

Reportage and Neutral Reportage – Are They Something New or Just Fair Report on Steroids?

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Introduction

In the UK it is called ‘reportage’ and in those places in the US where it is even recognised, it is called ‘neutral reportage.’ In the UK, reportage is a welcome corollary to the still-emerging *Reynolds* defence while in the US, it is a rather tired doctrine that can boast only that it was once almost acknowledged by the Supreme Court. This paper explores the reportage defence in the UK, the EU and the USA in terms of doctrinal law with some recourse to free speech theory and concludes that reportage, whether viewed as an extension of the fair report doctrine or as a corollary to responsible journalism, serves an important, if limited, role in freedom of speech and freedom of the press.

Initially, reportage can be recognised as having roughly the same meaning in America and England. Reportage is essentially a media defence to defamation claims where the media neutrally republishes defamatory statements originating from a non-official source. On its face, the defence appears to derive from the more well-established common law fair report defence relating to media neutrally republishing defamatory statements contained in official

reports or originating from a government source.¹ The apparent similarity between reportage and fair report may be tempting but is not convincing without fundamental doctrinal and theoretical support. This paper will attempt to demonstrate that the extension of defamation privilege to reportage is both natural and compelling. Before examining doctrinal and theoretical support for reportage, it is useful to conduct a survey of how the doctrine has fared in various jurisdictions.

United States

The neutral reportage doctrine in the United States is somewhat amorphous because it exists to fill in limited gaps that are not encompassed by the requirements of proving actual malice against public officials and public figures established by *New York Times v Sullivan*.² Judicial recognition of neutral reportage is generally acknowledged to have originated with the 1977 Second Circuit decision *Edwards v National Audubon Society, Inc.*³ where Chief Judge Irving Kaufman recognised a privilege for the accurate publication of otherwise libellous statements where the statements were made by a responsible entity concerning a public person⁴ regardless of whether the publisher believed in the truth of the statements.⁵ It is essential to keep in mind that the reporting was done by a third party, the *New York Times*, and that the court was careful to limit the privilege to the publication of allegations that were originally made by responsible organisations.⁶ In the Second Circuit's formulation, the limitation to responsible organisations really puts a crimp on the utility of the privilege

¹ Fair report is fundamentally different from the similarly sounding defence of fair comment which only relates to matters of opinion based on true underlying facts. See Mark Page, 'Price v Viking Penguin, Inc: The Neutral Reportage Privilege and Robust, Wide Open Debate' (1990) 75 *Minnesota Law Review* 157, 160-167.

² 376 US 254 (1964) ('*New York Times*').

³ 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 US (1977) ('*Edwards*').

⁴ Public person is used to include both public officials and public figures.

⁵ *Edwards*, 556 F.2d 113, 120 (2d Cir. 1977).

⁶ In this case, the National Audubon Society was viewed as a responsible organisation.

because the most outrageous and titillating allegations are not usually the province of responsible organisations. In this limited situation, the Second Circuit held that reckless disregard of the truth would not defeat the First Amendment privilege.⁷

Edwards was perhaps a rather inauspicious start for the neutral reportage doctrine because the underlying defamation claim should have failed without recourse to any new defence. While the plaintiffs prevailed in the trial court, the verdict could easily have been set aside under established defamation law. As a matter of law, the newspaper was not acting with actual malice; it was relying on statements made by responsible people and their organisation concerning other public people about a matter of current public controversy. Under the then recent decision of *Gertz v Robert Welch, Inc*⁸, the court of Appeals could have just as easily set aside the lower court decision on the actual malice issue.⁹ Several years later, the Second Circuit acknowledged, in what has proven to be an understatement, that *Edwards*, having established a new principle ‘did not attempt precise definition of its contours.’¹⁰ Indeed the contours of the neutral reportage doctrine have remained unclear and the doctrine has not been recognised by all jurisdictions.¹¹ A leading treatise summarising the doctrine as containing four essential elements may be paraphrased as follows:

⁷ *Edwards*, 556 F.2d 113, 120 (2d Cir. 1977).

⁸ 418 US 323 (1974) (*Gertz*).

⁹ The ability of appellate courts to essentially evaluate evidence to determine whether actual malice could have been established was well established under *New York Times* and has continued to be an essential aspect of US defamation law though its continued vitality may have been somewhat put in doubt by the 1989 Supreme Court decision in *Harte-Hanks Communications v Connaughton*, 491 US 657 (1989) (*Harte-Hanks*).

¹⁰ *Cianci v New York Times Publishing Co*, 639 F.2d 54 (2d Cir. 1980).

