the type of speech at issue.[181] The Court has acknowledged that although not dispositive, the

177. 403 U.S. 29 (1971); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

178. *See Gertz*, 418 U.S. at 344-45 (arguing that because limited-purpose public figures attain such status by thrusting themselves to the forefront of a public controversy, they voluntarily expose themselves to the increased risk of defamation; discussing generally the public's legitimate interest in those classed as public figures); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756-57 (1985) (arguing that *Gertz* did not render the type of speech at issue irrelevant). The Court argued that when a private individual was defamed, the state's interest in protecting the individual's reputation may outweigh first amendment concerns, even if the defamatory falsehoods were related to a matter of public concern. *Gertz*, 418 U.S. at 347-48.

179. Whether a defamatory falsehood relates to a matter of public concern always has been at the core of the Court's first amendment analysis. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). In addition, the Court must examine the context in which the defamatory falsehoods were made when it determines the status of a private individual plaintiff. *See Gertz*, 418 U.S. at 345 (discussing how an individual becomes a public figure). When a private individual attempts to influence the outcome of a public controversy, the Court provides the protection of the actual malice standard to those publishers who report or comment on that individual's behavior. *See id.* Therefore, if a matter of public concern surrounds the events at issue, the Court must distinguish between the individual who actively participates to influence the outcome of the matter and the individual who becomes involved passively. *See id.* The Court will accord the former individual the status of "limited purpose public figure" and will accord the latter the status of "private individual." The former individual will face the protection of the actual malice standard while the latter will face whatever standard the state court follows. *See id.* at 345, 347-48. If a matter of public concern does not exist, the Court has no reason to distinguish between the two private individual plaintiffs. In short, even under *Gertz*, the Court must determine whether the defamatory falsehoods relate to a matter of public concern.

180. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). *See supra* notes 70-71 and accompanying text.

181. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, (1985), the Court inquired whether the speech at issue related to a matter of public concern. *Id.* at 761-63. In fact, the inquiry was central to the Court's analysis. *See id.* at 757-61. In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), the Court accorded equal weight to the type of speech at issue and to the plaintiff's status. *Id.* at 775.

type of speech at issue plays an important role when the Court assesses the first amendment interests at stake.[182]

In addition, intrinsic to the robust, wide open debate theory is the notion that speech about matters of public concern lies at the heart of the first amendment.[183] The Court has recognized this notion repeatedly.[184] In short, inquiry into the type of speech at issue is consistent with existing first amendment libel law.

In constructing a framework to determine whether a matter is of public concern, courts should draw on both the rich common law heritage[185] and Supreme Court decisions.[186] At a minimum, courts should find that matters concerning "the governing of the nation"[187] or affecting public policy[188] are of public concern. To ensure that such a valuable right as freedom of speech is protected, courts must be given, and must exercise, the discretion to expand the definition further.[189]

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182. *See supra* note 181 and accompanying text; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978) (inquiring into the nature of the speech at issue in striking down a statute that made it a crime to divulge certain information).

183. New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

184. *See, e.g., Philadelphia Newspapers*, 475 U.S. at 775-78; *Dun & Bradstreet*, 472 U.S. at 755-57; *New York Times*, 376 U.S. at 269-70.

185. *See, e.g.*, Ponder v. Cobb, 257 N.C. 281, 294-97, 126 S.E.2d 67, 77-78 (1962); Friedell v. Blakely Printing Co., 163 Minn. 226, 229-30, 203 N.W. 974, 975 (1925); McLean v. Merriman, 42 S.D. 394, 399-400, 175 N.W. 878, 880-81 (1920); Coleman v. MacLennan, 78 Kan. 711, 718-42, 98 P. 281, 283-92 (1908).

186. *See, e.g., Philadelphia Newspapers*, 475 U.S. at 775; *Dun & Bradstreet*, 472 U.S. at 761-63; *Landmark Communications*, 435 U.S. at 839. An elaborate discussion of what constitutes a matter of public concern is beyond the scope of this Comment. For a seminal discussion of what constitutes such a matter, see Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-16 (1890). *See also* General Motors Corp. v. Piskor, 27 Md. App. 95, 107-11, 340 A.2d 767, 777-79 (1975) (examining what constitutes a matter of public concern); Firestone v. Time, Inc., 271 So. 2d 745, 748-51 (Fla. 1972) (same); *Developments in Defamation, supra* note 29, at 925-27 (same); Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207-11 (1949) (same).

187. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256. This speech includes any speech critical of official conduct. *See* Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

188. Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 624 (1983). Public policy encompasses any area in which a decision may affect the general welfare of the public. *See id.*

189. *Cf.* Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that judges should be given discretion to protect free speech values), *cert. denied*, 471 U.S. 1127 (1985).

2. Adoption of the Defamatory Falsehood

If a republisher adopts a defamatory falsehood, it should lose the first amendment protection of the neutral reportage privilege. Because the privilege requires courts to ignore the legal fiction that a republisher of a defamatory falsehood adopts the falsehood as its own, fairness dictates that the republisher, in fact, does not adopt the falsehood.[190]

Although this proposition seems obvious, courts may find it difficult to determine whether a republisher has adopted a defamatory falsehood. When courts make such determinations, they should consider whether the republisher accurately reported the statements, indicated that the statements are allegations, and published the accused's denials or explanation. Courts also should consider the republisher's motive.

When a republisher prints a defamatory falsehood, courts should require substantial, rather than literal, accuracy.[191] Because the republisher provides information and commentary in a condensed form, literal accuracy would unduly burden a republisher faced with the task of reporting voluminous and complicated matters of public concern.[192] Substantial accuracy, however, allows a republisher to perform such a task while ensuring that the public receives the substance of the matters at issue.[193] A workable test for substantial accuracy asks whether the statements as republished would have the same effect on the reader's mind as the statements that were published or uttered originally.[194]

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190. Sowle, *supra* note 33, at 543; Note, *Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication*, 58 TEX. L. REV. 623, 644 (1980) [hereinafter Note, *Accurate Republication*].

191. *See* Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977); Sowle, *supra* note 33, at 533.

192. *See* Cafferty v. Southern Tier Publishing Co., 226 N.Y. 87, 93, 123 N.E. 76, 78 (1919) (discussing libel law as a system of reasonable regulations, not a system of technicalities); *see also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (public relies on press to provide news and information "in convenient form"). A requirement of literal accuracy also would offend the first amendment concerns advanced in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974). In that case, the Court warned against the chilling effect created by intrusions into the editorial process. *Id.*

193. *See Edwards*, 556 F.2d at 120; Comment, *Cianci*, *supra* note 94, at 1517; Note, *Accurate Republication*, *supra* note 190, at 644. An inaccurate report is of no value to the public. Note, *Accurate Republication*, *supra* note 190, at 644; Note, *Developing Privilege*, *supra* note 100, at 873.

194. *Cafferty*, 226 N.Y. at 93, 123 N.E. at 78; *see* McCormick v. Miami Herald Publishing Co., 139 So. 2d 197, 200 (Fla. Dist. Ct. App. 1962); Brown v.

Courts should not require a republisher to attribute a statement directly to its source.[195] Nor should courts require a republisher to balance its report or commentary with the accused's denials or explanations.[196] The Supreme Court has declared similar intrusions into the editorial process unconstitutional because they chill speech by causing self-censorship.[197] The Court's reasoning applies equally well in the neutral reportage context.[198] A republisher will be reluctant to supply information or comment on debate if a jury will be allowed to second guess the republisher's editorial decisions.[199] When a republisher does elect to reveal sources or print the accused's response, however, the factfinder should weigh this factor heavily in favor of finding no adoption. Both the *Edwards* and

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Globe Printing Co., 213 Mo. 611, 636, 112 S.W. 462, 468 (1908). In determining whether the republisher has met the test, courts should consider the difficulty of the reporting task. Sowle, *supra* note 33, at 538.

195. *See* Medico v. Time, Inc., 643 F.2d 134, 147 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981); *cf.* C. BERNSTEIN & B. WOODWARD, *supra* note 150 (investigative reporting which ignited the public debate about Watergate). An investigative reporter often cannot reveal her sources for fear of her life or the lives of her sources.

196. *See* Comment, *Constitutional Privilege*, *supra* note 100, at 1281-84; *cf.* C. BERNSTEIN & B. WOODWARD, *supra* note 150 (investigative reporting which ignited the public debate about Watergate). An investigative reporter often cannot obtain the accused's comments because to do so may endanger both the reporter and her sources. Moreover, such an endeavor may inhibit the reporter's investigation because the accused may cover its tracks.

