NOTES

"START SPREADING THE NEWS": WHY REPUBLISHING MATERIAL FROM "DISREPUTABLE" NEWS REPORTS MUST BE CONSTITUTIONALLY PROTECTED

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While the common law of libel holds each republisher of false and defamatory statements equally as liable as the original author, many courts have followed the Second Circuit's 1977 decision in Edwards v. National Audubon Society *in recognizing a "neutral-reportage" privilege to protect the republication in neutral news media of potentially libelous statements made by reputable figures. In this Note, Keith Buell argues that the* Edwards *framework has become outdated in an age in which unsubstantiated and potentially false charges made by disreputable figures, publications, and Web sites play a significant role in the public forum. After surveying a number of recent events in which information from "disreputable" sources was widely available and influenced public debate, Buell revisits the* Edwards *test and argues for a revision of the neutral-reportage privilege that both protects the rights and reputations of defamed individuals and promotes the search for truth and the public's right to be know about the statements and beliefs that shape public policy.*

INTRODUCTION

During the House of Representatives debate over whether to impeach President Clinton, Republican leaders urged their members to read secret documents that were part of Independent Counsel Kenneth Starr's referral to Congress but had not been released to the public.[1] The material included allegations that Clinton had raped a woman, Juanita Broaddrick, many years before.[2] While such conduct,

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[1] See James Dao, Fearing Senate May Avert Trial, G.O.P. Invites Study of Evidence, N.Y. Times, Dec. 24, 1998, at A1 (describing Republican party leaders' efforts to draw attention to secret information).

[2] See id. Earlier in the year, Clinton's lawyers released an affidavit from Jane Doe No. 5 (later identified as Juanita Broaddrick) denying that the incident took place. See id. Broaddrick also denied the accusation during a deposition conducted by Paula Jones's attorneys. Broaddrick later retracted her affidavit and alleged that the assault did take place. See Amy Goldstein & Juliet Eilperin, Democrats, GOP Clash over FBI Documents: Alle-

if proven true, would be an impeachable offense,[3] the Judiciary Committee had not included the charge in its proposed Articles of Impeachment,[4] and at the time the public was largely unaware of the information because the House had not released the documents.[5] Nevertheless, the impeachment vote may well have been affected by those sealed, unproven, and uncharged allegations.[6]

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gations Against Clinton Unproved, Wash. Post, Dec. 19, 1998, at A36 (describing Broaddrick's changing story).

[3] See Frank O. Bowman III & Stephen L. Sepinuck, "High Crimes & Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment, 72 S. Cal. L. Rev. 1517, 1545 (1999) ("Criminal sexual misbehavior such as rape . . . would surely be an impeachable offense."); Cass R. Sunstein, Impeachment and Stability, 67 Geo. Wash. L. Rev. 699, 709 (1999) ("[A] President would be impeachable for an extremely heinous 'private' crime, such as murder or rape.").

[4] See H.R. Rep. No. 105-830, at 1 (1998).

[5] Vague details were available through the mainstream press. Several news organizations reported the allegation, under the pseudonym "Jane Doe No. 5," when Paula Jones's attorneys included information in a court document filed in March 1998. See Howard Kurtz, A Long-Simmering Story Explodes into the Mainstream, Wash. Post, Feb. 20, 1999, at A9 [hereinafter Kurtz, Long-Simmering Story] (noting inclusion of pseudonym in March 1998 court filing by Jones); Howard Kurtz, News Outlets Split on How to Treat New Allegation, Wash. Post, Mar. 30, 1998, at C1 [hereinafter Kurtz, News Outlets Split] ("News organizations differed not only in describing the unsubstantiated charge but on whether to name the woman in question, who has denied the assertion in a sealed deposition."). The Starr Report included vague references to the allegations in an appendix: "On the same day, Jane Doe #5 signed an affidavit in which she denied that the President made 'unwelcome sexual advances toward me in the late seventies.' (On April 8, 1998, however, Jane Doe #5 stated to OIC investigators that this affidavit was false.)" H.R. Doc. No. 105-311, at 74 (1998) (footnotes omitted) (Appendix to Referral from Independent Counsel Kenneth W. Starr).

[6] House Republican Whip Tom DeLay urged senators to review the secret evidence before striking a deal to avert a Senate impeachment trial:

> "Before people look to cut a deal with the White House or their surrogates who will seek to influence the process, it is my hope that one would spend plenty of time in the evidence room. If this were to happen, you may realize that 67 votes [two-thirds of all 100 senators] may appear out of thin air. . . . There are reams of evidence that have not been publicly aired and are only available to members."
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> According to aides, DeLay was referring to documents, including unsubstantiated allegations against the president, provided by independent counsel Kenneth Starr but not released by the House.

Juliet Eilperin, DeLay Warns Senate on Censure: GOP Whip Mentions Still-Sealed Material, Wash. Post, Dec. 24, 1998, at A1 (quoting Rep. DeLay's admonition to senators during House impeachment debates).

One Republican senator explicitly said that the evidence of the rape allegations influenced votes: "'[I]t is alleged that she is a professional woman of Arkansas who says she was forcibly—had a forcible sexual encounter with Bill Clinton . . . . I don't know whether that's true or not. . . . [A]pparently, it motivated a lot of the moderates of the House Republican caucus in their ultimate decision.'" All Things Considered (NPR radio broadcast, Dec. 24, 1998), transcript available in 1998 WL 3647693 (quoting Sen. Gordon Smith); see also Goldstein & Eilperin, supra note 173, at A36 ("Democrats yesterday accused the Republicans of trying to drum up support for impeachment on the eve of the House vote

The substance of the allegations was of the utmost public concern regardless of the truth of the accusation. Despite the possible effect on the Senate vote, NBC News was reluctant to broadcast an interview with Broaddrick out of concern that the charges could not be substantiated.[7] What made this story different from many other unreported stories was that millions of people already knew the woman's name and the general nature of the allegations.[8] On January 26, 1999, rumormonger Matt Drudge had publicized information about the Broaddrick interview on his infamous website.[9] Yet for almost a month, NBC did not broadcast the interview; meanwhile speculation about Broaddrick's accusations flooded the *Washington Post*,[10] the *Washington Times*,[11] the *Wall Street Journal*,[12] and CNN.[13] NBC finally aired the interview on February 24.[14]

It is still unknown whether the accusations were true. But if they were not, they were certainly libelous.[15] This story is of continuing

based on unproven and 'misleading' information."); Kurtz, Long-Simmering Story, supra note 5, at A9 ("[N]ews organizations [struggled] to deal with a delicate, long-ago allegation that could have affected the president's impeachment trial had it been carried in the mainstream press.").

7 See Kurtz, Long-Simmering Story, supra note 5, at A9 ("NBC News [has] yet to run the story, maintaining that the network lacks sufficient corroboration of the woman's allegations.").

8 See id. ("What made this period extraordinary was that millions of people knew, largely through the Internet, the general outlines of Broaddrick's allegation.").

9 See Matt Drudge, Drudge Report (visited Jan. 28, 1999) <http://www.drudgereport.com/matt.htm>.

10 See Lois Romano & Peter Baker, "Jane Doe No. 5" Goes Public with Allegation, Wash. Post, Feb. 20, 1999, at A1.

11 See Bill Sammon & Frank Murray, The Clinton Story That's Too Hot to Handle, Wash. Times, Feb. 4, 1999, at A1.

12 See Dorothy Rabinowitz, Juanita Broaddrick Meets the Press, Wall St. J., Feb. 19, 1999, at A18.

13 CNN devoted most of an episode of "Reliable Sources," a talk show about the media, to whether NBC should broadcast the interview—before the interview was even broadcast! The CNN broadcast contained most of the unverified details that made NBC reluctant to broadcast the interview. See Reliable Sources (CNN television broadcast, Jan. 30, 1999), transcript available at <http://www.cnn.com/TRANSCRIPTS/9901/30/rs.00.html>.

14 See Dateline (NBC television broadcast, Feb. 24, 1999), transcript available in Lexis, News Library, Transcripts file.

15 Both libel and slander are encompassed by the broad term "defamation," which has been defined as communications that "tend[ ] . . . to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). Libel is written defamation, and slander is oral defamation. See id. § 568(1)-(2) (noting that "[l]ibel consists of the publication of defamatory matter by written or printed words" and that "[s]lander consists of the publication of defamatory matter by spoken words"). While there is generally little legal difference between the two, courts have generally chosen to refer to defamatory television and radio broadcasts as libelous rather than slanderous. See Robert D. Sack & Sandra S. Baron, Libel, Slander, and Related Problems 67-69 (2d ed. 1994 & Supp. 1998).

concern because libel law creates potential liability for any news source that repeated Drudge's allegations. The common law of libel holds each republisher[16] of a statement equally as liable as the original publisher.[17] In this case, there was a strong possibility that the material was unprotected libel, even under the high actual malice standard[18] applied when the defamed person is a "public figure."[19]

The absolute liability for republication of libel has been tempered in some jurisdictions by the neutral-reportage privilege,[20] first advanced by the Second Circuit in *Edwards v. National Audubon Society*.[21] This multi-factored test protects "the accurate and disinterested reporting" of libelous accusations against public figures by "responsible, prominent organization[s]" because "[w]hat is newsworthy about such accusations is that they were made."[22] The *Edwards* privilege allows the media to publish a story when reputable public figures engaged in a public debate make accusations about one another.[23]

Edwards says nothing about what happens when libelous charges made by irresponsible or obscure organizations are republished, and the court's silence implies that such statements would not be constitu-

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16 Republication is the publishing of a news story that uses another media report as its source rather than interviews or first-hand knowledge of the reporter. See generally William H. Painter, Republication Problems in the Law of Defamation, 47 Va. L. Rev. 1131 (1961) (examining republication law before libel law was constitutionalized in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). The courts look to the substantive truth behind the statement, not its literal truth. See Sack & Baron, supra note 15, at 188 (noting that statements that are "literally true may be actionable if they imply false and defamatory statements of fact"). For example, if publication A reports "Jones murdered Smith" and publication B reports "Publication A reported that Jones murdered Smith," B is liable for libel even though the statement is literally true—that A reported the allegation against Jones. One commentator has argued that republication should not even be considered defamatory because it is literally true. See infra note 162.

17 See infra note 55 and accompanying text.

18 Actual malice requires knowledge of falsity or reckless disregard for the truth. See infra notes 57-59 and accompanying text. Because of Broaddrick's earlier denials under oath, see Goldstein & Eilperin, supra note 173; Kurtz, News Outlets Split, supra note 5, publishing (and republishing) the information is likely to amount to "reckless disregard."

19 See infra notes 71-73 and accompanying text.

20 Courts have also created other exceptions to republisher liability in situations that are not directly relevant here. See generally Bruce W. Sanford, Libel and Privacy ch. 10 (Supp. 1999) (describing fair-report privilege, absolute privilege for government officials, and qualified privilege to comment on absolutely privileged information).

21 556 F.2d 113 (2d Cir. 1977), cert. denied, 434 U.S. 1002 (1977). The Supreme Court has never directly addressed the issue. See infra note 79.

22 *Edwards*, 556 F.2d at 120.

23 "We do not know how authors can ever write about controversies without reporting accusations and counter-accusations." Price v. Viking Penguin, Inc., 881 F.2d 1426, 1444 (8th Cir. 1989). The *Price* court adopted the *Edwards* neutral-reportage privilege, finding the good faith belief of the reporter in the accurate presentation of allegations a significant factor in avoiding a pronouncement of malice or reckless disregard. See id. at 1433-34.

tionally privileged.[24] In the Broaddrick story, an *Edwards* analysis indicates that republication of NBC's interview would be privileged because NBC is generally reliable,[25] but republication of information from Drudge's website would not be protected because he is not considered reputable.[26] While this distinction may have made sense in a bygone era when the damage to reputation caused by disreputable media outlets was limited by their inability to reach a large audience, the advent of the Internet, political talk radio, and cable television has broadened the reach of disreputable and unreliable speakers. The importance of a story and its impact on public affairs are no longer defined by the reliability of the source but rather by the size of the audience.[27]

The type of reporting done by CNN, the *Washington Post*, the *New York Times*, and others—publishing a story about a publication elsewhere—has become commonplace in recent years, and these stories are often important regardless of their truth,[28] even though what initially seemed libelous often turns out to be mostly, if not entirely, true.[29] While responsible media organizations usually provide the de-

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[24] See Note, The Developing Privilege of Neutral Reportage, 69 Va. L. Rev. 853, 862 n.48 (1983) ("[*Edwards*] leaves the contours of the privilege in doubt, since it is unclear whether [the] qualifications—for example, that a 'responsible, prominent organization . . . makes serious charges against a public figure'—rise to the level of a doctrinal test or merely describe the factual setting of this case."); see also Leslie C. Levin, Comment, Constitutional Privilege to Republish Defamation, 77 Colum. L. Rev. 1266, 1275-76 (1977) (arguing that *Edwards* factors are doctrinal test).