¹¹ The Third Circuit has adopted its own version of the doctrine. See *Price v Viking Penguin, Inc*, 881 F.2d 1426, 1434 (3d Cir. 1989); *cert. denied*, 493 US 1013, *rehearing denied*, 494 US 1036 (1990). An exhaustive discussion and examination of decisions decided subsequent to *Edwards* is contained in a recent article by Professor David Elder that is strongly critical of the doctrine. While at times the article may border on polemics, its 1750 footnotes bear testimony to the comprehensive and exhausting research underlying this opus. See David Elder, ‘Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock’s Attempt to Circumvent *New York Times v Sullivan* (2007) 9 *Vanderbilt Journal of Entertainment and Technology Law* 551. More recently, Professor Elder has gone so far to say that neutral reportage was ‘fabricated from whole cloth by Judge Irving Kaufman in *Edwards*’ by ‘misusing and abusing precedent.’ David Elder, ‘A Libel Law

1. Charges of a serious nature must be in a situation where the charges themselves are newsworthy. In other words, the words must relate to something that is newsworthy.¹²
2. The allegation must have been made by a public person or a prominent organisation.
3. The allegations must concern a public person.
4. The reporting must be neutral. The media must not adopt the charges or in any manner endorse the truthfulness of the charges.¹³

There is not however any particularly definitive judicial statement of the precise requirements to trigger application of the privilege in the US¹⁴ and the States that have adopted the defence have modified the rules in ways that are probably more *ad hoc* than systematic.¹⁵

While these four factors seem to have some level of acceptance, there exist numerous variations and any number of modified versions have been suggested by commentators and scholars.¹⁶

Analysis of Media Abuses in reporting on the Duke LaCrosse Fabricated Rape Charges' (2008) 11 *Vanderbilt Journal of Entertainment and Technology Law* 99, 146. In Judge Kaufman's defence, the same criticism could be levelled against Justice Brennan with respect to the actual malice standard in *New York Times v Sullivan*.

¹² As to what may be newsworthy has also spawned critical evaluation. See, eg, Matthew Donnelly, 'A Newsworthiness Privilege for Republished Defamation of Public Figures' (2009) 94 *Iowa Law Review* 1023, 1034-1037.

¹³ Rodney Smolla, *Law of Defamation* (2d ed 2003) vol 2, 4-146. See also, Robert Sack, *Sack on Defamation* (3d ed 2007) vol 1, 7-48.

¹⁴ While California has not adopted the privilege, the Supreme Court of that State has held that whatever the merits of neutral reportage, the doctrine cannot go so far as to protect the media from claims asserted by a private person. *Khawar v Globe International, Inc*, 965 P.2d 696, 706-708 (Cal 1998), *cert. denied*, 526 US 1114 (1999).

¹⁵ A recent journal article by Professor Kutner reviews and analyses these recent decisions. Peter Kutner, 'What Is Truth?: True Suspects and False Defamation' (2008) 19 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1.

¹⁶ One writer has gone so far to suggest a constitutional privilege that would abolish the requirement of neutrality and would permit media exoneration for republication of charges derived from any source against a public figure stating that the 'privilege of neutral reportage will apply where a publisher accurately republishes any statement made by or about a public figure so long as attribution to and identification of the source is made.' James Boasberg, 'With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage' (1991) 13 *Hastings Communications and Entertainment Law Journal* 455, 487. Statutory reportage privilege has also been suggested. See Scott Saef, 'Neutral reportage: The Case for a Statutory Privilege' (1992) 86 *Northwestern University Law Review* 417, 448-452.

While the concept of neutral reportage initially attracted a great deal of judicial and academic interest, the excitement in the US has subsided. Professor Kyu Ho Youm describes the diminution in interest:

A 1998 study of the neutral reportage doctrine in US law found that the judicial enthusiasm for the libel defence in its second decade was less evident than it was in its first decade. The study concluded, 'The doctrine has not been invoked as frequently as was expected in the pre-1987 era.' Further, the rationale and scope of neutral reportage has increasingly been questioned in its third decade. Thus, it is no longer considered viable as a constitutional doctrine in American law.¹⁷

Of course, even if neutral reportage is not mandatory as a matter of constitutional law, the absence of constitutional mandate does not mean that the defence is not an essential aspect of the common law. This paper takes the position that reportage is indeed viable and as a common law defence is supported and explained by existing First Amendment decisions. Furthermore, regardless of constitutional implications, the same free speech theory that justifies the fair report doctrine is equally applicable to neutral reportage. However, before delving into the world defined by free speech theorists and philosophers, some pragmatic reasons for the decline in American interest should be explored.

One reason for the lack of interest is that neutral reportage has never been adopted or even directly considered by the Supreme Court. For that matter it has never been rejected as constitutional doctrine either. The closest opportunity for Supreme Court consideration arose in *Harte-Hanks* where Justice Blackmun in his concurring opinion stated that had the newspaper properly raised the issue on appeal, that neutral reportage could be considered and that the strategic decision to have 'eschewed any reliance on the neutral reportage defense' ...

