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THE NEUTRAL REPORTAGE DOCTRINE: MIA. DOESN'T GOOD JOURNALISM DEMAND IT?

Senator Charles Schumer tells you mid-interview that Senator Mitch McConnell is taking bribes in exchange for rallying certain legislation. When you call McConnell, seeking a response, he informs you that Schumer is having an affair with an underage girl. You, a seasoned political correspondent, believe neither of them. But the fact that the senators said these things about one another is obviously newsworthy. You report their statements, and, in the article, explain that there is no evidence in support of either accusation.

You could be liable for it under libel law. And the context you gave readers--the explanation that the senators' statements are unsupported--would be used against you to show actual malice.

This is where good journalism and the law diverge. The neutral reportage doctrine is a possible solution to the problem, but the doctrine has not been recognized in most states.

Justice William Brennan, writing for the Supreme Court in *NAACP v. Button*, [1] pointed to the protections necessary for First Amendment freedoms-- rights belonging to the individual but that define the nation and are, in Brennan's words, supremely precious, as well as delicate, and vulnerable. [2] The First Amendment, like fire, needs air to live: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." [3] This idea of "breathing space" became fundamental to the evolution of First Amendment jurisprudence, appearing in fifty subsequent opinions. Among them was *New York Times Co. v. Sullivan*, [4] in which the Court, overturning precedent and revolutionizing defamation jurisprudence, ruled that the First Amendment proscribes the outer bounds of state defamation law. [5]

It did so in recognition of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open []" [6] --of the individual's right to discuss and rebuke government, and the press as central to that process. In the Court's view, the Constitution demands the process be safeguarded. For that reason, *Sullivan* established, media defendants are not liable for false and defamatory statements published about public officials--and, by subsequent extension, public figures [7] -- unless the defendant acted with "actual malice"--meaning, knew the statements were false or showed a reckless disregard of their verity. [8] The risk of a lower liability bar is that, for fear of punishment, financial or otherwise, the press will "make only statements which 'steer far wider of the unlawful zone.'" [9] Libel law has since tended to track good journalistic practices because it has developed with these precepts in mind. The unlawful zone is constrained to avoid overcautious self-censorship.

The neutral reportage doctrine, also known as the neutral reportage privilege, is an exception to the tendency. First recognized, in 1977, by the Second Circuit in *Edwards v. National Audubon Society, Inc.*, [10] the doctrine has since received

a hopscotched treatment in defamation law--it has only been accepted in a few jurisdictions, rejected in many others, and remains unaddressed by the rest. [11] New York is split; federal courts have accepted it under *Edwards*, but it has been rejected at the state level. [12] Though the privilege varies according to the pronouncements of the recognizing court, in broad strokes the neutral reportage doctrine protects a report's republication of defamatory accusations against a public figure (or organization) in controversies of public interest, even when the reporter knows or suspects the accusations are false [13] --an exception to the ordinary republication theory, because of the newsworthy quality of the reported statement.

Consider the following scenarios; assume all reports published are, or aspire to be, neutral.

> • In anticipation of the upcoming Academy Awards, and in light of the ever-brighter spotlight being shown on sex-power disparity in Hollywood, the Academy of Motion Picture Arts and Sciences releases the results of a study it commissioned to analyze the makeup of this year's nominees relative to that of comparable award ceremonies. Time's Up, the newly formed organization founded and spearheaded by famous and powerful women, disputes the results. An official Time's Up publication rejects the study and identifies three Academy members, by name, as "paid liars." *The New York Times*, reporting on the controversy, republishes the Time's Up accusation, the names of the Academy members, and those individuals' denials. The three Academy members sue the *Times* for defamation.
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> • During a Senate vote on an appropriations bill, a senator from Wisconsin (for the bill) launches an attack on a senator (against the bill) from Florida. The attack is lurid, personal, racist, and anti-Muslim. The Florida senator is accused, among other things, of being a terrorist and financially aiding terrorist organizations. After ***15** the Senate session is recessed, the Wisconsin senator leaves the chambers and, outside his office door, continues to rant for an audience of at least ten. Among them is a reporter, who recounts the affair for an article in The Wall Street Journal. Voters, horrified, opt to unseat the Wisconsin senator in the next election. The *Journal*, which published the Wisconsin senator's remarks made during and after the vote, is sued by the Florida senator for defamation.
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> • Stephen Bannon, erstwhile Presidential advisor and ex-executive chairman of Breitbart News, is quoted by Vice as detailing, at length, how Michael Cohen, President Trump's personal lawyer, conspired with Russia to secure Trump's election. Vice includes the statement in an article that contains Cohen's denials and notes, in an editorial introduction, that Bannon's claims are not verified. Cohen sues Vice for defamation.