[25] The line between reputable and disreputable, or accurate and inaccurate, media sources has faded in recent years. See infra notes 110, 147.

[26] See infra notes 115-17 and accompanying text.

[27] But see Cianci v. New Times Publ'g Co., 639 F.2d 54, 68-70 (2d Cir. 1980) (limiting privilege established in *Edwards* because "all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past, and made by persons known to be of scant reliability"); Justin H. Wertman, Note, The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern, 65 Fordham L. Rev. 789, 789 (1996) ("The requirement that the charges be made by a prominent and responsible speaker increases the likelihood that the accusations are true and, if false, at least limits the privilege to speech that the public has a strong interest in hearing.").

[28] The authors of a leading libel treatise have recognized the importance of reporting on rumors:

> [T]here are surely rumors the reporting of which not only deserves, but demands, protection. A rumor may be as much a concrete fact as an earthquake. It may be false and known to be false, but its consequences, actual or possible, may require the media and others to repeat it.

Sack & Baron, supra note 15, at 409.

[29] Truth is generally a complete defense to libel. See Time, Inc. v. Hill, 385 U.S. 374, 383, 387-88 (1967) (holding that truthful publication concerning "matters of public interest" is absolutely protected); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."); Restatement (Second) of Torts § 581A (1977). An opinion by Justice White left

tails and ferret out the facts from the rumors and innuendo that the public hears from questionable sources,[30] the first reports often emerge from tabloids,[31] obscure publications,[32] and rumor-mill websites.[33] The mainstream media quickly republish these stories, and the first mainstream reports often do not contain original reporting but

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open the possibility that truth may not be a constitutionally mandated defense in suits involving private plaintiffs and issues not of public concern. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 490 (1975) ("The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person . . . ."). Later cases have cast doubt on this possibility. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (holding that state law cannot provide legal remedies that punish publication of truth).

In actions concerning matters of public concern, "the common law's rule on falsity—that the defendant must bear the burden of proving truth—must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

For example, Matt Drudge accurately reported most of the details about the affair between President Clinton and Monica Lewinsky—even the infamous dress detail—before mainstream media sources reported them. See Today (NBC television broadcast, Jan. 22, 1998), transcript available in 1998 WL 5261041 (interview with Drudge mentioning semen-stained dress). Substantial truth is a defense to libel even when there are minor inaccuracies. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" (quoting Heuer v. Kee, 59 P.2d 1063, 1064 (Cal. 1936))).

Washington Post media reporter Howard Kurtz chastised Drudge and ABC for reporting the rumor because, at the time he was writing a book about the White House press corps, Kurtz did not believe that the dress existed. See Howard Kurtz, Spin Cycle 308 (1998). Though the dress became the final straw that forced Clinton to admit the relationship, see Susan Schmidt & Peter Baker, Lewinsky, Clinton Testimony in Conflict, Wash. Post, Aug. 20, 1998, at A1 ("Clinton [admitted to having a sexual relationship with Lewinsky] only after Starr requested the release of a DNA sample to compare with an apparent semen stain left on a blue dress Lewinsky turned over to prosecutors . . . ."), Drudge is nevertheless considered to be less reliable even though he admits his frequent errors, see infra notes 115-17 and accompanying text.

30 "Many of the filters that once kept such news from the American public are easy to bypass. It is now conventional wisdom that the Internet, talk radio and late-night comics provide a conduit through which half-baked news, gossip and innuendo flow to the public." Felicity Barringer, Dividing News from Sleaze in the Age of Flynt, N.Y. Times, Jan. 17, 1999, § 4 (Week in Review), at 3.

31 The Gennifer Flowers story first was reported widely by the supermarket tabloid the *Star*. See infra note 126 and accompanying text.

32 Iran-Contra first was reported in a small Lebanese magazine, *Al Shiraa*. See George J. Church, The U.S. and Iran: The Story Behind Reagan's Dealings with the Mullahs, Time, Nov. 17, 1986, at 12, 23 ("*Al Shiraa* had introduced all the main elements of the story: the secret meetings between U.S. and Iranian officials, the arms transfers and the negotiations about the hostages in Lebanon.").

33 The first accounts of President Clinton's relationship with Monica Lewinsky were reported on Matt Drudge's website. Drudge maintains an archive of the original report. See Matt Drudge, Drudge Report (visited Apr. 10, 2000) <http://www.drudgereport.com/ml.htm>.

merely parrot the accusations of the original story.[34] Despite the frequency of this practice, libel law makes each republisher, along with the original speaker, liable for the false speech even when the republisher indicates that he does not believe the charges to be true.[35]

In some circumstances, republishing potentially libelous information from disreputable sources can serve several important purposes. When the issue is of public concern,[36] and the newsmakers involved are acting based on information mostly unknown to the public but nevertheless circulating among a wide audience, the public should know what information is shaping current events,[37] regardless of whether the information is true or false. Furthermore, the republication of news stories that are possibly false (or known to be false) leads to further reporting and provides an opportunity for the eventual re-

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[34] One survey concluded that 20% of news reports in the initial Clinton-Lewinsky feeding frenzy were just republications of reports from other sources. See Felicity Barringer, Study Finds More Views Than Facts, N.Y. Times, Feb. 19, 1998, at A14 (discussing survey by Committee of Concerned Journalists (CCJ) and reporting Committee's finding that about one-fifth of news reports were unconfirmed by reporting news source and were in fact borrowed by that source from another news outlet); see also Committee of Concerned Journalists, The Clinton Crisis and the Press (visited Apr. 10, 2000) <http://www.journalism.org/clintonreport.html>. The study also found that 40% of the stories were analysis, opinion, and speculation, rather than factual reporting, and that anonymous sources were the basis for one-third of the stories. See Barringer, supra; Committee of Concerned Journalists, supra.

[35] See Restatement (Second) of Torts § 578 cmt. e (1977):

> *Disbelief.* The rule stated in this section is applicable to make the republisher of either a libel or a slander subject to liability even though he expressly states that he does not believe the statement that he repeats to be true. The fact that he expresses belief or disbelief may, however, be taken into account in determining the damages for the harm to the reputation of the person defamed for which the repeater will be liable.

[36] The Supreme Court has had difficulty defining "public concern" in other areas of libel law. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), a plurality of the Court extended constitutional protection to "all discussion and communication involving matters of public or general concern." Id. at 44. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court expanded the scope of public concern and approved Justice Marshall's dissent in *Rosenbloom*, which stated that "all human events" are of public interest and that courts are not competent to judge "what information is relevant to self-government." See *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). The precise definition is of less significance in the context of neutral reportage because, under the test proposed in Part II of this Note, the protection is only applicable when the original false accusation has already reached a large audience, in which case public concern is essentially a given. But see Wertman, supra note 27, at 820-23 (arguing that neutral reportage should protect only stories of public concern, but not all newsworthy stories).

[37] See Marc A. Franklin, Libel and Letters to the Editor: Toward an Open Forum, 57 U. Colo. L. Rev. 651, 668 n.101 (1986) ("Although the identity of the source may be relevant to the question of harm . . . it is not relevant in deciding whether the governing public should learn of charges being made about how our servants are performing.").

buttal of the original false publication.[38] In most libel cases the reputational interest of the plaintiff in silencing defamatory false accusations clashes with the defendant's interest in disseminating information. Both of the primary interests that are balanced in the constitutional law of libel[39]—reputation[40] and the public's interest in the truth[41]—are satisfied in these cases when the media republish news reports, even when the original accusations are of dubious reliability.[42] Such reporting usually leads to the ultimate finding of what actually happened, and this determination protects reputation; when the original report was false, the defamed individual is cleared of sus-

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38 Justice Brennan wrote about the importance of speculation in matters of public concern:

> Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 34-35 (1990) (Brennan, J., dissenting).

39 "[T]he First Amendment . . . require[s] that state remedies for defamatory falsehood reach no further than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Gertz*, 418 U.S. at 349.

40 See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 515 (1991) ("[T]he tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false."); *Milkovich*, 497 U.S. at 11 ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); Laurence H. Tribe, American Constitutional Law § 12-12, at 861 (2d ed. 1988) ("Although its impact is felt on reputation rather than on bodily integrity, libelous speech was long regarded as a form of personal assault, and it was accordingly assumed that government could vindicate the individual's right to enjoyment of his good name . . . without running afoul of the Constitution."); see also Steve Brill, Behind CNN's Nerve-Gas Apology, Brill's Content Online, Sept. 1998, available at <http://www.brillscontent.com/partner/cnn1.html> ("'The purpose of libel law is to restore improperly lost reputation. Libel law does not exist for the purpose of improving journalism any more than it exists for the purpose of assuring a truthful speech as a general proposition in our society.'" (quoting CNN counsel Floyd Abrams)).

41 See infra notes 45-48 and accompanying text.

42 That is not to say, however, that such reports are always good journalism or that they benefit society; the media must still exercise independent judgment about the importance of the allegation. See William P. Marshall & Susan Gilles, The Supreme Court, The First Amendment, and Bad Journalism, 1994 Sup. Ct. Rev. 169, 178-81 (arguing that Supreme Court's First Amendment cases have encouraged "superficial journalism"). Repeating a false allegation when there is no basis for believing that additional publicity will lead to the determination of the truth or bring to light other relevant information is no better than knowingly publishing false information in the first place.

"'Libel law provides some incremental help in dealing with corrupt journalism, it doesn't deal with bad journalism. It deals with deliberately false journalism . . . . [W]e can't look to libel law as our salvation against most bad journalism and we shouldn't want to . . . .'" Brill, supra note 40 (quoting Floyd Abrams).

picion. When the original report turns out to be true, libel law does not allow any recovery of damages.[43]

Part I of this Note traces the origins of the pursuit-of-truth theory of the First Amendment and then explores the incorporation of that doctrine into the constitutional law of libel. Part I concludes with the development of the neutral-reportage privilege, including its treatment by various courts. Part II begins with an exposition of modern media behavior and the inaccurate assumption that the neutral-reportage privilege provides complete protection for republication. Part II then offers a solution to the clashing of old law and new media practice: It redefines the neutral-reportage privilege in a way that protects the republication of important news reports from disreputable sources while at the same time seeking to protect both the defamed individual's reputation and society's interest in determining the truth.

I
ORIGINS AND JUSTIFICATIONS FOR THE NEUTRAL-REPORTAGE PRIVILEGE

A. Pursuit of Truth and the First Amendment

There are two primary theoretical justifications underlying free-speech jurisprudence: a liberty interest[44] and a political interest in truth and self-governance.[45] While in some cases, speech is protected

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[43] See supra note 29.

[44] See generally C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 990-96 (1978) (arguing that constitutional protection of free speech is justified because of its liberty values); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 61-62 (1974) ("Consider, for example, the liberties of thought and expression, in speech, the press, religion or association. . . . The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person's full and untrammelled [sic] exercise of capacities central to human rationality."). Critics of this approach have argued that speech is no different from other "expressive" activity that the government is free to regulate. See Frederick Schauer, Free Speech: A Philosophical Enquiry 15, 47-72 (1982) (noting that argument that free speech is valuable because it leads to truth is "the predominant and most persevering" of all arguments used to justify free speech principle); see also Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.").

[45] See Tribe, supra note 40, § 12-1, at 785 (noting bifurcation between rationales and difficulty in formulating coherent justification for free speech); Alexander Meiklejohn, Political Freedom 27 (1960) (arguing for importance of free speech in promoting self-governance); see also Rodney A. Smolla, Law of Defamation § 1.07 (1998) (chronicling development of free speech law and importance of self-government).