¹⁷ Kyu Ho Youm, 'Liberalizing British Defamation Law: A Case of Importing the First Amendment?' (2008) 13 *Communication Law and Policy* 415, 438. The conclusion is based on Professor Elder's earlier polemic. See above n 11.

‘appears to have been unwise in light of the facts of this case.’¹⁸ The Supreme Court’s interest in neutral reportage was not limited to this comment by Justice Blackmun. In the opinion of the Court, Justice Stevens also observed that *Harte-Hanks Communications* did not raise the defence in its petition or brief and that accordingly the doctrine would not be considered.¹⁹ Having foregone this opportunity, the media has not had such a clear situation to argue to the Supreme Court that reportage should be part of First Amendment freedom of speech or freedom of the press. The failure to have pressed this point in *Harte-Hanks* had serious consequences in the more recent Supreme Court of Pennsylvania decision, *Norton v Glenn*.²⁰

In *Norton v Glenn*, the Supreme Court of Pennsylvania rejected the neutral reportage defence on a number of grounds that all seem to derive from the central fact that the US Supreme Court never said that the defence was required by the First Amendment. The facts in the Pennsylvania case present a very clear example of a situation where a reportage doctrine could be relevant. A local newspaper, the *Chester County Daily Local* reported comments of members of a local borough council that were made both inside and out of council chambers. The litigation concerned comments made outside of official proceedings. The newspaper article contained allegations made by Councillor Glenn accusing two other municipal leaders of being homosexuals and child molesters. The named targets of the accusations filed defamation claims against the newspaper and Glenn.²¹ The trial court dismissed the claims against the media defendants based on the defence of neutral reportage. On appeal, the Superior Court of Pennsylvania reversed on the grounds that neutral reportage did not exist as

¹⁸ *Harte-Hanks*, 491 US 657, 694-695 (1989).

¹⁹ *Ibid* 660 fn 1.

²⁰ 580 Pa. 212, 860 A.2d 48 (2004), *cert. denied*, 544 US 956 (2005) (*‘Norton’*).

²¹ *Ibid* 860 A.2d at 50.

a constitutional defence.²² On review by the high court of the State, the Supreme Court of Pennsylvania, the Court briefly reviewed the history of US defamation law commencing with *New York Times*²³ and concluded that the requirement that the public person plaintiff prove that publisher acted with actual malice provided a sufficiently broad defence and that no blanket media defence of reportage was appropriate.²⁴

The Pennsylvania Court correctly recognised that neutral reportage is meant to be effective even in the presence of actual malice and the Supreme Court of the US has never sanctioned a defence where actual malice existed.²⁵ Following this same train of thought, a trial court in Los Angeles recently declined to apply neutral reportage because the California Supreme Court had earlier stated that the US Supreme Court had never decided the issue as a matter of constitutional law.²⁶ Based on these recent decisions, it is reasonable to conclude that part of the uncertainty with neutral reportage is the absence of relevant US Supreme Court precedent. The absence of Supreme Court precedent may be justified because reportage is not usually all that essential for the media to mount a defence because it is not a privilege that is required in so many situations.

Neutral reportage could only fill a relatively small gap in media defence in the US because of existing constitutional doctrines. For example, if the source of the information were an

²² 797 A.2d 294 (Pa Superior Ct 2002).

²³ 376 US 254 (1964)

²⁴ *Norton*, 860 A.2d 48, 56. It is also possible that the Pennsylvania decision failed to apply existing US Supreme Court precedent. Under *St. Amant v Thompson*, a publisher is under no duty whatsoever to conduct an investigation to establish a reasonable basis for the allegations. 390 US 727 (1968).

²⁵ *Norton*, 860 A.2d 48, 57. A critique of this decision is also contained in 'Comment, Constitutional Law – Freedom of the Press – Pennsylvania Supreme Court Declines to Adopt Neutral Reportage Privilege *Norton v Glenn*, 860 A.2d 48 (Pa. 2004)' (2005) 118 *Harvard Law Review* 2029.

²⁶ *Bennett v Columbia University*, 34 Media Law Rptr 2202, 2205 (Superior Court 2006). The trial court declined to find the defence despite the advocacy of very well-known trial counsel for the media. Instead, relying on *Khawar v Globe International*, 19 Cal 4th 254 (1998), the trial found that the Supreme Court of California had never accepted the doctrine but had left it for another day. The trial court added that the silence of the US Supreme Court on the issue made the defence all the more uncertain. 34 Media Law Rptr at 2205.