In each scenario, good journalism would command: publish. The outrageousness of the defamatory statement does not doom the point; it likely is the point, in these cases. But the media outlet that quotes the alleged libel is the media company that violates two established principles of defamation law. The Restatement (Second) of Torts' caution that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it[ ]" [14] reflects a tradition well-entrenched in common law: republication, that "tale bearers are as bad as tale makers." Separately, *Sullivan*'s actual malice standard is protective of the media up until that line only. The result is that, absent the neutral reportage privilege to a defamation claim, a newspaper may be liable for reporting genuinely newsworthy statements made by a public figure. The liability risk is only increased if the media defendant informs its readers--as good journalism would dictate--of the dubious verity of the statement at issue, for instance, or is otherwise shown later, by sufficient evidence, to have known the statement was false, or suspected as much.

The result can approach the absurd, as illustrated by *Norton v. Glenn*, [15] the 2004 Pennsylvania case from which the second hypothetical above was drawn. *Norton* concerned "heated exchanges" between members of a Pennsylvania borough council. In short, one councilmember, Glenn, accused the two others of being homosexuals, and alleged that one lunged at his penis; Glenn said he had a duty to make public his accusations as the two councilmembers had "access to children." [16] *The Chester County Daily Local* published an article, entitled "Slurs, insults drag town into controversy," that quoted Glenn's attacks inside the council chambers and outside, where they had continued. The editors' rationale--that Glenn was an elected official, the public should know of his behavior, and the statements illustrated the "dysfunctional state of local government" [17] --was, in fact, borne out by the voters' decision, in the next election, to remove Glenn from office and retain the other two councilmembers. [18]

Nonetheless, the two councilmembers sued Glenn and the *Daily Local* for defamation. The trial court recognized the neutral reportage doctrine as mandated by the First Amendment, concluded that the media defendant was entitled to invoke the neutral reportage privilege as to its reporting of all of Glenn's comments, and granted summary judgment in the *Daily Local*'s favor. [19] On appeal, the Superior Court ruled that there was no constitutional or statutory basis for the neutral reportage doctrine, and reversed. [20] Pennsylvania's Supreme Court affirmed. Neutral reportage, though in possession of "visceral appeal," had no home in either the United States or Pennsylvania constitutions. [21] Sadly, the case settled before trial.

The result, in *Norton*, is that the *Daily Local* could argue that the widely accepted fair report privilege--a defense to defamation for reporting any official action or proceeding and any meeting open to the public [22] --protected its republishing Glenn's comments made inside the council's chambers, but was liable for reporting the accusations Glenn lodged outside chamber doors. But in an imbroglio between public officials, the newsworthiness of Glenn's allegations--made inside and outside the chamber walls--is obvious.

Newsworthiness, however, does not determine the constitutional protection accorded the media. In *Gertz v. Welch*, the Supreme Court ruled that the category of fault required for liability purposes is determined by the status of the plaintiff; [23] in so doing, the Court underlined that society's interest in a vibrant, dogged free press must be balanced with its interest in protecting individuals from reputational harm. [24] The courts that reject neutral reportage doctrine mainly cite the same two reasons: their determination that *Edwards*, the seminal Second Circuit decision, is inconsistent with the balance struck in *Gertz*, and, second, that the doctrine circumvents the absolute malice ceiling established in *Sullivan*. [25]