Some critics have distinguished between pursuit of truth and self-governance. See Thomas I. Emerson, The System of Freedom of Expression 6-7 (1970) (splitting justifications for free speech into four types with separate categories for truth and self-govern-

for both reasons,[46] the Supreme Court has relied primarily on the political justification rather than the personal liberty approach in the field of libel law.[47]

Since 1964, the Supreme Court has justified protecting false statements of fact on the notion that even false factual assertions can lead to the determination of truth.[48] The search for truth, or "marketplace of ideas" theory of free speech, relies on the assumption that the answer to erroneous speech is more speech. Although the theory originated with John Milton,[49] John Stuart Mill created the modern exposition of that approach in his essay *On Liberty*, where he argued that truth is best determined by open debate through the collision of "adverse opinions."[50] Mill's theory, however, is based on "truth" gen-

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ance). For present purposes, and because the Supreme Court has conflated the two in *Sullivan*, these slightly different rationales will be treated as one. See infra notes 48-54 and accompanying text.

46 Several cases have made the point that both rationales are important. Justice Harlan stated:

> The constitutional right of free expression . . . [puts] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971) (holding that wearing jacket embossed with words "Fuck the Draft" in courthouse is protected speech).

Justice Brandeis expressed similar views:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties.... They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.... [The] freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

47 New York Times Co. v. Sullivan, 376 U.S. 254 (1974), relied on the self-governance model: "The [First Amendment], we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 376 U.S. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985) (showing support for self-governance model by limiting some constitutional protections to matters of "public concern"). But see Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

48 See infra notes 62-63 and accompanying text.

49 See John Milton, Areopagitica 35 (Payson & Clarke, Ltd. 1927) (1644) ("And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter.").

50 Mill articulated four reasons for the "freedom of expression of opinion": (1) any opinion that is silenced may actually be the truth; (2) even incorrect statements often contain "a portion of truth," and the "whole truth" is determined by the "collision of adverse opinions"; (3) unless the truth is determined by open debate, people will be skeptical of its

erally, including both factual truth and political opinion, whereas current libel law is concerned only with statements of fact and not those of opinion.[51]

Modern commentators have applied Mill's theory and see the purpose of free speech as aiding the search for a limited type of truth—political truth—for the end of creating an informed electorate, thereby strengthening self-governance. The determination of political truth is based on facts, and to determine political truth, speakers must be free to make factual assertions on which their political views are based. Alexander Meiklejohn argued that the First Amendment was protective only of speech relevant to self-government,[52] and this view influenced a wide range of scholars and judges including William Brennan[53] and Robert Bork.[54] While this view is underinclusive and often fails to protect artistic expression and other forms of speech that would be protected under the liberty theory, the rationale of pursuit of truth to create an informed populace is the primary support for constitutional limitations on libel law and is sufficient to justify protecting false statements of fact when doing so helps lead to the determination of truth.

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rational basis; and (4) truth will no longer be anything more than dogma, and human experience will no longer be reflected in people's minds. John Stuart Mill, On Liberty 60-61 (Prometheus Books 1986) (1859).

51 The Supreme Court has said that "[t]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). The distinction between fact and opinion, however, is far from clear. Opinion is not protected when it is based on underlying factual assumptions that are untrue. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (differentiating between pure opinions and opinions that "imply a false assertion of fact").

52 The purpose of the freedom of speech "is to give every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal. . . . [The] principle of the freedom of speech springs from the necessities of the program of self-government." Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 27 (1948). Meiklejohn later expanded his theory to recognize that other areas of human experience, like education, the arts and sciences, and "[p]ublic discussions of public issues," all contribute to the development of "sane and objective judgment" among voters. Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 256-57.

53 See William Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 14-18 (1965) (exploring Meiklejohn's influence on Supreme Court decisions, including *New York Times Co. v. Sullivan*).

54 See Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 29 (1971) (arguing that only political speech is protected by First Amendment and that "constitutionally, art and pornography are on a par with industry and smoke pollution").

B. Development of Libel Law

The common law of libel holds that one who repeats a libelous statement is liable as though he published it himself and was not merely quoting another.[55] This section explores how the Supreme Court has constitutionalized various aspects of libel law; this section also investigates how the courts have retreated somewhat from the previous equivalent liability for publishers and republishers.

1. New York Times Co. v. Sullivan

The Supreme Court revolutionized the common law of libel when it held in *New York Times Co. v. Sullivan*[56] that the Constitution protects incorrect statements of fact made about a public figure if the speaker does not act with "actual malice."[57] After *Sullivan*, courts no longer consider the injurious intent of the speaker; an attack article is

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[55] See Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir. 1988) ("The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own and is liable in equal measure to the original defamer."); Morse v. Times-Republican Printing Co., 100 N.W. 867, 871 (Iowa 1904) ("Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him."); Restatement (Second) of Torts § 578 (1977); id. § 578 cmt. b (restating common law view that republisher's liability is equivalent to that of original publisher); Clement Gatley, Law and Practice of Libel and Slander 111 (2d ed. 1929) (stating common law view that republishers are equally liable as original publisher for libelous statements); Sack & Baron, supra note 15, at 361 (noting that republishers are equally liable). Even expressing disbelief is insufficient to avoid liability. See, e.g., Wheeler v. Shields, 3 Ill. (2 Scam.) 348, 351 (1840) (holding that defendant's explanation that he was merely repeating reports of others at time of making defamatory accusation does not constitute defense to slander charge); Nicholson v. Merritt, 59 S.W. 25, 26 (Ky. 1900) ("No character or reputation would be safe, if a mere statement of a personal disbelief of a rumour which the speaker was engaged in circulating could be made to defeat the right of recovery for the slander."); Burt v. McBain, 29 Mich. 260, 266-67 (1874) (finding disbelief of veracity of repeated falsehood is insufficient to avoid liability); Hampton v. Wilson, 15 N.C. (4 Dev.) 468, 468, 470 (1834) (same).

This restriction makes sense when narrowly construed to cases involving suits against the media that contain libelous assertions made to a reporter in a private interview. Almost all libel begins with an accusation by one person against another. The media rarely create a story without any sources or from sources that the reporter knows to be untruthful. The knowing creation of a false story is libel in its purest form. Justice Brennan wrote that a deliberate lie, even one used for political advantage, does not enjoy constitutional protection. "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth . . . .' [T]he knowingly false statement and the false statement made with reckless disregard of the truth[ ] do not enjoy constitutional protection." Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Repeating the calculated falsehood, however, provides insight into the speaker's character, which can sometimes be sufficient to justify protecting the republication. See infra note 155.

[56] 376 U.S. 254 (1964). For a fascinating history of the case (and libel law in general), see Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991).

[57] *Sullivan*, 376 U.S. at 280.

protected speech despite its falsity if the author does not act with actual malice.[58] The Supreme Court accepted the argument that, at least with regard to public officials, the speaker is not liable unless the false, defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[59] The Court accepted Mill and Meiklejohn's pursuit-of-truth theory, asserting that the First Amendment "was fashioned to assure unfettered interchange of ideas,"[60] and the Court recognized "the power of reason as applied through public discussion."[61] The Court cited Mill for the proposition that erroneous statements are inevitable in public debate[62] and that even false statements help to determine truth.[63]

In practice, the determination of "reckless disregard" has proven extremely problematic. The Supreme Court has attempted to define reckless disregard on several occasions. In *Garrison v. Louisiana*,[64] the Court held that recklessness was present when the publication was made with a "high degree of awareness of . . . probable falsity."[65] In *St. Amant v. Thompson*,[66] the Court held that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[67]

It is arguable that this definition of "reckless disregard" leads to the surprising result that a publication can evade liability by declining to research allegations, thereby avoiding serious doubts. "Failure to investigate does not in itself establish bad faith."[68] But failure to investigate before publishing may constitute actual malice "where there

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[58] See Greenbelt Publ'g Ass'n v. Bresler, 398 U.S. 6, 10 (1970) (affirming constitutional protection of false statements exclusive of "knowing or reckless falsehood[s]," regardless of hostile intent of speaker).

[59] *Sullivan*, 376 U.S. at 280.

[60] Id. at 269 (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

[61] Id. at 270 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[62] "'[I]t is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.'" Id. at 272 n.13 (quoting John Stuart Mill, On Liberty 47 (Oxford: Blackwell, 1947) (1859)).

[63] See id. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the 'clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting Mill, supra note 62, at 15)).

[64] 379 U.S. 64 (1964).

[65] Id. at 74.

[66] 390 U.S. 727 (1968).

[67] Id. at 731.

[68] Id. at 733 (citing *Sullivan,* 376 U.S. at 287-88).

are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[69] The difficulty in defining and applying "reckless disregard" leads to problems in the context of neutral reportage because neutral reportage involves reporting information known to be false (or at least suspected to be false). It is unclear how much doubt a republisher must have about the reliability of the original source to incur liability, especially when the source has an inconsistent track record.

2. Gertz v. Robert Welch, Inc.

The decision in *Gertz v. Robert Welch, Inc.*[70] significantly affected the determination of libel standards for private-figure plaintiffs (as opposed to public officials and public figures), and the case also cast doubt on whether there is any value in false statements of fact.[71] The Court's justification that private figures have a lower threshold in libel suits was largely a practical one because "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[72] The Court overlooked that in some circumstances, when the public has strong interest in a story, private figures also will have access to the media to rebut false accusations.[73]

Courts that have declined to apply the neutral-reportage privilege have cited *Gertz* for the proposition that because "there is no constitutional value in false statements of fact," there is no protection for publishing something one knows to be false.[74] That argument overlooks both the fundamental teaching of *Sullivan*, that breathing room is necessary because falsity cannot always be determined before publi-

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69 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

70 418 U.S. 323 (1974).

71 See id. at 342-46.

72 Id. at 344. "Of course, an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Id. at 344 n.9.

73 While the Court may be correct in some circumstances, it is not always the case. For example, one individual who sued for defamation also went on *60 Minutes* and corrected the accusations against him on national television, thereby receiving a larger audience than had received the original false accusations. See Khawar v. Globe Int'l, Inc., 965 P.2d 696, 707 (Cal. 1998); Khawar v. The Globe, 60 Minutes (CBS television broadcast, Sept. 6, 1998), transcript available in Lexis, News Library, Transcripts file. This case is discussed more fully at infra note 111.

74 *Gertz*, 418 U.S. at 323. See infra notes 103-06 and accompanying text for a discussion of cases relying on this ground.

cation,[75] as well as other constitutional privileges that permit the republication of false information.[76] The fair-report privilege, for example, protects a balanced report of the official actions of government.[77] Therefore, *Gertz* cannot be read to mean that there is never value in the knowing repetition of a false statement.

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[75] See generally Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light That Failed, 64 N.Y.U. L. Rev. 364, 406-21 (1989) (arguing that truth cannot always objectively be determined, and even if it could, truth should not be determined by government).

[76] An early analogue to the neutral-reportage privilege is the wire-service defense, which originated in Layne v. Tribune Co., 146 So. 234 (Fla. 1933), but has not been adopted universally. The Florida Supreme Court held in *Layne* that the publisher of the *Tampa Morning Tribune* was not liable for publishing defamatory reports from wire services:

> The mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news . . . cannot through publication alone be deemed per se to amount to an actual libel by indorsement, in the absence of some showing . . . that the publisher must have acted in a negligent, reckless, or careless manner in reproducing it to another's injury.

Id. at 238. But see Gay v. Williams, 486 F. Supp. 12, 16 (D. Alaska 1979) (refusing to adopt wire-service privilege).

While the *Sullivan* decision did not directly address the wire-defense issue, the adoption of the "actual malice" standard precluded public officials from prevailing against a media report based on wire-service dispatches because in all likelihood the publisher would not know the material to be false or be reckless in disregarding its truth. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (applying actual malice standard to deny liability in lawsuit based on alleged defamation in report based on wire-service accounts).

One commentator has argued that the wire-service defense should be extended beyond wire services to the republication of information from a few distinguished media sources. See James E. Boasberg, With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage, 13 Hastings Comm. & Ent. L.J. 455, 464 (1991). While some sources are generally more reputable than others, no media outlet is infallible. See infra note 147. Furthermore, a media organization subscribes to a wire service for the primary purpose of publishing material verbatim, while a conscious editorial decision is made when republishing a story from a source other than a wire service. While it is a common media practice to rewrite stories from other sources, there is a subtle distinction between when a republication is merely a rewrite and when it is a story about the story that fits in under the neutral-reportage principle. Mere repetition is not the prototypical example envisioned by the court in *Edwards*.

[77] See Restatement (Second) of Torts § 611 cmt. b (1977) (noting that "[i]f the report of a public official proceeding is accurate or a fair abridgment, an action" cannot constitutionally be maintained for defamation); see also supra note 20 (listing other privileges allowing for publication of false information without libel liability).