official body such as a government agency or legislature, there is an established common law defence of fair reporting on government proceedings. Furthermore, even if the source were not an official agency, the privilege would not be necessary unless the plaintiff could establish that the media published with actual malice. As defined by *Edwards* and subsequent cases, the defence only applies where the report concerns a public person; consequently, the plaintiff would need to establish by clear and convincing evidence that the media either knew the underlying facts to be false or acted in reckless disregard of the truth. So, the defence should only be relevant in a situation where plaintiff can establish actual malice in the first place.²⁷ Since *Edwards* required that the report emanate from a responsible organisation, it is very likely that the media, relying on such a source, could not be shown to have acted with actual malice. Because the plaintiff in the US must show actual malice by clear and convincing evidence, it is a difficult burden made doubly hard if the source were a responsible organisation. Arguably, even *Norton* could have been resolved favourably for the media under existing actual malice decisions had the reporting not been so neutral. The statements were made by a public official outside of an official proceeding and the media very likely knew that the charges were absurd and had the media made it clear that the publication was made because of the questionable behaviour of the speaker, the claim of defamation might not even have been asserted against the media.²⁸

The actual malice doctrine has, in general, marginalised development of defamation privileges in the US. For example, the obsolescence of the traditional wire service defence is an example. At one time, some courts established a special defence for broadcasters and

²⁷ See Keith Buell, "'Start Spreading the News': Why Republishing Material from Disreputable News Reports Must Be Constitutionally Protected' (2000) 75 *New York University Law Review* 966, 997.

²⁸ The actual claims by Councillor Glenn included assertions that the council president had grabbed Glenn's penis. When informed of this verbal tirade, even the target, Council President Norton, expressed hope that the speaker could obtain appropriate help. *Norton*, 860 A.2d 48, 50.

publishers who simply carried wire service stories that proved to be defamatory.²⁹ The courts found that the media were not required to conduct fact checking but could reasonably rely on wire services and would be exonerated from liability for defamatory republications. Today, the wire service defence is largely irrelevant because the publisher would have lacked actual malice in republishing a wire service story. Of course if the publisher knew that the wire was not true and actual malice could be proven, liability would attach.³⁰

In light of the spotty or tepid reception that neutral reportage has received in the US, the question of the constitutional propriety of the defence is certainly subject to question. However, a common law basis for the defence was actually alluded to but not developed in *Norton*. The Pennsylvania Supreme Court observed that the trial court was incorrect in equating neutral reportage as but ‘another name for the fair report privilege.’³¹ The Court observed that the fair report doctrine protected ‘fair and accurate reports of governmental proceedings.’³² The Court then stated that the issue before the Court were statements ‘not made in the course of official proceedings’ and thereupon dropped the argument. In his concurring opinion, Justice Castille observed that the media should have been protected in making the report but was not protected under US Supreme Court precedent. But, most notably, Justice Castille made the salient point that the applicability of the fair report privilege had not been addressed in the appeal before the Supreme Court but could be raised in the trial court on remand.³³ The fair report privilege predated *New York Times* and, in Pennsylvania, was derived from Section 611 of the *Restatement (First) of Torts* which was

²⁹ For a discussion of the wire service defence, see Richard Peltz, ‘Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm’ (2008) 34 *Northern Ohio University Law Review* 717, 734-738; and Boasberg, above n 16, 458-465.

³⁰ Under the wire service defence, the wire service was not exonerated but was fully liable both for the initial wire and all of the republications.

³¹ *Norton*, 860 A.2d 48, 53, fn 6.

³² *Ibid*.

³³ The underlying problem was that the record was garbled because the trial court had ‘conflated’ neutral reportage with fair report. Precluding clarification, the Supreme Court declined to permit appellate review based on the fair report privilege. *Ibid* 61.

then broadened by the *Restatement (Second) of Torts* to be an almost absolute media privilege:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.³⁴

The fair report privilege has been applied to a wide range of activity, sometimes barely touching upon traditional understandings of governmental activity such as legislative or judicial proceedings. For example, in *Curran v Pennsylvania Newspapers, Inc*, the Pennsylvania Supreme Court stated that if a newspaper accurately reported statements made by a government prosecutor at a news conference, the media would not be exposed to liability.³⁵ In *Norton*, Justice Castille noted that whether the newspaper's report of the councillor's outburst qualified under the fair reports privilege required evidentiary questions that were not pursued by the trial court. Specifically, the trial court never dealt with the central issue of whether the councillor's comments were made during a 'privileged occasion' triggering the existing privilege.³⁶ Consequently, *Norton*, rather than being cited as an example of the rejection of neutral reportage, more properly belongs in a category of cases where there may have indeed been a valid media defence but the defence somehow became lost in the appellate proceedings. This paper maintains that Justice Castille was indeed proceeding along the correct intellectual track by recognising the centrality of the fair report privilege and not being derailed by the absence of relevant US Supreme Court First Amendment decisions. *Norton* could, and should, have been decided through reasonable extension of the common law.