197. The Supreme Court has held that a state cannot require a publisher to provide a right of reply to persons attacked in its publication. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). The Court reasoned that such a requirement constituted an impermissible intrusion into editorial discretion. *See id.* at 256. The reasoning rested on the notion that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 257 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)); *see also id.* at 261 (White, J., concurring) (stating that "this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor").

198. Although requiring a publisher to present a story in a certain manner to invoke a privilege differs fundamentally from requiring the publisher to provide right of access to avoid a criminal penalty, the notion that the right of access chills free speech applies equally to a requirement of neutrality. Both require the publisher to behave in a certain manner, regardless of his best judgment, or suffer a penalty; in the case of the neutrality requirement, the penalty takes the form of denying the publisher the privilege's protection. This consideration in turn chills speech and inhibits public debate, for the publisher will not run a story when the publisher cannot present the other side of the story, when the story criticizes, or when the publisher feels that including the other side detracts from the story as a whole.

199. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

Viking Penguin courts recognized this proposition.[200]

A republisher, nevertheless, should be required to indicate that allegations are merely allegations.[201] If a republisher fails to do so, the public may assume not only that the republisher believes that the allegations are true but also that the republisher made the allegations. Liability should follow in such a case because the republisher should not be allowed to misinform the public or comment on debate which it has deliberately distorted.[202]

A republisher's ill will or improper motive should not itself remove the first amendment protection of the neutral reportage privilege.[203] Such a finding, however, is evidence that the republisher adopted the defamatory falsehood. The republisher can rebut this evidence if it can show that, regardless of its motive, it republished the defamatory falsehoods in a fair and accurate fashion.[204]

Courts cannot impose liability for speech of constitutional dimension if they merely determine that the speaker acted out of hatred, spite, or ill will.[205] Similarly, in the neutral report-

200. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1444-45 (8th Cir. (1989), *cert. denied*, 110 S. Ct. 757 (1990); Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

201. Comment, *Constitutional Privilege*, *supra* note 100, at 1283. Such an intrusion into the editorial process is minimal. *Id.* Moreover, the requirement is objective. It is not subject to the review of a jury. As such, it does not subject the republisher to potential liability because a jury does not like the republisher's speech. *See infra* notes 206-07 and accompanying text (exploring the danger of the jury to the republisher).

202. *Viking Penguin*, 881 F.2d at 1434; *Edwards*, 556 F.2d at 120.

203. Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964); Sowle, *supra* note 33, at 541-43; Note, *Constitutional Privilege*, *supra* note 100, at 1279; Comment, *Cianci*, *supra* note 94, at 1522-24; Note, *Accurate Republication*, *supra* note 190, at 639-40.

204. *Cf. Viking Penguin*, 881 F.2d at 1444-45 (noting that republisher of damaging attack gave accused chance to respond); Sowle, *supra* note 33, at 541-43 (arguing that fairness and accuracy should defeat ill will). The *Viking Penguin* court recognized that courts should only focus on the particular statements at issue and ignore the overall tone of the report. *Id.* at 1434. Such a narrow focus insures not only that the public receives a wide range of information, Comment, *Cianci*, *supra* note 94, at 1522-24, but also that a wide range of participants can participate in public debate, *cf. Viking Penguin*, 881 F.2d at 1444-45 (arguing that reporters must be allowed to repeat allegations to write about controversies).

205. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10-11 (1970). Debate on public issues will be chilled if the speaker knows that the accused can hale her into court and establish liability by simply showing that she spoke out of hatred. *Id.*

age context, courts should allow a republisher to comment on defamatory falsehoods without fear of liability. If a jury can impose liability on a finding of ill will, the jury may reduce the range of information and commentary available to the public,[206] as well as deny republishers the opportunity to participate in public debate.[207]

The factfinder should consider the above factors to determine when a republisher has crossed the line from merely reporting to adopting defamatory falsehoods.[208] Once a republisher has crossed that line, courts should hold the republisher liable.

3. Scope

The twin theories underlying the expanded neutral reportage privilege[209] should define its scope. The public will desire information whenever a matter of public concern arises, and republishers will want to comment on such matters. Thus, the privilege should apply whenever a matter of public concern arises.

Both the robust, wide open debate and informational theories justify such a broad privilege when the original publisher directs allegations at a public official or public figure. If the republisher informs the public of such allegations, the public can urge investigation or comment itself on the subject's behavior.[210] Even if the republisher knows that the allegations are false, it should retain the freedom to print the allegations so that it may comment on them.[211] Moreover, the public needs information about the entire matter to formulate its opinion and comments.[212]

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206. *See* Comment, *Cianci*, *supra* note 94, at 1522-24.