Such a privilege is crucial to all aspects of reporting on libel. Without that privilege, the media could not report on the proceedings in a libel lawsuit, and scholarly research in the field would be constrained because inherent in the study of libel cases is the republication of the original accusations. The neutral-report privilege is equally necessary for a scholar to comment on libel cases that do not go to trial. Indeed without that protection, a scholar would not be allowed to repeat stories such as Falwell's murder accusations against Clinton, see infra note 155, or the stories about Clinton's alleged illegitimate child, see infra note 115. Without the neutral-reportage privilege and the fair-report privilege, libelous utterances would be relegated to the trashcan of history, never again to be mentioned.

C. Edwards v. National Audubon Society

The neutral-reportage privilege was first recognized in 1977 by the Second Circuit in *Edwards v. National Audubon Society*.[78] The Supreme Court denied certiorari and has never addressed neutral reportage on the merits.[79] The opinion is quite short, and the explanation for the establishment of the privilege is even more concise—well under a page.[80] Nevertheless, the court recognized the "fundamental principle" that the media enjoy constitutional protection when they report on a public debate that includes false accusations by a "responsible, prominent organization" because "[w]hat is newsworthy about such accusations is that they were made."[81]

In *Edwards*, the *New York Times* had repeated allegations contained in a publication by the National Audubon Society, *American Birds*, which claimed that scientists were paid to lie by the chemical industry when they claimed that the pesticide DDT was not harmful to bird eggs. The *Times* published an article including both the society's accusations and a response from the scientists.[82]

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[78] 556 F.2d 113 (2d Cir. 1977).

[79] The Supreme Court explicitly declined to address the issue in another case because the petitioner did not argue for the privilege in its petition or its brief. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 660 n.1 (1989).

However, Justice Blackmun expressed his support for *Edwards* in his concurrence: "[P]etitioner has eschewed any reliance on the 'neutral reportage' defense.... This strategic decision appears to have been unwise in light of the facts of this case.... Were this Court to adopt the neutral reportage theory, the facts of this case arguably might fit within it." Id. at 694-95 (Blackmun, J., concurring).

The Supreme Court's only other reference to the neutral-reportage doctrine was an oblique reference in a dissent by Justice Brennan. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 36 (1990) (Brennan, J., dissenting) ("Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate.").

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

[81] Id.

[82] The case arose out of a public controversy over use of the pesticide DDT, which the Audubon Society and other environmental groups felt was harmful to birds. The Audubon Society was dismayed at the tactics used by DDT supporters. The editor of the Society's publication, *American Birds*, published a comment claiming that pro-DDT scientists were being paid by the pesticide industry to voice their opinions: "'Any time you hear a scientist say [that bird populations are not decreasing], you are in the presence of someone who is being paid to lie....'" Id. at 117 (quoting Robert S. Arbib, Jr., Foreword, 12 Am. Birds 135, 135 (1972)).

New York Times nature reporter John Devlin learned about the controversy and wrote a story describing the debate. Although the *American Birds* article did not name the scientists who were allegedly paid liars, Devlin learned the names of five "suspects" from the editor of *American Birds*. Devlin was able to reach three of the five for comment, and all three vigorously denied the charges. Devlin wrote an article for the August 14, 1972, *Times* that included the details of the *American Birds* article, the names of the five supposed paid liars, and the categorical denials. (The case does not present clean facts for the

The Second Circuit held that the *Times* was protected by the neutral-reportage doctrine, which the court based on a 1971 Supreme Court decision holding that the failure of a report to include the word "alleged"did not constitute actual malice.[83] The Second Circuit did not explicitly formulate a test for neutral reportage, but rather it described factors relevant to the court's consideration: 1) the accuracy of the report (i.e., the accuracy of the analysis or quotation of the original report and not the accuracy of the underlying facts); 2) the neutrality of the report; 3) the attribution of the source; 4) the responsibility of the source; 5) the public nature of the original report; 6) whether the source of the statement is a public figure; 7) whether the target of the statement is a public figure; and 8) whether the report concerns a public controversy or is newsworthy.[84]

Courts are divided in their acceptance of *Edwards*.[85] The following discussion is not intended to be exhaustive but rather to indicate the reasons various courts have given for accepting or rejecting *Edwards*. Some courts have decided that the factors outlined in *Edwards* do not go far enough toward protecting the press when it reports accusations made by others. An Illinois appellate court issued one of the most expansive readings of the neutral-reportage privilege when it upheld the publication of accusations by an assistant state attorney regarding the management of a drug program, requiring only that the quotations be accurate and the accusations be newsworthy.[86]

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neutral-reportage privilege because the *Times* reporter relied on names obtained from the Audubon Society in a private interview that were not in the original publication. One can debate the merits of protecting such private assertions, but they are outside the scope of this inquiry.) The scientists sued the Audubon Society and the *Times*, and later added two Society officials to the litigation. See id. at 119.

[83] See Time, Inc. v. Pape, 401 U.S. 279, 289 (1971) ("[W]e cannot agree that [failure to refer to an accusation as "alleged" is] a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.'"). The case was based on media reports about police brutality in Chicago. The *Time* magazine report was based on a police commission report and *Time* misattributed the source of the allegations. The Supreme Court held that the report, even with errors, was privileged. "[A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody Said rather than of what anybody Did. . . . The question of the truth of such an indirect newspaper report presents rather complicated problems." Id. at 285-86. A case in which the media publishes the false remarks of a third party, rather than making the false statements itself, "differs . . . from a conventional libel case." Id. at 285.

[84] See *Edwards,* 556 F.2d at 120 (outlining issues that are relevant but not explicitly formulating test); Boasberg, supra note 76, at 469 (listing factors).

[85] See Scott E. Saef, Comment, Neutral Reportage: The Case for a Statutory Privilege, 86 Nw. U. L. Rev. 417, 436-52 (1992) (noting varied approaches to neutral reportage by various courts and proposing statutory alternative).

[86] Krauss v. Champaign News Gazette, 375 N.E.2d 1362, 1363 (Ill. App. Ct. 1978) ("If the journalist believes, reasonably and in good faith, that his story accurately conveys information asserted about a personality or a program, and such assertion is made under

That interpretation seemingly eliminates all factors of the *Edwards* test except for the accuracy of the quotation and attribution, thereby opening the door for private, investigative reporting to make any accusation so long as a source's information is conveyed accurately.[87]

The Northern District of California issued a similarly broad decision in a case that concerned statements made by a basketball player about his coach in a interview for *Sports Illustrated*.[88] The court stressed the "public's 'right to know' that serious charges have been made against a public figure"[89] when the "defamatory statement is made by a party to that controversy."[90] But the court did not insist that the original source be reliable or that the statement be made in public or to a wide audience.[91]

The broadest interpretation of neutral reportage was made by the United States District Court for the District of Columbia in *In re United Press International*.[92] In that case, the court did away with the requirement that the source be "responsible" or "prominent" because it was "inconsistent with the raison d'etre of the doctrine."[93] The court required only that the charges be part of an existing dispute, allowing any charges made by any source against a public figure so

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circumstances wherein the mere assertion is, in fact, newsworthy, then he need inquire no further."). Similarly, an Ohio appellate court said it perceived "no legitimate difference between the accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest." April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio Ct. App. 1988). But the Ohio Supreme Court has specifically declined to recognize the neutral-reportage privilege in any form. See Young v. Morning Journal, 669 N.E.2d 1136, 1138 (Ohio 1996) ("This court has never recognized the 'neutral reportage' doctrine and we decline to do so at this time.").

87 The Illinois courts have since retreated from this broad view of neutral reportage. See Davis v. Keystone Printing Serv., 507 N.E.2d 1358, 1368-69 (Ill. App. Ct. 1987) (requiring target to be public figure); Fogus v. Capital Cities Media, 444 N.E.2d 1100, 1102 (Ill. App. Ct. 1983) (requiring responsible source).

88 See Barry v. Time, Inc., 584 F. Supp. 1110, 1112-13 (N.D. Cal. 1984).

89 Id. at 1125.

90 Id. at 1127.

91 The court in *Barry* was correct, however, in its early recognition that the responsibility or prominence of the source is not determinative of whether *Edwards* should apply: "The primary rationale of *Edwards*—the public interest in being fully informed about public controversies—is inconsistent with such a differentiation.... [I]t could create a chilling effect on the members of the press if they were required to be the arbiters of how 'trustworthy' a source is." Id. at 1126. See also Boasberg, supra note 76, at 481-82 (arguing that responsibility of source "should have no place as a requirement for the neutral reportage defense"); Rodney A. Nelson, Comment, Neutral Reportage: Making Sense of *Edwards v. National Audubon Society, Inc.*, 20 Cap. U. L. Rev. 471, 495 (1991) ("The requirement that the accuser be a responsible, prominent organization or individual has no logical foundation....").

92 In re United Press Int'l, 106 B.R. 324 (D.D.C. 1989).

93 Id. at 329.

long as they were newsworthy, even when there was no existing public debate or the controversy was not widely known.[94]

The three cases above essentially ignore the Supreme Court's libel doctrine and allow for most republishing situations to fall under the neutral-reportage doctrine as long as the republisher accurately quotes the source. Most news stories include the citation of a source—unless the reporter witnesses events first-hand—and the accuracy of the quotation cannot suffice when the reporter is the first party to bring the matter to the public's attention.[95] The reporter essentially bootstraps his way to privilege: As long as he can find a source willing to make an accusation, which he quotes accurately, the reporter may print the story. Furthermore, the cases eliminate the *Edwards* requirement that the accusation, rather than the underlying events, be the story.[96] Such a broadening of *Edwards* to cover all reporting by the media is just as dangerous to the values protected by libel law as is a cramped reading in which no neutral reportage is protected because the pursuit of truth and the protection of reputation are hampered.

Many courts have rejected the *Edwards* privilege outright, saying that its holding is inconsistent with Supreme Court decisions in *Sullivan*, *Gertz*, and *St. Amant*.[97] The Third Circuit, rejecting the neutral-reportage privilege within a year of its creation, held that the *Edwards* decision was inconsistent with the Supreme Court's holding in *St. Amant*.[98] Publishing newsworthy statements "without fear of a libel suit even if the publisher 'has serious doubts regarding their truth' . . . is contrary to the Supreme Court's ruling in *St. Amant*."[99] The Third Circuit ignored the fact that *St. Amant* was merely a rephrasing of the definition of actual malice, that neutral reportage is a constitutional extension beyond actual malice, and that the neutral-

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94 See id. at 331.

95 See McManus v. Doubleday & Co., 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981) (finding that neutral reportage was "limited in scope" and not "meant to cover investigative reporting" or "reports of . . . journalist-induced charges").

96 See Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977) ("What is newsworthy about such accusations is that they were made.").

97 See Dennis J. Dobbels, Comment, *Edwards v. National Audubon Society, Inc.*: A Constitutional Privilege to Republish Defamation Should Be Rejected, 33 Hastings L.J. 1203, 1203 (1982) ("[A] careful analysis of first amendment theory indicates that *Edwards* was inappropriately decided.").

98 See Dickey v. CBS Inc., 583 F.2d 1221, 1225 (3d Cir. 1978).

99 Id. at 1225 (misquoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("[T]he defendant in fact entertained serious doubts as to the truth of his publications.")).

reportage privilege is only necessary when actual malice can be demonstrated.[100]

Other courts have declined to adopt *Edwards* for a variety of reasons. Some have evaded judgment of the merits of *Edwards* by deciding cases on other grounds.[101] Another said, "[T]he media already enjoys [sic] the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact and opinion[,]" and that further protection was unwarranted.[102] A New York court rejected the defense (despite New York's presence in the Second Circuit, which decided *Edwards*), explaining that "[t]he Supreme Court [had] not adopted *Edwards* . . . and [that] in [its] view it is not possible to reconcile it with that court's prior decision in *Gertz*."[103] The Supreme Court of Kentucky declined to apply the privilege, partly because it misunderstood the *Edwards* decision. The Kentucky court read *Edwards* to "grant[ ] the press absolute immunity from liability for accurately reporting 'newsworthy statements,' regardless of the press' belief about the truth of the statements."[104] A Missouri appellate court refused to ratify the doctrine or to extend it to private figures.[105] The California Supreme Court has conditionally rejected neutral reportage, at least with regard to private-figure plaintiffs.[106]

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100 See Boasberg, supra note 76, at 468 ("[N]eutral reportage only applies where actual malice probably exists. If the protection that neutral reportage provides is co-extensive with actual malice, the defense is redundant."); David McCraw, The Right to Republish Libel: Neutral Reportage and the Reasonable Reader, 25 Akron L. Rev. 335, 350 (1991) ("[T]he privilege's usefulness, if any, would come . . . in cases in which the *Times-Gertz* standards did not afford protection (e.g., there was a finding of actual malice on the part of the media defendants) . . . .").