The first is open to dispute. Edwards, which is the basis for the Time's Up hypothetical, concerned a *New York Times* article reporting on a DDT-related controversy. The National Audubon Society had published an editorial that referred to certain scientists voicing support for the chemical industry as "paid liars." The Audubon publication didn't identify the scientists, but a *Times* reporter had elicited names from an Audubon member. The article the *Times* published contained Audubon's "paid liars" accusation, the names provided, and denials from the named scientists. Three of the scientists brought defamation claims, arguing that the newspaper was dutybound to determine whether the "paid liar" accusation was true. On appeal, the Second Circuit ruled that even if actual malice were to be found, a constitutional privilege of neutral reportage protected the *Times* from liability. [26] Noting that "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them [,]" Judge Kaufman, who had a strong First Amendment record--perhaps ***16** an offering of sorts to the liberal community after sentencing the Rosenbergs to death--wrote, on behalf of the Second Circuit, that

> when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such

> accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. [27]

In articulating the neutral reportage doctrine, *Edwards* "did not attempt precise definition of its contours[,]" [28] though emphasized that the plaintiff was a public figure, the defendant a "responsible, prominent" organization, and the article at issue a neutral--"accurate and disinterested"--reporting of the allegedly defamatory statement. None of this is inconsistent with *Gertz*. To the extent *Edwards*' "newsworthiness" rationale is inconsistent, that is dicta and not an element of the privilege.

Which is not to say that *Edwards* is problem-free. As others have discussed at length, the Second Circuit cited as precedent two cases, *Time, Inc. v. Pape* [29] and *Medina v. Time, Inc.*, [30] which, in fact, do not support the neutral reportage doctrine. [31] Nonetheless, other courts have taken their cue from *Edwards* in articulating neutral reportage doctrines that they contend are consistent with *Gertz* and constitutionally mandated. In *Barry v. Time, Inc.*, [32] for example, the court discussed neutral reportage at length before formulating what is perhaps the most expansive version of the privilege. *Barry* involved two *Sports Illustrated* articles concerning the University of San Francisco's investigation of its basketball team's alleged illegal recruiting methods. The articles focused on charges that Quintin Dailey, a former USF star player who later played professionally for the Chicago Bulls, received improper payments from a USF supporter in violation of National Collegiate Athletic Association rules. Dailey accused the former USF head basketball coach, Pete Barry, of personally transmitting the money to Dailey. *Sports Illustrated*, in writing about the controversy, reported Dailey's accusations and Barry's denials. The articles also mentioned that Dailey had recently pled guilty to unrelated aggravated assault charges. Barry sued Dailey for slander and *Sports Illustrated*, owned by defendant Time, for libel.

The court, after deciding that Barry was a limited purpose public figure in this context, ruled that summary judgment in favor of Time is required by "the constitutional privilege of neutral reportage," recognizing the doctrine in a matter of first impression in the Ninth Circuit. [33] According to the *Barry* court, the doctrine can be harmonized with *Gertz*: under *Gertz* and its progeny, courts must already assess whether the plaintiff is a public figure, and that assessment precedes the application of neutral reportage. The doctrine does not entail evaluating the newsworthiness of a subject. Moreover, neutral reportage serves an underlying value of the First Amendment: self-government. The court noted:

> Recognition of the public's 'right to know' that serious charges have been made against a public figure is an important application of the Supreme Court's concern that 'debate on public issues be uninhibited, robust, and wide-open.' If a republisher may be held liable for passing on newsworthy but defamatory information to the public, it is likely that he will decline to publish this information for fear that his doubts will later be characterized as 'serious' and therefore actionable. Even if he does not fear ultimate liability, the mere threat of costly and time-consuming inquiry into his state of mind may cast a chilling effect on publication. In this way, the public will be deprived of the opportunity to make informed judgments with respect to public controversies. [34]

In elucidating the doctrine, the judge in *Barry* expanded it beyond its expression in *Edwards*. The neutral reportage privilege recognized by *Barry* applies where the defamed person is a public figure who is involved in an existing controversy, the defamatory statement is made by a party to the controversy, and the republication is "accurate and neutral." [35] According to the court, this is the more sensible approach: it nullifies the court's need to evaluate the trustworthiness of a source, and is better suited to the aim of providing the public with "full information" regarding a public controversy. [36] Moreover, it aligns journalistic responsibility--here, revealing to readers information that casts

doubt on Dailey's reliability--with the need for neutrality.[37] What otherwise may be regarded as evidence of actual malice is instead recognized as a best practice.