³⁴ *Restatement (Second) of Torts*, Sec 611 (1977). The primary difference between the versions in the First and Second Restatements is that the qualification contained in the First Restatement that the privilege could be forfeited if the publication was made to cause harm was removed in the Second Restatement. Although Pennsylvania had not formally adopted the Second Restatement., it had not been rejected.

³⁵ 497 Pa. 163, 439 A.2d 652 661(1981).

³⁶ *Norton*, 860 A.2d 48, 63-64.

To demonstrate the doctrinal and theoretical logic of extending the fair report privilege to situations such as in the *Norton* case, it is helpful to examine recent decisions in England and the European Union where there is no potential for confusion caused by First Amendment jurisprudence. In this regard, the English common law courts have made a significant contribution.

United Kingdom

The provenance of reportage is both more recent and clearer in the UK than in the USA. It is more recent because it was a direct outgrowth of the reasonable journalism defence articulated in *Reynolds v Times Newspapers* by the House of Lords.³⁷ It is clearer because the English courts are national courts and not subject to the vagaries of fifty different bundles of common law and state constitutions unified only by certain First Amendment guarantees. To appreciate the doctrinal ancestry of English reportage, it is only necessary to re-visit *Reynolds* itself. In *Reynolds*, the former Prime Minister of Ireland had brought a claim for defamation based on an article appearing in the *Sunday Times*. In its decision, the House of Lords announced that the common law recognised a privilege that could be utilised by general-purpose publications providing that the defamatory matter concerned a matter of general public interest. While England has long been viewed as an extremely plaintiff-friendly jurisdiction applying virtually strict liability to defamation claims, the potential of the *Reynolds* defence before a receptive judiciary for eventually altering both the reality and perception of this predisposition justifies an extended examination of this decision.

The common law had long recognised a privilege for factual inaccuracies where there existed

³⁷ [2001] 2 AC 127 [HL] (*'Reynolds'*).

a special relationship between the speaker and the recipient of the defamatory content and the publication was restricted to those persons between whom the special relationship existed.³⁸

Lord Nicholls re-stated this privilege as:

There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged.³⁹

Lord Nicholls further noted that, over the years, many circumstances had been held to be within this privilege, including employment references and reports or statements made to police. Underlying all of the applications of this privilege is the existence of a duty or interest connecting the maker of the statement to the recipient; the interest itself may be social, moral or legal and the interest between the two parties must be mutual.⁴⁰

However, *Reynolds* did not attach any special privilege to political speech and Lord Nicholls specifically rejected the publisher's argument that a special privilege should attach to political speech regardless of the circumstances. Lord Nicholls felt it would be 'unsound' to distinguish political discussion from other matters. In this respect, the decision can be criticised by both its supporters and detractors as suffering some level of disconnect from recognised free speech theory. However, in a subsequent decision concerning the law of privacy, Baroness Hale brought the English treatment of free speech more in line with recognised theory. This development is extremely significant because it brings the concept of responsible journalism more in harmony with the theoretical underpinnings of *New York*

³⁸ The evolution of some of these privileges from a sociological perspective is discussed in M. Slaughter, 'The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society' (1993) 14 *Cardozo Law Review* 351.

³⁹ *Reynolds* [2001] 2 AC 127, 194 [HL].

⁴⁰ *Adam v Ward* [1917] AC 309, 334 [HL].

Times and *Gertz*. This point will be discussed at some length in the theoretical discussion that follows later in this paper.

In his speech in *Reynolds*, Lord Nicholls identified ten factors that should be considered in applying the reasonable journalism privilege:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.⁴¹

Although hardly as revolutionary as *New York Times*, some commentators and legal

⁴¹ *Reynolds* [2001] 2 AC 127, 205 [HL]. See F. Trindade, 'Defamatory Statements and Political Discussion' (2000) 116 *Law Quarterly Review* 185, 189

practitioners nevertheless saw *Reynolds* as a serious loss of individual rights.⁴² Subsequent to *Reynolds*, a number of cases were decided that added clarity concerning the reach of the privilege.⁴³ On the other hand, some of the lower courts misconstrued Lord Nicholls' speech and insisted that the privilege would not apply unless all ten of the factors were present.⁴⁴

The ability of common law malice to defeat the *Reynolds* privilege has been a matter of debate. *Reynolds* is built on the concept of a defamatory publication concerning matters of public interest being privileged if the publisher behaved reasonably. Under the traditional common law limited privilege, the privilege could be defeated by malice.⁴⁵ In *Loutchansky v Times Newspapers Ltd*, the Court of Appeal was of the opinion that in a case involving the *Reynolds* defence, if the publisher could establish reasonable conduct, then malice was usually foreclosed by the proof of reasonable conduct.⁴⁶ Lord Phillips observed that malice was hard-pressed to co-exist with reasonableness:

[Once] Reynolds privilege attaches, little scope remains for any subsequent finding of malice. Actual malice in this context [not the *New York Times* meaning] has traditionally been recognised to consist either of recklessness, ie not believing the statement to be true or being indifferent as to its truth, or making it with the dominant motive of injuring the claimant. But the publisher's conduct in both regards must inevitably be explored when considering Lord Nicholls' ten factors, ie in deciding whether the publication is covered by qualified privilege in the first place.⁴⁷

⁴² See eg, Jonathan Coad, 'The Irrelevance of Truth and Falsity in the New Law of Defamation,' (2002) 13(5) *Entertainment Law Review* 95, 96. The passage of time and cases decided between *Reynolds* and *Jameel* did not appear to soften Mr. Coad's criticisms. See Jonathan Coad, 'Reynolds and Public Interest – What About Truth and Human Rights' (2007) 18(3) *Entertainment Law Review* 75.

⁴³ Ian Loveland, 'The Ongoing Evolution of Reynolds Privilege in Domestic Libel Law' (2003) 14(7) *Entertainment Law Review* 178.

⁴⁴ Marin Scordato, 'The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law' (2007) 40 *Connecticut Law Review* 165, 175.

⁴⁵ The history of malice as a factor in defamation claims is discussed in Paul Mitchell, 'Malice in Defamation' (1998) 114 *Law Quarterly Review* 639.

⁴⁶ [2002] QB 783, 806 (CA).

⁴⁷ *Ibid.*

This conclusion in *Loutchansky* may be questioned because a publisher could conceivably meet all the reasonableness tests and still publish with common law malice.⁴⁸ Perhaps a better argument is that *Reynolds* should exonerate the publisher regardless of malice because if the publication is reasonable, malice should not diminish the objectively measured conduct of the publisher and the value of the publication to the public.

The House of Lords took up the *Reynolds* issue again in 2007 in *Jameel v Wall Street Journal (Europe)*.⁴⁹ In his speech, Lord Hoffmann wrote that the ten factors created by Lord Nicholls ‘are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J [the trial court] treated them.’⁵⁰ As Lord Hoffmann further noted, the standard of responsible journalism was objective and ‘no vaguer than standards such as “reasonable care” which are regularly used in other branches of law.’⁵¹ While *Jameel* does not substantively alter *Reynolds*, it is an important decision because it clarifies the breadth of what is now commonly referred to as the *Reynolds* privilege or defence and implicitly invites the wider application of the defence.⁵² The underlying facts in *Jameel* provided a relatively clear situation of legitimate public interest – the funding of terrorist activities. The *Wall Street Journal Europe* had employed an experienced reporter but not all possible sources had been checked nor had the claimant been contacted for comment prior to publication. Yet, in a

⁴⁸ Of course, viewed pragmatically, it could be difficult to convince the judge or jury that conduct was reasonable if the publisher bore true animus toward the claimant.

⁴⁹ See Ian Cram, ‘Reducing Uncertainty in Libel Law After Reynolds v Times Newspapers? Jameel and the Unfolding Defence of Qualified Privilege’ (2004) 15(5) *Entertainment Law Review* 147.

⁵⁰ [2007] 1 AC 359, 384 [HL]. Judge Eady’s actions in this respect may be not unlike the US judges who ignored the actual malice language imposed by the Supreme Court in *New York Times* and continued to use the common law meaning of malice in jury instructions. Lord Hoffmann wrote that ‘Eady J stated that the concept of “responsible journalism” was too vague. It was, he said, “subjective”. I am not certain what this means except that it is obviously a term of disapproval. (In the jargon of the old Soviet Union, “objective” meant correct and in accordance with the Party line, while “subjective” meant deviationist and wrong.):’ at 383.

⁵¹ *Ibid.*

⁵² David Hooper, ‘The Importance of the Jameel Case’ (2007) 18(2) *Entertainment Law Review* 62, 63. Judges will need a new mindset focusing not on presumption of probable falsity but on genuine public interest.

procedural move somewhat reminiscent of the US Supreme Court in *New York Times*, the House of Lords did not send the matter back for retrial but concluded that even without benefit of reviewing all of the trial evidence, the matter should be dismissed. *Jameel* constitutes an unqualified re-affirmation of the *Reynolds* defence.⁵³ Perhaps the single most memorable contribution of *Jameel* was contained in the speech of Baroness Hale where she defined the scope of the defence in terms so blunt and elegant that they almost might have been barked by General Patton:

[T]here must be a real public interest...[and] this is very different from saying that it is information which interests the public – the most vapid tittle-tattle about footballers’ wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.⁵⁴