101 See Boasberg, supra note 76, at 470 n.59 (listing decisions that have avoided *Edwards* question).

102 Janklow v. Viking Press, 378 N.W.2d 875, 881 (S.D. 1985); accord Postill v. Booth Newspapers, Inc., 325 N.W.2d 511, 518 (Mich. Ct. App. 1982) (rejecting *Edwards* because "the press is adequately protected by the burden of proof required in *Sullivan*").

103 Hogan v. Herald Co., 446 N.Y.S.2d 836, 842 (App. Div. 1982). But see McCraw, supra note 100, at 345-49 (arguing that *Gertz* and *Edwards* are compatible).

104 McCall v. Courier-Journal, 623 S.W.2d 882, 886 (Ky. 1981). The Kentucky court read *Edwards* to have only one element to the test—the accuracy of the reporting—and ignored *Edwards*'s other requirements.

105 See Englezos v. Newspress & Gazette Co., 980 S.W.2d 25, 32 (Mo. Ct. App. 1998) ("We are offered no policy reasons why we should consider adopting a broader privilege such as the neutral reportage privilege, nor why we should expand it to apply to private figures . . . .").

106 See Khawar v. Globe Int'l, Inc., 965 P.2d 696, 707 (Cal. 1998) (invoking *Gertz* and refusing to apply neutral-reportage privilege to *Khawar* facts because Khawar was private figure); infra note 111 and accompanying text.

II
A New Theory

A. The Media Ignore Their Potential Liability

The media no longer rely primarily on comprehensive, investigative reporting when first reporting a story. Many stories now originate from rumors that spread amongst reporters[107] and are published in media sources other than the mainstream press.[108] In the past the press might have asked a person about rumors during an interview, but the denial was never a story without further information to substantiate the reporter's version of events.[109] Now, in the era of instant updates on twenty-four-hour cable news and Internet sites, the media feel that they must be first on the air with a story whether it is true or false, rumor or verified fact.[110]

Only some of the current examples given in this Note actually resulted in libel suits,[111] and only two were against the republisher

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107 "[J]ournalists and political insiders have been talking about [the Clinton paternity scandal] for a week. Why should we deprive our readers of knowing what the journalists are talking about?" Howard Kurtz, The "Love Child" Story Turns into an Orphan, Wash. Post, Jan. 11, 1999, at C1 (quoting *Washington Times* Editor-in-Chief Wesley Pruden); see also Barringer, supra note 30, at 3.

108 See Felicity Barringer, When an Old Drug Question Becomes New News, N.Y. Times, Aug. 22, 1999, at A28 ("[S]everal journalists noted in interviews [that] questions by the news media about rumors about a candidate . . . take on a new life in the era of the Internet, when widely consulted Web sites like The National Journal's Hotline duly record every question, and late-night joke, about every candidate."); Kurtz, supra note 107, at C1 ("[T]oday's technology provides lots of ways for disputed charges to reach millions . . . even if the major newspapers, network newscasts and magazines choose not to report them.").

109 Today, the denial of a rumor sometimes becomes a story even when nobody believes the rumor or finds it to be important. See Melinda Henneberger, Post-Monica Skittishness: Sex, Politics and the Open Door, N.Y. Times, Oct. 10, 1999, § 4 (Week in Review), at 1 ("[Republican Presidential candidate Gary Bauer] called a news conference to deny rumors almost no one had heard—about improprieties no one seems to believe occurred."); see also Felicity Barringer, Unverified Account Spawned Many News Reports, N.Y. Times, Oct. 23, 1999, at A12 ("[I]n the fast-changing ecosystem of the news business, an anonymously sourced account about [Presidential candidate George W. Bush] lived as a news item. Denials, first by the Bush campaign and later by the former President, made some editors judge the allegations more newsworthy, not less.").

110 See generally David Shaw, The Pride and Perils of Fast Reporting, L.A. Times, Aug. 5, 1998, at A1 (describing pitfalls of media's rush to break stories). The media became even more bold and aggressive during the time that this Note was under development. "It used to be that 'respectable' newspapers would at least wait for a tabloid to break the story." Jerry Nachman, The Watchdog, Now Grown Rabid, N.Y. Times, Aug. 22, 1999, § 4 (Week in Review), at 13.

111 The cases that resulted in libel suits include those of Richard Jewell, see infra note 112, Sidney Blumenthal, see infra note 116, and Khalid Iqbal Khawar.

In *Khawar*, the California Supreme Court upheld a $1.175 million verdict against the supermarket tabloid the *Globe* for publishing a story about a book that advanced a new theory about Robert Kennedy's assassination. See Khawar v. Globe Int'l, Inc., 965 P.2d

rather than the original publisher.[112] Many of the reports eventually turned out to be true, and truth is a defense to a libel action. But at the time of republication, the reports' validity often could not be known, and the republisher often thought, or even knew, that the original publication was false. The small number of actual lawsuits does not suggest, however, that litigation by the defamed individuals would prove to be unsuccessful under current law; even in those jurisdictions that have adopted some form of the neutral-reportage privilege, the plaintiffs could still prevail because the original publisher was not reputable. Also, even though many of these examples are about defamation against public officials, like the President, who are unlikely to sue,[113] the First Amendment does not give carte blanche to defame the President or any other person despite his or her position or the unlikelihood of a lawsuit.[114]

696, 698-700 (Cal. 1998) (citing John Blackburn, Former CIA Agent Claims: Iranians Killed Bobby Kennedy for the Mafia, Globe, Apr. 4, 1989, at 9). The *Globe* merely reported the allegations contained in the book; it did not advance its own theory. Robert Morrow's book, The Senator Must Die (1988), claimed that the Iranian secret police, working with the CIA and the Mafia, was the assassin rather than Sirhan Sirhan, who had been convicted of the assassination. See *Khawar*, 965 P.2d at 698-99; Morrow, supra, at 2, 10, 119-20, 184-87; see also People v. Sirhan, 497 P.2d 1121, 1132, 1151 (Cal. 1972) (upholding conviction of Sirhan). Morrow's book contained photographs of a young man identified as Ali Ahmand standing near Kennedy minutes before the assassination. See Morrow, supra, at 200, 272-73. The *Globe* ran a story that reiterated the allegations in the book, making clear that they came from Morrow. The *Globe* enlarged one of the photographs and added an arrow pointing to one of the men, identifying him as the alleged assassin, Ali Ahmand. The photograph was actually of Khalid Iqbal Khawar, who was a photographer working on assignment. The FBI questioned Khawar soon after the shooting but never regarded him as a suspect. See *Khawar*, 965 P.2d at 698-99.

Khawar sued the author, the book's publisher, and the *Globe*. The author defaulted. (The court declined to enter judgment against the author, however, because the photograph in the book was poorly reproduced and Khawar could not be identified.) The publisher settled. Khawar prevailed against the *Globe*, however, because the photograph in the *Globe* was clear enough to identify Khawar, even though the article referred to him as Ahmand. See id. at 698-700.

112 The two are Khawar and Jewell. When the FBI's false allegations identifying him as the Olympic bomber were published, Richard Jewell sued a variety of media organizations, including the *Atlanta-Journal Constitution* (which made the initial report), CNN, and NBC. He settled with all but the *Atlanta-Journal Constitution*. See Mark Curriden, Jewell Case Could Alter Libel Law, Dallas Morning News, Dec. 27, 1998, at 1J.

113 President Carter came close to filing a libel suit against the *Washington Post* after it published a rumor that President and Mrs. Carter had bugged the Blair House (the guest house for the White House) while the Reagans were waiting for President Carter to move out of the White House. See Phil Gailey, Carters Threaten to Sue for Libel, N.Y. Times, Oct. 9, 1981, at A25. Carter eventually decided not to sue. See Irvin Molotsky, Carter Decides Against Suing Paper for Libel, N.Y. Times, Oct. 25, 1981, § 1, at 26.

114 "[T]he lie, knowingly and deliberately published about a public official," is not protected by the First Amendment. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

Harry Kalven has argued that "defamation of the government is an impossible notion for a democracy." Harry Kalven, The New York Times Case: A Note on "The Central

Republishers may be reluctant to report important stories because in some circumstances they may be skeptical about whether a story is true, and if they recklessly disregard the truth, they can be held liable. In some cases they even know beyond all doubt that the charges are false. There is substantial uncertainty when the media report is based on a source that has an inconsistent track record for accuracy.[115] For example, Matt Drudge often admits that his stories are erroneous[116] and has even characterized himself as having an "80 percent accuracy rate."[117] The media do not know what to do when confronted with a sensational story from a shaky source because it is difficult if not impossible to determine when a source's past inaccuracies are significant enough to render republication "reckless" and outside *Edwards*'s protection for republishing from prominent and reputable sources.[118]

Fear of large jury verdicts and the expense of litigation can cause the media to refrain from reporting stories they deem to be important. This self-censorship is known as the chilling effect.[119] The Supreme

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Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 205. While such a statement is true when criticizing government policies and actions, as in seditious libel, different considerations are present when the alleged libel involves accusations of personal, unofficial conduct, where privacy considerations are more important.

115 Does the fact that Matt Drudge had almost every detail of the Clinton-Lewinsky story correct from the first report make it so that the media are not reckless when they republish other stories from Drudge without further investigation? If so, does that lack of recklessness disappear after Drudge was proven patently wrong with another "scoop," the Clinton paternity story? Drudge created a sensation when he reported, falsely, that President Clinton was the father of an illegitimate child by a woman in Arkansas. The story attracted much attention, with reports in the *New York Post, New York Daily News, Washington Times,* and *Boston Herald.* See Kurtz, supra note 107, at C1 (describing media reports on subject).

116 See Blumenthal v. Drudge, 992 F. Supp. 44, 46, 48 (D.D.C. 1998) (describing Drudge's retraction and apology for erroneous report accusing White House aide Sidney Blumenthal of abusing his wife); see also Howard Kurtz, Net Result: Blumenthals Get Apology, Wash. Post, Aug. 12, 1997, at A11 (describing Drudge's false allegations and his retraction and noting Blumenthal's planned lawsuit against Drudge). Blumenthal's lawsuit may have unwittingly helped Drudge's rise to prominence. See Howard Kurtz, Internet Gossip Parries the Press, Wash. Post, June 3, 1998, at D1 (quoting Drudge as saying "Thank you, Sidney Blumenthal" in reference to Blumenthal's libel lawsuit that brought Drudge newfound publicity).

117 Editorial, What We Do Now, Colum. Journalism Rev., Mar.-Apr. 1998, at 25, 25. But see John Schwartz, Private Data, Public Worries, Wash. Post, June 8, 1998, Washington Business, at 24 (characterizing "80 percent accurate" as misinterpretation of Drudge's comments).

118 See Boasberg, supra note 76, at 481 ("[T]he courts and the media should not be forced to judge who is and who is not responsible. Would one lie make someone previously responsible now irresponsible? Two? How many?").

119 The term "chilling effect" was first used by the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). The rationale is that the media will fail to print stories that are not libelous if there is a probability that they would lose a subsequent libel suit or

Court has recognized that the media need some latitude because otherwise they will be overly cautious in their reporting, and important, truthful speech will be deterred.[120] The mainstream media often do not republish stories from disreputable sources, possibly because they do not believe them to be true, possibly because they do not think the stories are important,[121] possibly because they think that they have higher standards,[122] and possibly because of fear of liability.[123]

An important type of news story is the "media critic" story in which a writer critiques the coverage by other media outlets. These stories provide an avenue for the mainstream press to publish accusa-

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if the cost of defending a libel suit outweighs the benefits of publishing. See Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (noting that fear of litigation costs may chill vigorous reporting); David Boies, The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution, 39 St. Louis U. L.J. 1207, 1207-08 (1995) (noting that costs of litigation and frivolous suits, not meritorious lawsuits, are real cause of chill). See generally Michael Massing, The Libel Chill: How Cold Is It Out There?, Colum. Journalism Rev., May-June 1985, at 31.

The chilling effect is also partly due to jury confusion regarding libel law. See Steven Brill, Inside the Jury Room at the Washington Post Libel Trial, Am. Law., Nov. 1982, at 1 (noting that interviews with several jurors in famous libel case indicate that jury did not understand "actual malice" concept and thought defendant had burden of proving truth); Stuart Taylor, Jr., Libel Law: A Tough Puzzle for Trial Jury, N.Y. Times, May 5, 1983, at B15 (discussing jury's difficulty in comprehending libel standards).