That interplay between journalistic responsibility and journalistic liability underlines the logic of neutral reportage doctrine. Neutral reportage, unlike the absolute malice standard, applies regardless of the defendant's state of mind. As a result, the privilege allows for faster resolution of a dispute because the case can be decided on summary judgement--inquiry into scienter is unnecessary. A second, overarching point is that neutral reportage doctrine is useful because, in republication, there are two relevant "truths"--a core and a husk. The core is the truth of the republished statement; the husk is the truth that the statement was said. Both provide information to a reader. Whether the benefit in that information's conveyance outweighs the detriment to an individual defamed by it is a legal determination. But ignoring the reality of the husk is nonsensical. It leads to cases in which lawyers' arguments and court decisions both seem to stretch a little to reach a conclusion the privilege should allow--or, in any event, injects uncertainty about how a judge will rule on opinion vs fact, or some other potentially applicable defense, that ***17** would be unnecessary if the privilege stood.

The intuitive logic supporting the neutral reportage doctrine has led some courts to perform judicial gymnastics to dismiss a case on other grounds. Consider, for example, *Gorilla Coffee, Inc. v. New York Times Co.*,[38] involving a staff dispute in a Park Slope cafe. The Times, reporting on the dispute, republished, in full, a statement employees made accusing the owners of Gorilla Coffee of creating a "perpetually malicious, hostile, and demeaning work environment[.]"[39] The owners sued the Times for defamation. New York state has rejected the neutral reportage doctrine that the Second Circuit has recognized, rendering the privilege unavailable.[40] The Times contended that the employees' statements were opinion, which argument the court adopted in granting summary judgement for the newspaper.[41] Although relying on opinion under these circumstances would seem dubious, a likely explanation is that the judge did so because he recognized that the Times' responsibly reported newsworthy events and thought it proper to dismiss this case. The court's discussion of the statement's context--relevant to the opinion/fact inquiry--stressed, among other things, the neutrality of the article.[42] If the neutrality reportage doctrine were available, which it was not, the analysis could have been more straightforward.

On a national level, the contours of the neutrality reportage doctrine remain unfixed.[43] Logic demands it be seriously reintroduced into the legal landscape. True, the privilege is likely inapplicable in many contexts, and may be available in situations in which good journalism may counsel against republishing something. Consider, for example, the third and last hypothesis sketched above. This is the easy version of Michael Cohen's defamation case against Buzzfeed, currently pending: an imaginary situation in which Vice publishes Stephen Bannon's quote, defaming Cohen. The neutral reportage doctrine would likely protect Vice in jurisdictions, such as the Second Circuit, that allow the defense. The harder case is reality: Buzzfeed posted a dossier of unverified claims about President Donald Trump. Many media organizations declined to do the same, fearing legal liability or beholden to the tradition of liability for republication, especially with such rather flimsy charges.

But editorial discretion is a matter distinct from self-censorship. The neutral reportage doctrine can relieve a news outlet of worrying, with good reason, that to provide its readers with "full information"--of accusations against a public figure, of reason to be skeptical of the accuser, of relevant context for evaluating the accusation--is to build a case against itself for defamation. The privilege narrows the zone of unlawful publication. It provides breathing space that is eminently logical, and perhaps especially well-suited to an age of dissolving political norms and the symbiotic pressurecooker of culturemediapolitics--all intensified by the whipsnap of technology. Many now bemoan the difficulty the media faces in relaying facts. Allowing the media to share with the public important information, and to point out how it is and is not supported, may be part of a solution.

Footnotes

a1 **Naomi Sosner** *is a fellow and* **George Freeman** *is executive director of the Media Law Resource Center in New York City. This article also appeared in the most recent edition of the MLRC Bulletin.*

1 371 U.S. 415 (1963).

2 *Id.* at 433.

3 *Id.*

4 376 U.S. 254 (1964).

5 *Id.* at 276-69.

6 *Id.* at 270.

7 *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967) (overruled by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

8 *New York Times Co. v. Sullivan*, 376 U.S. at 279-80.