Within post-*Reynolds* environment of liberalising media privileges, reportage was also recognised as a possible defence to a defamation action. In a post-*Jameel* decision, *Roberts v Gable*,⁵⁵ the Court of Appeal had occasion to revisit the *Reynolds* privilege and, this time, quite correctly, did not require the publisher to satisfy all ten factors identified by Lord Nicholls in *Reynolds*.⁵⁶ Indeed, the Court of Appeal marginally expanded *Reynolds*, or at least created a corollary to encompass and recognise a separate defence of reportage. The alleged defamatory statements in *Roberts v Gable* involved a publication of limited circulation that reported allegations made by members against one another in a right-wing political party - the British Nationalist Party.⁵⁷ Unlike the rather specific conditions laid down in *Edwards* by the US Second Circuit, the English Court stated in more general terms that the doctrine of reportage related to the publication of allegations made in the context of a matter

⁵³ Kate Beattie, ‘New Life for the Reynolds “Public Interest Defence”? *Jameel v Wall Street Journal Europe*’ (2007) 1 *European Human Rights Law Review* 81.

⁵⁴ *Jameel*, [2007] 1 AC 359, 408 [HL].

⁵⁵ [2008] QB 503 (CA).

⁵⁶ *Ibid* 517.

⁵⁷ *Ibid* 506. Judge Eady had previously dismissed the matter on summary judgment.

of public interest in which the allegations are not reported as facts by the media but are reported simply as allegations.⁵⁸ The basis of the privilege is that the allegations themselves constitute a matter of general public interest and thereby fall within *Reynolds*.

In *Roberts v Gable*, Ward J reviewed situations when the concept of fair reportage had been raised in the past and noted at some length the earlier American decision in *Edwards*. However, Ward J was reluctant to place too much reliance on *Edwards* because of his somewhat tongue-in-cheek ‘concern’ that to a court in the United States, the First Amendment might carry more weight as legal authority than would Article 10 of the *European Convention on Human Rights* that applied to the English proceedings.⁵⁹ In dealing with the concept of reportage within the context of the common law, Ward J made the following observations which demonstrate how the concept of reportage is encompassed within the umbrella of *Reynolds*:

Once *reportage* is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is ... a special example of *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own.⁶⁰

Ward J went on to identify a series of elements that would be relevant inquiries if the publisher asserted a defence of reportage. These elements can be paraphrased:

1. The information must be in the public interest.
2. Under *Reynolds*, the publisher must take reasonable steps to verify the truth and accuracy of what is published. *In reportage, there is no need*

⁵⁸ Ibid 517.

⁵⁹ Ibid 523. In fact it is by no means clear that *Reynolds* is in compliance with Article 10 of the European Convention. Rory Dunlop, ‘Article 10, The Reynolds Test and the Rule in the Duke of Brunswick’s Case – The Decision in Times Newspapers Ltd v United Kingdom’ (2006) 3 *European Human Rights Law Review* 327.

⁶⁰ *Roberts* [2008] QB 503, 526 (CA).

to verify underlying facts. It is only necessary that the allegations were, in fact, made.

3. *The report must have the overall effect of reporting not the truth of the statements but the fact that they were made.*
4. The overall effect of the article is a matter for the court and not the jury – it is objective and not subjective.
5. The privilege is lost if the publisher adopts the statements or fails to report in a fair and disinterested way.
6. The publication must always meet the standards of responsible journalism as described in *Reynolds* but as modified by the special circumstances of reportage.
7. The seriousness of the allegation is a relevant consideration.
8. There is no need for a US public figure test as it is unnecessary if the other factors have been met.
9. Urgency or hot news is a relevant consideration.⁶¹

Lord Justice Ward explained the defence in terms of the rules of evidence:

To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction.⁶²

In *Charman v Orion Group Publishing Group Ltd*, which was roughly contemporaneous with *Roberts*, Ward J made some further observations about the reportage defence that shed light on its connection to traditional legal analysis:

The critical point of that analysis is that the defence will be established where, judging the thrust of the report as a whole, the effect of the report is not to adopt the truth of what is being said, but to record the fact that the statements

⁶¹ Ibid 527-528.

⁶² Ibid.

which were defamatory were made. The judge's task is akin to the way in which at common law hearsay evidence used to be admitted or excluded. The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way.⁶³

While this analogy does not directly connect to free speech theory, the metaphor raising the comparison to rules governing hearsay evidence bears further explanation. Traditionally, hearsay is defined as an out of court statement offered to prove the truth of the matter asserted. The key phrase is 'offered to prove the truth of the matter asserted.' If the testimony were being elicited only for the point that the statement had been made, it would not be hearsay at all because the witness testifying would indeed be subject to cross-examination with respect to whether the statement had been made. As perhaps every trial lawyer knows, trying to overcome the hearsay rule merely by saying that the statement is offered not to prove the truth of the matter but rather to prove that the statement was made can be challenging. The challenge is to establish the relevance of the statement itself and sometimes to patiently explain, without appearing condescending, the sense of the matter to the court and opposing counsel. A frequent basis for claims of relevance is that the statement indicates reliance or bias. With apologies to trial lawyers and for the benefit of transactional counsel, an example may best explain this somewhat arcane point of evidence.