120 The problems of the chilling effect were highlighted in *Sullivan*:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); see also Lewis, supra note 56, at 34-45 (describing southern "strategy of intimidation by civil libel suits" to prevent coverage of the civil rights movement). But see Herbert v. Lando, 441 U.S. 153, 170 (1979) ("But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment.").

121 Even the executive editor of the *New York Times* admitted, though reluctantly, that his newspaper will cover scandalous accusations: "[Exposing sexual allegations] 'is the only area of news where I can't imagine wanting to be first,' he said. . . . 'I need not just an excuse to do it. I need to be deprived of my last excuse not to do it.'" Barringer, supra note 30, at 3 (quoting *New York Times* executive editor Joseph Lelyveld).

122 While the *New York Post* screamed the Clinton paternity story on its front page, see N.Y. Post, Jan. 3, 1999, at 1, the *New York Times* only mentioned the story once (in a story about the media's reaction to the rumor). See Barringer, supra note 30, at 3. The *Washington Post* mentioned it three times in January 1999; all three references were stories about the media's response to the original publication, and the first ran more than a week after the initial disclosure. See, e.g., Howard Kurtz, supra note 107, at C1.

123 C-SPAN declined to run Larry Flynt's press conference "outing" Congressman Bob Barr's rumored marital infidelity because of fear of liability for defamation. See Barringer, supra note 30, at 3; Howard Kurtz, Airing on the Side of Caution, C-SPAN Delays Broadcast of Larry Flynt's Revelation, Wash. Post, Jan. 13, 1999, at C1. Note that the republishers seemingly ignored their potential liability.

tions and rumors in a neutral manner in which the story really is the previous publication and not the underlying facts—precisely the neutral reportage envisioned by *Edwards*. For example, the *New York Times* included the following in a story intended to debunk rumors:

> [A]rticles like the one you are reading at this moment . . . provide a convenient framework to inform readers and viewers about how information is passing through the body politic. They also, inevitably, pass on information deemed unworthy of publication in its own right, and so are widely derided as back-door ways to give the respectable press a cover for passing on disreputable information.[124]

But the cost of forswearing all mention of rumor may be leaving the rumor unchecked, or foregoing the chance to help readers evaluate the information that comes their way.[125] When the original source is not reputable, however, the protections outlined in *Edwards* do not apply even to this type of story.

The media also bring these stories in through the "back door" by reporting that a tabloid has made the accusation. Somehow it seems less sleazy to report that "*The Star* has reported that Bill Clinton had an affair with Gennifer Flowers" rather than to attribute it to one's own reporting, even if the "respectable" publication obtained the same details on its own. The Flowers story was first reported by the supermarket tabloid the *Star*. Clinton initially denied the charges, as had Flowers the previous year when an Arkansas radio station aired allegations about the affair; Flowers even threatened to sue for defamation. The *Star* paid Flowers $50,000 for her story; one could assume that the author would have serious doubts regarding the truth of the publication in such a circumstance, especially since Flowers had already denied it so publicly.[126]

The demarcation between reputable and tabloid media sources seems to have faded in recent years, but this may be largely because the inaccurate reports generated by the Internet and tabloids require the "reputable" publications to cover the disreputable ones, sometimes even after the accusation has been proven untrue, because the

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124 Barringer, supra note 30, at 3.

125 See id.

126 See Ex-Aide's Suit Claims Clinton Had Affair with Beauty Queen, Boston Herald, Jan. 17, 1992, at 13, available in 1992 WL 4047194 ("A disgruntled, former state employee claims in a lawsuit that Arkansas Gov. Bill Clinton is a shameless womanizer, used public funds to wine and dine his ladies and even had Arkansas State Police ferry them to trysts. That's according to next Monday's edition of *Star* magazine."); Michael Kramer, Moment of Truth, Time, Feb. 3, 1992, at 12, 13. Howard Kurtz has noted that the "fixed laws of media thermodynamics" began with this story, in which "Flowers sold her story to *The Star* . . . and within days the tale spread to the *New York Post* and *New York Daily News*, to other big papers, and to CNN . . . ." Kurtz, supra note 29, at 99.

reaction itself is more important than the original story.[127] Some news reports center around the fact that another media source declined to publish or broadcast a story.[128]

The editors of major newspapers recognize their conflicting roles as purveyors of truth and reporters of the background material that drives public events.[129] Even a rumor that is not true can affect the behavior of public officials, and the public is poorly served by media that ignore that aspect of the story.[130] The next two parts of this Note revise the *Edwards* test in a way that protects the public's interest in

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127 A *Washington Post* columnist criticized a rival newspaper's coverage of the allegation that Clinton had fathered a child with an Arkansas prostitute:

> The Washington Times dragged the story in like the dead skunk that it was. It began its front-page account by telling readers that most newspapers, "including this one," weren't printing the story and then proceeded to print all the salacious details of the story it wasn't printing—complete with the name and occupation ('hooker,' it wrote) of the boy's mother. . . . All of the above occurred before the DNA test results were in.

Judy Mann, Down the Road to Rumormongering, Wash. Post, Jan. 13, 1999, at C15. While media criticism stories are often a good way to expose the accusations in a balanced way, the author of the *Post* article seemed oblivious to the fact that she was doing exactly the same thing she criticized the *Washington Times* for doing: reporting the "salacious" details while priding herself on not reporting the story as news but rather as media criticism.

128 Matt Drudge's first report about the Clinton-Lewinsky scandal was partially about the fact that *Newsweek* had declined to publish the story. See Matt Drudge, Drudge Report (visited Jan. 19, 1999) <http://www.drudgereport.com/ml.htm>.

Another story that attracted a flood of speculation was the interview by NBC reporter Lisa Myers with Broaddrick. The moderator of CNN's *Reliable Sources*, *Washington Post* media critic Howard Kurtz, aired the allegations, saying that "NBC is still trying to corroborate the woman's allegations and has not made a final decision on whether to air the . . . report. CNN . . . has not confirmed these allegations. We are talking here only about NBC's role and the media ethics issues raised by the story." See Reliable Sources (CNN television broadcast, Jan. 30, 1999), transcript available at <http://www.cnn.com/TRANSCRIPTS/9901/30/rs.00.html>. Co-moderator Bernard Kalb recognized that the broadcast added fuel to the fire:

> [W]e on this very program now are giving this story an additional momentum by discussing it. It's picking up a new kind of leg because we are . . . possibly even arousing some curiosity about it, even as . . . we are dealing with a moral challenge that this story presents to the media.

Id.

129 The Flynt-Barr story, see supra note 123; infra note 151, caused the media to find itself in a "Catch-22":

> By reporting the rumor you give it greater currency. By not reporting it, we have a feeling that we may not be serving our readers fully. Part of the function of the mainstream media is to sort out, verify, test and grade the flood of data we are all subjected to, and to give some order to it. . . . [The solution] is to investigate the buzz or the accusation or the rumor, and to find a way to put them in context.

Barringer, supra note 30, at 3 (quoting Doyle McManus, Washington bureau chief of the *Los Angeles Times*).

130 See Robert E. Cooper, Jr., Note, Libel and the Reporting of Rumor, 92 Yale L.J. 85, 87 (1982) (listing important events fueled by rumors, including stock market fluctuations, riots, and political manipulation).

knowing about important rumors and accusations,[131] while at the same time promoting the search for truth and thereby protecting the defamed individual's reputational interest.

B. Rethinking Edwards*—A New Test*

Courts that have adopted some form of the *Edwards* test have been inconsistent regarding the terms of the test. The *Edwards* court identified eight different factors[132] used to determine the libel liability of a republication, but it neither allocated priority among them nor indicated whether all eight must be satisfied or whether they are merely factors relevant to a holistic determination.[133] This section will show why four factors of *Edwards* should be retained: The factors of the accuracy of the republication, the attribution to the original source, the neutrality of the report, and the public nature of the original report all further the goals of disseminating important information, determining the truth, and protecting reputation. Two factors of the *Edwards* test, whether the target is a public figure and whether the original source was reputable, do not serve these goals and are rejected. Finally, two elements of the *Edwards* test, whether there is a preexisting controversy and whether the original source is a public figure, are inherently satisfied when the original publisher has reached a large audience. Because this Note is only concerned with stories that have reached a large enough audience such that refuting the stories is more important than silencing them, these *Edwards* factors are irrelevant in this context and are not discussed at length.

In setting a standard for republication liability, then, four of the *Edwards* factors are of central importance: accuracy, neutrality, attribution, and the public nature of the original report. The accuracy with which the republisher reports upon the original source directly affects the value of the republication for determining the truth about the story's subject. Any pursuit-of-truth rationale fails if a republisher is permitted to make substantive errors in its report, even when that report is based upon a previously published news story containing falsehoods. The accuracy of the report must be of the same standard as in other areas of libel law; otherwise, the media would be allowed additional room for error merely because the source for their story was another media source and not events or interviews. The accuracy in

131 See Nelson, supra note 91, at 472 (arguing that neutral-reportage privilege not only protects free press but also protects right of public to receive important information about public controversies).

132 See supra note 84 and accompanying text.

133 Boasberg, supra note 76, at 469 (noting *Edwards*'s vagueness about requirements of test).

question is not the truth of the allegations but rather the accurate characterization of the original report about the allegations.[134]

The "neutrality" of the story is important even though neutrality is a matter of accuracy and attribution rather than the more common understanding of neutrality.[135] The story must make clear that the newsworthy element is the accusation (and possible response) rather than just the subject of the accusation. When the reporter supports the accusations or espouses his belief in them, neutral reportage is not a shield.[136]

Correct attribution of the original source is an important element of the neutral-reportage doctrine because "[w]hat is newsworthy about [potentially libelous] accusations is that they were made," rather than that the underlying story is true.[137] To eliminate this requirement would remove the distinction between the neutral-reportage principle and the ordinary publishing of libel, because it would not be clear that the republisher was merely stating an accusation made by another source.

The public nature of the original report is a critical element of the *Edwards* test. The factors consider whether the original report was made in public to a large audience or in private to a reporter. Statements to a small audience are not protected because they do not create a public controversy. Recent technological changes, however, have blurred the distinction between a private speaker and a large media outlet. One person with a website can communicate with the

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134 A republication would fail this prong in the following circumstance: Publication A reports that Senator Doe sexually harassed an employee. Publication B intentionally reports that Publication A said that Senator Doe raped an employee. Publication C reports that Publication A said that Senator Doe sexually harassed an employee. Assuming that Senator Doe neither raped nor harassed the employee, Publication C is protected by the neutral-reportage privilege. Publication A is vulnerable to a libel suit if it knew the allegations to be false or was reckless regarding their falsity. Publication B is liable for libel because it intentionally accused rape rather than sexual harassment.

135 One court has noted that neutral reportage can apply even when the author believes or supports some of the allegations. See Price v. Viking Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989) ("Evidence of the author's general disposition toward his topic does not establish whether he espoused each particular allegation."). But see McFarlane v. Esquire Magazine, 22 Media L. Rep. (BNA) 2033, 2042 (D.D.C. 1994) (stating in dicta that neutral reportage is not applicable when statement is not reported neutrally), aff'd, 74 F.3d 1296 (D.C. Cir. 1996).

136 See Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977) ("[A] publisher who in fact espouses or concurs in the charges made by others . . . cannot rely on a privilege of neutral reportage.").

137 Id. at 120. But see Burns v. Times Argus Ass'n, 430 A.2d 773, 778 (Vt. 1981) (holding that it is consistent with philosophy underlying *Edwards* to permit accusations based on rumor without attributing source when accusations are newsworthy simply because they were made).

world.[138] The neutral-reportage test must look at the level of dissemination of the story because some reports from disreputable sources reach a large audience and should be addressed, while others have a small audience, and repetition of these stories causes more harm than it cures.

Two of the *Edwards* factors are inherently satisfied when the republication is from any source with a wide audience: The original source is a public figure, and the story concerns a newsworthy public controversy. In all of the examples discussed in this Note, and in most contemporary republication cases involving media defendants, the original source has a wide audience and is therefore considered "public," regardless of its reputation.

However, the other two elements of the *Edwards* test do not adequately protect republished reports: the requirement that the target be a public figure and the requirement that the original publisher be reputable. The first unjustified element is discussed here, and the reputability requirement is discussed in the next section.