9 *See id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

10 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

11 A 2006 survey of cases identified seventeen jurisdictions that adopt some version of neutral reportage privilege and thirteen that reject it. *See* Jennifer J. Ho, Annotation, Construction and Application of the Neutral Reportage Privilege, 13 A.L.R. 6th 111(2006). However, as one law review author notes, "a precise count of jurisdictions is difficult because courts a) have been circumspect about whether they actually are adopting neutral reportage, b) tend to confuse the neutral reportage privilege with the fair report privilege, c) have endorsed or rejected the neutral reportage privilege but only in dicta, and d) are sometimes split within states." Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 85 (2010) (citing cases).

12 *See Hogan v. Herald Co.*, 84 A.D.2d 470, 478-79, 446 N.Y.S.2d 836, 842 (4th Dep't), *aff'd on op. below*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982). That said, the New York Court of Appeals has also ruled that a defendant who would otherwise escape liability under neutral reportage may be protected by New York's *Chapadeau* standard. *See Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 594-95, 549 N.E.2d 453, 456-57, 550 N.Y.S.2d 251, 254-55 (1989); *accord Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11 (2d Cir. 2000). *Chapadeau* established that "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover" if he or she can establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

13 *See Edwards*, 556 F.2d at 120.

14 Restatement (Second) of Torts § 578 (1977).

15 860 A.2d 48 (Pa. 2004).

16 *Id.* at 50.

17 *See* Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 86 (2010) (citing Kathleen Brady Shea, *Defamation Suit from 1995 Settled: A Newspaper was Sued Over Quoted Epithets*, PHIL. INQUIRER, July 14, 2006, at B1).

18 *See id.* at 86.

19 *Glenn*, 860 A.2d at 50-51.

20 *Id.* at 51.

21 *Id.* at 57-58.

22 Restatement (Second) of Torts § 611 (1977).

23 *See* *Gertz v. Welch*, 418 U.S. 323, 347-51 (1974). In contrast to a public figure plaintiff, who must show absolute malice, a private plaintiff at a minimum must show negligence. *See* *id.* at 346.

24 *Id.* at 343.

25 *See* *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1124 (N.D. Cal. 1984) (citing cases).

26 *Edwards*, 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

1. *Id.* at 120 (internal citations omitted).

28 *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68 (2d Cir. 1980).

29 401 U.S. 279 (1971), *reh'g denied*, 401 U.S. 1015 (1971).

30 439 F.2d 1129 (1st Cir. 1971).

31 *See, e.g.*, *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1123 n.15 (N.D. Cal. 1984) (noting neither case is generally regarded as adopting a constitutional privilege of neutral reportage); David McCraw, *The Right to Republish Libel*, 25:2 AKRON L. R., 335, 339 (1991).

32 *Barry v. Time, Inc.*, 584 F. Supp. 1110.

33 *Id.* at 1113. The court also rejected Barry's argument that Time had a heightened duty to investigate Dailey's claims because Time was clearly aware that Dailey was a convicted felon and thus an unreliable source. Looking to Ninth Circuit precedent, the court concluded Barry's allegations failed to show actual malice because "a publisher's knowledge of a source's disreputable character is not necessarily sufficient to put him on notice of probable falsity, and the publisher acts responsibly by not concealing from the reader facts which tend to impugn the source's credibility[.]". *See* *id.* at 1121-22.

34 *Id.* at 1125 (internal citations omitted).

35 *Id.* at 1127. In *Edwards*, the alleged defamer must be "responsible" and "prominent." *See* *Edwards*, 556 F.2d at 120.

36 *Barry*, 584 F. Supp. at 1126.

37 *See* *id.* at 1127.

38 32 Misc. 3d 1230(A), 936 N.Y.S.2d 58 (Sup. Ct. Kings Cnty. 2011).

39 *Id.* at ***4.

40 *See supra* note 12.

41 *See id.* at ***2, ***4.

42 *See id.* at ***13 ("Furthermore, the statement must be viewed in context of the entire post. The Times Defendants presented the workers' statement as part of an ongoing labor dispute. The article presented the opinions of management first, and then that of the workers. It did not state or imply one side's position to be factual or more credible than the other.")

43 The last time the Supreme Court seems to have addressed it was in 1989, by way of footnote. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 660 n.1 (1989). In contrast, a variant of the doctrine was recently codified in the United Kingdom. *See* Section 4 of the Defamation Act 2013, *available at* http://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted.

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