207. *Cf.* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1444-45 (8th Cir. 1989) (arguing that reporters must be allowed to repeat allegations to write about controversies), *cert. denied*, 110 S. Ct. 757 (1990).

208. For example, suppose a republisher publishes a harsh attack on an individual. In its attack, it republishes defamatory falsehoods and mentions that they are only allegations. The republisher has information that would alleviate the harshness of the allegations but withholds the information because it desires maximum impact. In this situation, the factfinder should find adoption and hence liability.

209. The informational theory and the robust, wide open debate theory. *See supra* notes 43-45, 64-66 and accompanying text.

210. *See* Comment, *Cianci*, *supra* note 94, at 1512-13.

211. *Viking Penguin*, 881 F.2d at 1444.

212. Thornhill v. Alabama, 310 U.S. 88, 102 (1940). *See supra* notes 165-67 and accompanying text; *see also* Barry v. Time, Inc., 584 F. Supp. 1110, 1127

Both the robust, wide open debate and informational theories also justify the republication of allegations made by a public official or public figure. Such statements are a matter of public concern at their mere utterance.[213] The public has an interest in the allegations because they reflect the credibility and judgment of those whose decisions affect their lives.[214] Similarly, both the republisher and the public have an interest in commenting on the allegations. In addition, the nature of the positions occupied by public officials and public figures allows them unique access to the media to defend themselves.[215] Moreover, public officials and public figures must accept the consequences of their positions, withstanding greater public scrutiny in the interest of maintaining robust, wide open debate.[216]

When a private individual directs allegations at another private individual but the allegations relate to a matter of public concern, a republisher should be allowed to inform the public of all speech surrounding the matter. The public has an interest in receiving complete information because such information allows the public, rather than the courts, to be the ultimate judge of the matter.[217] Moreover, courts should allow republishers to repeat the allegations so that the republishers can comment on them.[218] Having absorbed the republisher's commentary, the public can comment on the allegations or the republisher's opinion. Thus, republication perpetuates the

(N.D. Cal. 1984) (arguing that the public, not the press, should assess credibility of sources and their accusations).

213. Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

214. Sowle, *supra* note 33, at 529-30. Today, public figures play a active and significant role in decisionmaking. Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring).

215. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

216. *Id.* at 344-45. The nature of the remedy provided by a libel judgment indicates that the best arena for redress is not the courts, but the arena of public debate. A libel judgment comes in the form of money damages and typically comes years after the injury to reputation. Because the injury to the public official or figure is swift, the judgment can hardly be said to compensate the injury, but takes on the character of punishment which in turn results in deterrence. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring) (characterizing libel actions brought against public officials as a "technique for harassing and punishing a free press"). Such a result chills speech and inhibits robust, wide open debate. The better remedy is forceful, confident entry into the public debate.

217. Barry v. Time, Inc., 584 F. Supp. 1110, 1127 (N.D. Cal. 1984). *Contra* Comment, *Cianci*, *supra* note 94, at 1513 n.115.

218. *See supra* notes 168-70 and accompanying text.

debate.[219]

This analysis may seem to treat the reputational interests of the private individual lightly. It does so only because it focuses on the need to encourage public debate and disseminate information regarding matters of public concern to the public. These activities are at the heart of the first amendment.[220] Consequently, the private individual's reputational interest is subordinated to weightier constitutional interests. Three factors, however, alleviate the potential harshness of such a rule. First, the neutral reportage privilege in no way affects the ability of the individual defamed to pursue a defamation action against the original publisher. The privilege protects only the republisher. Although the republisher significantly magnifies the potential for harm by republishing the allegations, the original publisher will be liable for the full extent of any reasonably foreseeable harm.[221] In addition, because the private individual usually suffers the most harmful consequences of a defamatory falsehood in the immediate community, a jury verdict in her favor will counteract the falsehood's effect in the community, for news of such a verdict is capable of being spread throughout the immediate community.