Edwards was incorrect when it required that the target be a public figure. In *Gertz v. Robert Welch, Inc.*,[139] the Supreme Court ignored the inextricable link between public and private figures in newsworthy matters.[140] Important events often involve private figures who have done nothing wrong. The Supreme Court and lower courts have hypothesized that such instances are not a common occurrence.[141] While in everyday reporting that may be true, the important scandals and controversies of the last several decades have damaged

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138 During the summer of 1998, the Drudge Report website was receiving 20 million hits per month and was, for a time, a significant player in the media market. See Howard Kurtz, Matt Drudge Cuts Radio Deal with ABC, Wash. Post, July 8, 1999, at C10. One story by Drudge received more than 2,600 visits from White House computers. See Kurtz, supra note 29, at 236.

139 418 U.S. 323 (1974).

140 See April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio App. 1988) ("We see no legitimate difference between the press's accurate reporting of accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest."); Levin, supra note 24, at 1276-77 (noting that little-known speakers play roles in newsworthy events equally important as roles played by more prominent speakers).

141 "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz*, 418 U.S. at 345; see also Grossman v. Smart, 807 F. Supp. 1404, 1409 (C.D. Ill. 1992) (declaring plaintiff not to be involuntary public figure after noting *Gertz*'s "exceedingly rare" language); Khawar v. Globe Int'l, Inc., 965 P.2d 696, 707 (Cal. 1998) ("Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter of public concern.").

the lives of many who did not voluntarily submit to public scrutiny.[142] The courts have clung too doggedly to a high level of protection for involuntary public figures when they become involved in matters of importance. In some circumstances, the name and actions of a private figure are extremely important in examining the conduct of public officials, and the search for political truth generally outweighs a private figure's reputational interest.[143]

C. *Why the Source's Reputation Is Irrelevant*

1. *The Public Should Know About Important Allegations from All Sources*

The reputation of the original publisher is irrelevant in determining the importance of the story, whether republication will help determine the truth, and whether the defamed individual's reputation will be protected more by the eventual public determination of truth or by the media just ignoring the original report.[144]

It is impossible to argue that all news sources are equally reputable, and the *Edwards* test relies heavily on the judges' opinion that the National Audubon Society was "responsible" and "prominent."[145] Some later decisions have questioned the necessity of prominence and reputation in applying the neutral-reportage privilege.[146] But for

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142 Think of Fawn Hall, Paula Jones, Monica Lewinsky, Richard Jewell, etc.

143 "It is more important to refrain from chilling republication of speech made by public figures . . . than to protect the reputations of private figure targets. . . . [A] private figure target is not without a remedy; the target may still sue the public figure who made the original statements under . . . *Gertz* . . . ." Boasberg, supra note 76, at 484. See supra note 73 for an example of media access for private figures.

144 See McCraw, supra note 100, at 363 (arguing that "fair, full, and accurate presentation" is more important than requiring media and courts to evaluate reliability of source).

145 Edwards v. National Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977).

146 A California district court rejected the "trustworthiness" element of the test in a decision that is probably the most expansive reading yet of the neutral-reportage privilege.

> This court is of the opinion that the neutral reportage privilege does not depend solely upon the "trustworthiness" of the individual or organization making the allegedly defamatory statements. . . . [T]he primary rationale of *Edwards*—the public interest in being fully informed about public controversies—is inconsistent with such a differentiation. Moreover, it could create a chilling effect on the members of the press if they were required to be the arbiters of how "trustworthy" a source is. . . . A much more sensible approach is to extend the neutral reportage privilege to *all* republications of serious charges made by one participant in an existing public controversy against another participant in that controversy, regardless of the "trustworthiness" of the original defamer. This approach is more consistent with providing the public with "full information" about public controversies.

Barry v. Time, Inc., 584 F. Supp. 1110, 1126 (N.D. Cal. 1984); see also In re United Press Int'l, 106 B.R. 323, 328-30 (D.D.C. 1989) (rejecting consideration of how "responsible" and "prominent" source is in applying neutral-reportage doctrine).

those courts in the majority that consider the source's reputation, the factual determination poses a significant problem: What is a "reputable" news organization? The clear line that once separated the *New York Times* from the *National Enquirer* has been blurred.[147] For example, though commentators have levied harsh criticism at the mainstream media's treatment of the Clinton-Lewinsky story, a less reputable source was almost entirely correct with his initial reports: Matt Drudge.[148]

Public officials do not glean all their information from the *New York Times*, however. Rumors and innuendo influence govern-

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147 Matt Drudge provided the best anecdote about why no media organization is inherently more trustworthy than others:

> [T]here's different levels of journalism; I'll concede that. One of my competitors is *Salon Magazine Online*, who I understand is the president's favorite website. And there's a reporter there, Jonathan Broder. He was fired for plagiarism from the *Chicago Tribune*. And I read that in the *Weekly Standard*. But do I believe it? Because as much as I love the *Weekly Standard*, they have had to settle a big one with Deepak Chopra, if I recall. I heard that from CNN. But hold on. Didn't CNN . . . have the little problem with Richard Jewell? I think Tom Brokaw told me that, and then I think Tom Brokaw also had to settle with Richard Jewell.
>
> I read that in the *Wall Street Journal*. But didn't the *Wall Street Journal* just lose a huge libel case down in Texas, a record libel, $200-million worth of jury? I tell you, it's creative enough for an in-depth piece in *The New Republic*. But I fear people would think it was made up.

Matt Drudge, Anyone with a Modem Can Report on the World: Address Before the National Press Club (June 2, 1998), transcript available at <http://www.frontpagemag.com/Archives/miscellaneous/drudge.htm>; see also Jules Witcover, Where We Went Wrong, Colum. Journalism Rev., Mar.-Apr. 1998, at 18, 19 ("Into the vacuum created by a scarcity of clear and credible attribution [about the Clinton-Lewinsky story] raced all manner of rumor, gossip, and, especially, hollow sourcing, making the reports of some mainstream outlets scarcely distinguishable from supermarket tabloids.").

148 See, e.g., Steven Brill, Pressgate, Brill's Content, July-Aug. 1998, at 122 (recounting media coverage of early days of Clinton-Lewinsky story). It is interesting that some of Brill's harshest criticism of the reporting is about ABC's report where Lewinsky kept a blue dress stained with the President's semen. See id. at 144. Scott Pelley of CBS reported on January 29, 1998, that "no DNA evidence or stains have been found on a dress that belongs to Lewinsky." Id. Pelley said later, "I'd much rather have our scoop about the semen dress than the scoop everyone else had." Id. As it turns out, Pelley was wrong because the dress story was true. See Witcover, supra note 147, at 18. Witcover called a report that Lewinsky "described how Clinton allegedly first urged her to have oral sex, telling her that such acts were not technically adultery" a "close competitor for the sleaziest report award." See id. at 22. Little did Witcover know that quibbling over the definition of sexual relations would be a major issue in Clinton's impeachment and Senate trial.

Although Matt Drudge's importance has faded in recent months, see Frank Rich, The Strange Legacy of Matt Drudge, N.Y. Times, Dec. 4, 1999, at A17 (noting discontinuation of Drudge's television program), in 1998 and 1999, mainstream journalists were following his lead. "And while the mainstream media are busy licking their wounds over the subversion of their profession, they have also learned early on that they had best monitor the Drudge Report consistently—his stories became their headlines." Andrew Hudson, My Turn: In Defense of the Drudge Report, Denv. Bus. J., June 19, 1998, at 55A.

ment,[149] and, as the Broaddrick story shows, they may affect the weightiest decisions. The Broaddrick story demonstrates the absurdity of this element of the reputability prong of the *Edwards* test. Assume that Broaddrick's allegations were false and that both Drudge and NBC were subject to liability for publishing information about her accusations. Given Drudge's influence on public opinion, there is no logical reason why the liability for the republisher would depend on whether the story referenced Drudge's website or NBC's interview, but *Edwards* differentiates in precisely this way.

It may appear that the reckless-disregard element of the actual malice test is coextensive with the reputability of the original source, and to some extent that is correct. Republishing information from a source that rarely gets a story correct should put the republisher on notice that there is a strong possibility that the current story is not correct. Presumably such behavior would constitute actual malice. The neutral-reportage privilege, however, is applicable when actual malice has been shown. A report from a reputable source could be known to be false,[150] and reports from disreputable sources could be known to be true. Reckless disregard is not the same as reputability of the source. Actual malice is not a part of neutral reportage because the privilege is only available when there is actual malice—the publisher knows that his story is false or is intentionally disregarding the possibility of falsity. The reputability of the source is often indeterminate and irrelevant to the newsworthiness of the story and has no bearing on whether the republisher knows that the story is or is not true. Larry Flynt's *Hustler* magazine might not be considered a reputable source, and some would argue that it is reckless disregard to republish an attack on the morality of congressmen based on that source.[151] After Flynt's report about Speaker of the House-elect

[149] For example, in the winter of 1981, rumors were circulating that Vice President George Bush had been shot on the same day as President Ronald Reagan, see Janet Cooke & Benjamin Weiser, Anatomy of a Washington Rumor, Wash. Post, Mar. 22, 1981, at A1, perhaps leading to Alexander Haig's infamous statement that he was "in charge" at the White House.

[150] Reporting after the fact about CNN's errors in the nerve gas story is one example of the media writing about a reputable source knowing that the report is false. See Felicity Barringer, Defendant in CNN Suit Hires Her Own Lawyer, N.Y. Times, Oct. 12, 1998, at C9 (describing libel suits resulting from case); Robin Pogrebin & Felicity Barringer, CNN Retracts Report that U.S. Used Nerve Gas, N.Y. Times, July 3, 1998, at A1 (discussing CNN's allegations in context of CNN's retraction of its earlier broadcast).

[151] Larry Flynt's attacks were important, however, because the first one was true and resulted in the resignation of Speaker-designate Bob Livingston during the Clinton impeachment debate. See Howard Kurtz, Larry Flynt, Investigative Pornographer, Wash. Post, Dec. 19, 1998, at C1 (recounting history of Flynt's accusation that Livingston had committed adultery). After that successful attack, suppose that the media knew the next attack to be false. The reckless disregard test would be met, but the importance of the

Robert Livingston forced him to resign from Congress, Flynt's accusations were news, regardless of their truth and regardless of whether Flynt is generally accurate in his reporting.[152] Stories like this show why the test should be the accurate, neutral, attributed reporting of a public source rather than any absolute determination based on the overall reputation of a source for accuracy.

The best republishing stories do have a reply from the subject of the accusation, present a balanced consideration of the attack, and make independent inquiry into the veracity of the accusation. Such a story fully lives up to the *Edwards* ideal that the importance of the story is its report of the accusation, rather than the underlying truthfulness of the charge. One of the best stories and most deserving of protection is the first *New York Times* story about Juanita Broaddrick's accusation that Clinton sexually assaulted her in 1977, while he was Arkansas Attorney General.[153] The story describes the history of the rumor and evaluates much of the evidence Broaddrick advanced to support her claim. The report also examines how the rumor affected Clinton's impeachment trial and concludes with a section about why the media were reluctant to publish the story. While the law cannot expect every story to live up to this ideal, the fact that such stories recount the accusation and describe the response is evidence that scandal reporting is important. The public has a much stronger sense of the truthfulness of the accusations after careful reporting.[154]

Although the reputation of the speaker is not dispositive, the identity is. To ensure that the fact of the allegation and not the facts underlying the allegation are central, republications attributed to anonymous sources should not be privileged. In republishing a possibly libelous statement, we often learn more about the original speaker than we do about the target of the attack.[155] In those situations in

story, based on the track record, would be such that the public would have an interest in knowing the new allegations. See Barringer, supra note 30, at 3 (quoting CNN Washington Bureau chief as saying, "Whether anybody likes it or not, [Larry Flynt] has injected himself into this very ugly public discussion [about the possible hypocrisy of Clinton's accusers, Bob Barr and Bob Livingston]. Ignoring him is not an option.").

152 See generally Clay Calvert & Robert D. Richards, Defending Larry Flynt: Why Attacking Flynt's "Outing" of Sexual Affairs Is Misguided, 21 Hastings Comm. & Ent. L.J. 687 (1999) (supporting Flynt's exposure of sexual hypocrisy).

153 See Felicity Barringer & David Firestone, On Tortuous Route, Sexual Assault Accusation Against Clinton Resurfaces, N.Y. Times, Feb. 24, 1999, at A16.

154 See McCraw, supra note 100, at 360 (arguing that neutral reportage should require "fair, full, and accurate accounting not only of the allegation but also of the allegation's context").

155 For example, Jerry Falwell sold a videotape, see The Clinton Chronicles (Citizens Video Press 1994), on his television program that accused Bill Clinton of being hooked on cocaine, accused Hillary Clinton and Vince Foster of having an affair, and implied that Foster was murdered by agents of the President. None of the allegations has ever been

which the allegations turn out to be true, the public learns to pay more attention to that source in the future and no longer dismisses out of hand a report from that source.[156]

2. *The Search for Truth*

It seems counterintuitive that spreading false information will ultimately result in the determination of the truth. In fact, in many circumstances it will not. When a false report is made to a small audience, there is no need to "pursue truth" through repeating the allegation because so few individuals become aware of the falsity in the first place. However, with the spread of the Internet, the constant news cycles of cable news networks, and the visibility of tabloid magazines at supermarket checkout stands, many inaccurate news reports can reach a wide audience. False reports can spread rapidly and influence events because people act and form opinions based on erroneous information unless additional reporting unearths more facts. The revelation of truth does not happen automatically. Additional reporting is unlikely if the media cannot first report on the initial accusation because it is impossible to relate the story without including the false charge. Furthermore, the press will not be interested in additional reporting unless the issue is of concern to the public, which is why the scope of dissemination of the original report is of far more importance than the original publisher's reputation for truth. Sometimes, the truth is undiscoverable, as in the Broaddrick-Clinton he-said/she-said. In that case additional reporting did allow for a full airing of the accusation so that each person could make her own determination of the truth based on facts rather than rumors.

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proven or even substantiated to any degree. See Crossfire (CNN television broadcast, Dec. 22, 1998), transcript available in Lexis, News Library, Transcripts file.

Falwell endorsed the video and its impact on the impeachment. See id. ("And out of that [video] came *The Wall Street Journal* taking the thing seriously, the ball began rolling, which led to the president's impeachment last Saturday. So [the video's producers] ought to receive some credit."). Despite the fact that the libelous allegations relate not to Jerry Falwell, but rather to Bill and Hillary Clinton, we learn far more about Falwell's character than the Clintons'. Critics of the *Edwards* doctrine seemingly would hold Falwell, CNN, and, indeed, even the author of this Note, liable for republishing the false accusations against President Clinton when the real story is the fact that Falwell supported the impeachment of the President on such outrageous assertions.

156 President Clinton's Press Secretary, Joe Lockhart, attempted to dismiss allegations that President Clinton had fathered an illegitimate child by attacking the source of the rumor, the supermarket tabloid the *Star*. See Joe Lockhart, White House Press Briefing (Jan. 4, 1999), transcript available at <http://www.pub.whitehouse.gov> (refusing to answer questions about rumor because source was tabloid even though that same tabloid had previously reported accurately that presidential advisor Dick Morris had affair with prostitute and that Gennifer Flowers had affair with President Clinton).

The best support for the notion that falsity can beget truth is history. We now know, because of additional reporting inspired by the original false reports,[157] that Clinton did not have a love child,[158] that Sidney Blumenthal does not beat his wife,[159] that Richard Jewell was not the Olympic bomber,[160] and that Clinton did not sell burial plots at Arlington National Cemetery to campaign contributors.[161] Also, stories that seemed improbable at the time have been proven true by additional reporting, such as the allegations that Clinton was having an affair with a young intern.

3. *Protecting Reputation*

Constitutional libel law must balance the conflicting values of promoting the search for truth and protecting the reputation of those defamed. While these dual goals often are in conflict, when the source of the accusations has a large audience, the defamed individual repairs his reputation through additional reporting rather than less.[162] Once the rumor or allegation reaches a large audience, the defamed individual is better served by denying those charges in a public forum rather than by letting them remain unsubstantiated and unchallenged.[163]

It is difficult to separate the truth function of constitutional libel law from the protection of reputation function of common law libel because in the context of widespread false or possibly false accusations, the truth-seeking process inevitably protects reputation as a

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157 Although the Internet and cable television may cause the media to report half-baked stories, the same technological advances force retractions and corrections more quickly. See Jonathan Alter, Something in the Coffee, Newsweek, July 13, 1998, at 66, 66 ("So while the Internet's instant-news culture increases pressure to be first, the pressure to retract is growing, too. Media outlets that mindlessly defend weak work will be bombarded with criticism long before any libel suit comes to trial."); Witcover, supra note 147, at 23-24 (discussing quick retractions by *The Wall Street Journal* and *Dallas Morning News* of reports from alleged "eyewitnesses" to sexual acts between Clinton and Lewinsky).

158 See supra note 115.

159 See supra note 116.

160 See supra note 112.

161 The burial plot story began in an obscure conservative magazine, spread to conservative talk radio (including Rush Limbaugh, Oliver North, and G. Gordon Liddy), to Republican lawmakers, and to the *New York Times*, *Washington Post*, *Los Angeles Times*, and CNN. It was quickly shown to be false. See Kurtz, supra note 29, at 281.

162 See McCraw, supra note 100, at 362 (arguing that good neutral report is not defamatory because story does not assert false defamatory accusations as literally true).

163 Howard Kurtz reported on the need to kill rumors before critical mass:

> [White House Press Secretary Mike] McCurry had been through the exercise dozens of times. A rumor would pop up in some gossip column or tabloid or British newspaper and quickly make its way up the media food chain. Stamping out such rumors before they reached critical mass had become a major distraction, another sign of the increasingly tabloid nature of the press.

Kurtz, supra note 29, at 96.

consequence.[164] To some extent, the defamed individual is redeemed when the truth emerges to a large audience. While the defamed individual would prefer that the accusation had never been made, additional publicity[165] generally results in a better determination of the truth and allows individuals to protect their reputation. Why else would Richard Jewell hold a press conference[166] or Sidney Blumenthal send his lawyer to appear on television?[167] Indeed, protection of reputation and clarification of the truth may be the only sound reasons why anyone would risk further publicity by "going public." Most libel suits are unsuccessful[168] and are brought primarily to show the defamed individual's disagreement with the publication rather than as a sincere effort to collect money to compensate for the

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164 But see McCraw, supra note 100, at 358-59 (arguing that "mere publication of a denial" is not adequate reputational protection).

165 One excellent example of the value of additional publicity after a defamatory attack occurred after Larry Flynt published a parody advertisement in *Hustler* magazine, suggesting that the Reverend Jerry Falwell's first sexual encounter was with his mother in an outhouse. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48, 57 (1988) (holding that parody is constitutionally protected by First Amendment). Falwell was enraged by the attack; one would assume that if a person has been defamed, he would want to keep it to himself and limit the audience, but even before Falwell filed suit, he sent copies and descriptions of the ad parody to over one million of his followers. See Rodney A. Smolla, Jerry Falwell v. Larry Flynt: The First Amendment on Trial 7-9 (1988). Perhaps Falwell recognized what is proposed here: The best response by a victim of a widely circulated defamation is not silence but rather more press and attention, thereby exposing the untruth of the statement to as wide an audience as possible.

166 See Bill Rankin, Jewell: FBI Trampled on My Rights, Atlanta J.-Const., Oct. 29, 1996, at A1 (describing statements made at press conference). Richard Jewell made himself available for 11 interviews in the 3 days following the bombing. See Felicity Barringer, Ruling Sets Back Libel Suit of Guard in Olympic Bombing, N.Y. Times, Oct. 6, 1999, at A16 (noting Jewell's many interviews).

167 See Equal Time (CNBC television broadcast, Aug. 12, 1997), transcript available in Lexis, News Library, Transcripts file.

168 Only about 5 to 10% of plaintiffs ever recover:

> When looked at in combination, the impact of the Court's First Amendment process is striking: Between 70% and 80% of all defense motions for summary judgment are granted. Of the suits which remain, plaintiffs lose about a third of them at trial. And of those cases that plaintiffs win at trial, the victory is usually short lived—an appeal is almost certain and 70% of defense appeals see pro-plaintiff trial verdicts reversed, remanded, or modified. Studies have repeatedly reported that only 5%, and up to perhaps 10% of plaintiffs who file suit, ever recover.

Susan M. Gilles, Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation, 58 Ohio St. L.J. 1753, 1779 (1998); see also Ten Years of "Independent Appellate Review" in Defamation Cases from *Bose* to *Connaughton* to the Present, Libel Def. Resource Center Bull., Apr. 1994, at 1 (studying rate of reversal of libel verdicts by appellate courts).

injury.[169] The press has an important role in helping the public determine truth. One way in which the truth-advancing function is demonstrated is by the fair-report privilege, which allows the press to comment on allegations made in court (and in legal documents) regardless of their truth or falsity.[170] If one sincerely believed that the press should only air truthful information, the press would have to verify allegations made at trials independently, thereby replacing the jury as the ultimate arbiter of truth.

Similar factors apply, however, even when there is no libel suit. With issues of intense public interest and concern, the press will usually seek the rebuttal of the defamed individual—not out of a redemption principle, but rather because the media want to get the story correct for their audience.[171] Allowing the media to report allegations that result in a libel suit while other false allegations are unpublishable taboo is a distinction without a meaningful difference because publishing additional information inevitably requires repeating the additional false accusation whether or not a lawsuit resulted.[172] If Richard Jewell had never sued for libel, under the traditional common law, a news report exonerating him from responsibility for the Olympic bombing

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169 See Boies, supra note 119, at 1208-09 ("Defamation actions, particularly those that involve individuals, usually have strong noneconomic motives. Defamation litigation usually arises when someone is hurt.").

170 The fair-report privilege protects reporting on libel and other lawsuits. See Restatement (Second) of Torts § 611 cmt. 3 (1977) (explaining fair-report privilege). Some courts require that not only must a lawsuit have been filed but that the parties have appeared before a judge because the complaint could have been filed merely to provide protection for the defamatory accusation. See, e.g., Sanford v. Boston Herald-Traveler Corp., 61 N.E.2d 5, 6-7 (Mass. 1945) (holding that reporting on lawsuits not yet heard by judge is not privileged). Some critics have noted similar behavior in the way that the mainstream press reported on Drudge's accusations. "[The press] was using the subpoena, and this Drudge guy, as an excuse to publish unsubstantiated charges that they could otherwise never touch." Kurtz, supra note 29, at 237. See generally Kathryn Dix Sowle, Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. Rev. 469 (1979) (arguing that fair-report should be constitutionally protected rather than left to state law). Courts and commentators have noted the parallel between the fair-report privilege and the neutral-report privilege. See Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 894 (Iowa 1989); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 115, at 116 n.39 (5th ed. 1984 & Supp. 1988) (noting that similar principles underlie both privileges).

171 Cf. supra note 143 (discussing notion that political truth outweighs reputational interest).

172 Academic literature about libel suits (and libelous accusations that never resulted in a lawsuit) provides a medium through which to perpetuate the untruth and to continue its dissemination. The lie continues to be spread, in court and in legal writing, to determine whether the publication was true and whether the court's resolution of the issue was correct. Despite the defamed individual's interest in silencing the discussion, court opinions and law review articles are another way for the original lie to endure without the author incurring liability for the republication.

would have been libelous because it repeated the initial false allegation.

CONCLUSION

Perhaps the real reason for the narrow acceptance of the *Edwards* doctrine and close adherence to the Second Circuit's requirement of a "prominent" and "reputable" source is the facts upon which the cases have been decided.[173] Those courts that have rejected *Edwards* might be far more likely to accept the reasoning if confronted with an issue they think to be important, such as publishing stories about crimes committed at the highest levels of government.

The media have recognized their immunity, either implicitly or explicitly. They have no real fear of liability when publishing accusations from other media sources and public figures despite the "technical" liability that remains in dusty law books. While they have been loath to report some scandals, such as the Clinton paternity and rape scandals, it is more likely that the decision not to publish was based on propriety (or lack thereof) rather than fear of a lawsuit from President Clinton for libel.

The purpose of this Note has been to examine an apparent gap in the law and the media's disregard of their potential liability in light of changed reporting practices in this age of constant news updates on cable television and the Internet. Perhaps the plaintiff's libel bar is prescient enough to realize that pressing the edges of the *Edwards* doctrine on important stories could backfire. The courts should learn from defamed individuals such as Richard Jewell and Sidney Blumenthal, who have realized that their reputations are best protected by bringing their side of the story to as many people as possible.

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[173] See David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 504 (1991) ("If the President of the United States baselessly accused the Vice President of plotting to assassinate him, for example, most courts surely would hold that the media could safely report the President's accusation even if they seriously doubted its truth.").