Second, the requirement that the republisher disclose that an allegation is only an allegation[222] cushions the blow of any

219. If a matter of public concern does not exist before a *private* individual directs allegations at a *private* individual, courts should deny the republisher the first amendment protection of the neutral reportage privilege. Without such a pre-existing matter, the justifications break down. The public has no pre-existing interest. Nor does the republisher have any reason to comment. When a public official is involved, however, courts should not require a pre-existing controversy because the public's interest in the conduct of the public official is pre-existing, as is the need for comment. Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

220. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92, 495 (1975) (setting forth need for information); *New York Times*, 376 U.S. at 269-71 (setting forth need for public debate); Associated Press v. United States, 326 U.S. 1, 20 (1945) (setting forth need for information). The Court places special emphasis on the need for public dissemination of commentary on matters of public concern: "The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'" Curtis Publishing Co. v. Butts, 388 U.S. 130, 149 (1967).

221. R. SMOLLA, *supra* note 24, § 4.13[2]; RESTATEMENT (SECOND), *supra* note 24, § 576 comment d; *see* W. KEETON, *supra* note 24, § 113, at 803. Moreover, fairness dictates that the original defamer bear the consequences of its act. Comment, *Accurate Republication*, *supra* note 190, at 641-42.

222. *See supra* notes 201-02 and accompanying text (discussing the need to indicate allegations).

defamatory falsehoods, for the reader will realize that the republished statements are debatable.[223] Thus, any imputations of fact will be left to the reader. In this sense, the republisher does not magnify the injury because the reader judges the truth of the allegations for herself.[224]

Finally, the requirement that the allegations relate to a matter of public concern will ensure that the republisher invokes the neutral reportage privilege only when its protection truly is warranted. Thus, the allegations will be republished for a purpose other than to injure the private individual.[225]

The matter of public concern requirement also will minimize opportunities for republishers to republish defamatory falsehoods directed at private individuals. A private individual rarely will become embroiled in a matter of public concern unless she injects herself into that matter.[226] When a private individual does become embroiled passively, she probably will be the center of the matter.[227] In this situation, the interests of the private individual must be subordinated to those of the general public. If the individual's interests are not subordinated, the republisher can report only a distorted version of the matter and may not be able to report the matter at all.

IV. CONCLUSION

The *Viking Penguin* court considered whether and how to protect a republisher of allegedly defamatory falsehoods. The

223. Comment, *Constitutional Privilege*, *supra* note 100, at 1283. The Court has argued that the public is capable of making similar judgments. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (public is capable of understanding that because of context in which publisher used the word "blackmail," publisher did not accuse plaintiff of committing a criminal offense).

224. Barry v. Time, Inc., 584 F. Supp. 1110, 1127 (N.D. Cal. 1984). Because the media will be interested in a matter of public concern regardless of the "public" or "private" status of the defamed individual, the defamed "private" individual should enjoy access to the media to defend herself similar to the access enjoyed by public officials and public figures. Thus, the reader will be exposed to rebuttal of the allegations.

225. Comment, *Cianci*, *supra* note 94, at 1515-17.

226. *E.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967). There are of course exceptions to this proposition. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40 (1971).

227. *See, e.g.*, *Gertz*, 418 U.S. at 345; *Rosenbloom*, 403 U.S. at 43, 48. In this situation the private individual often approaches the status of a limited purpose public figure. *E.g.*, *Curtis Publishing*, 388 U.S. at 154-55. *But see, e.g.*, Wolston v. Readers Digest Ass'n, 443 U.S. 157, 165-69 (1979); *Gertz*, 418 U.S. at 352; *Rosenbloom*, 403 U.S. at 40.

court seized the opportunity to provide republishers the first amendment protection afforded by the neutral reportage privilege. Because the falsehoods at issue arose in the context of investigative reporting, the court incorporated the robust, wide open debate theory adopted in *New York Times Co. v. Sullivan*. Previously, courts and commentators had justified the neutral reportage privilege with the theory that the privilege allowed the public to obtain information about public controversies. The *Viking Penguin* court's use of the privilege suggests a justification for the neutral reportage privilege that not only strengthens the privilege's doctrinal validity but also broadens its scope.

If courts use both the informational theory and the robust, wide open debate theory to undergird the neutral reportage privilege, the privilege applies to the reporting of any matter of public concern. To invoke the privilege, a republisher must ensure that the republished statements relate to a matter of public concern. Further, the republisher must not adopt those statements. In spite of the conditions, the neutral reportage privilege affords the republisher much needed protection to report and comment on matters of public concern.

Courts should adopt a wide ranging neutral reportage privilege. The privilege will allow matters of public concern to be both fully reported and fully debated. Such debate is indispensable if the values underlying the first amendment are to be realized.

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