Jones is arrested for illegally setting-off fire alarms at a motion picture theatre and causing a near panic. Jones' counsel wishes to introduce evidence that Jones set off the alarms after hearing Smith yelling 'fire, fire, run for your lives.' Smith has meanwhile fled the jurisdiction. The novice prosecutor objects on the grounds that Jones is testifying to hearsay. Defence counsel argues that the statement is not being offered for the truth of the matter asserted; that is, whether in fact there was a fire, but rather for the fact that Jones heard

⁶³ *Charman v Orion Group Publishing group Ltd* [2007] EWCA 972 Paragraph 48.

someone yelling ‘fire’ and in reliance, reacted reasonably under the circumstances – the fact that the statement was made rather than the truth of the statement is the relevant fact. In the normal course, the trial court would, of course, admit the testimony.⁶⁴ Then consider a more typical situation where Jones is accused of driving through a red light and causing a traffic accident. Jones attempts to testify that he heard a non-party onlooker remark after the accident that Jones had made a complete stop at the light. In this situation, the fact that the statement was made is irrelevant to the case. The statement is rank hearsay because it is offered to prove the truth of the matter asserted – namely that Jones did indeed stop at the light.

Given this example, Lord Justice Ward’s reference to hearsay in the context of neutral reportage is clear. If the fact that the assertion was made is important to the populace without regard to whether it is true or not, then it may be reasonable to report the allegation but without endorsement as to its validity. Furthermore, in keeping within the parameters of *Reynolds*, the publication must be undertaken responsibly, which typically requires giving the target of the calumny an opportunity to respond. By way of example, if a dictator announces that a minority living within his country’s borders are criminals not entitled to life or liberty, that information is extremely valuable, at least to members of that minority, regardless of the falsity of the underlying factual assertion of ethnic criminality. Or, consider the situation where the President of the US refers to the Vice President as too stupid, narrow-minded and

⁶⁴ For those of us who attended Columbia or New York University Law Schools in the 1970s and were fortunate enough to have the late Judge Irving Younger as our evidence instructor, we are reminded of the Judge’s advice that when the trial court judge does not appreciate the relevance of the statement itself as opposed to the truth of the matter contained within the statement, an appropriate course of action is to waive your arms and with deepest seriousness indicate to the court that the statement constitutes part of the *res gestae*! Judge Younger’s point being that relevance arguments should have long ago relegated the somewhat gauzy or fuzzy *res gestae* argument to the same section of the law attic that houses such once notable concepts as the Rule in Taltarum’s case.

corrupt to be permitted to be in the line of succession.⁶⁵ Regardless of whether the statement is true or false, the fact that the President is saying such words is important to the public because it indicates a dysfunctional administration or at least a lack of harmonious and cordial relations among elected leaders. This would be an example of a public person stating something about another public person that is newsworthy regardless of the truth or falsity of underlying facts.

There is one salient and unfortunate respect in which the UK reportage decisions are similar to their American cousins, in neither jurisdiction has the high court of the land expressed approval for the defence. The House of Lords has yet to rule on reportage as a common law doctrine and at least one commentator has indicated that reportage in its current iteration is unlikely to be recognised as responsible journalism because without verification of the underlying facts, reportage is per se unreasonable.⁶⁶ However subsequent to that observation, published decisions from the European Court of Human Rights, discussed in the next section, likely preclude an outright rejection of reportage by the English courts. Furthermore, it can also be argued that, following the hearsay metaphor, verification is properly irrelevant because the statements are not being published for the truth of the matter asserted but rather it is responsible journalism to publish the statements because the statements are important simply because they have been uttered. Looking back at the Pennsylvania case, *Norton v Glenn*, the statements may have been revealing of the mental or emotional stability of the speaker who was an elected official and perhaps the public was entitled to be aware of that situation.

⁶⁵ With the exception of the corruption allegation, this hypothetical is not all that far removed from statements made by President Nixon concerning Vice President Agnew as Nixon manoeuvred to find a way to replace the hapless Agnew with Nixon's personal choice of successor Treasury Secretary John Connolly. Of course, as it turned out, Agnew was corrupt and ultimately resigned in disgrace. See Jules Witcover, *Very Strange Bedfellows* (2007) 207-224.

⁶⁶ See Godwin Busuttill, 'Reportage: A Not Entirely Neutral Report' (2009) *Entertainment Law Review* 44, 49. See also, Jonathan Coad, 'Hutton's Law for the Media – Was He Right' (2004) *Entertainment Law Review* 157.

Input` from Strasbourg – The European Court of Human Rights

Article 10 of the *European Convention of Human Rights*⁶⁷ as interpreted by the European Court of Human Rights (‘European Court’) provides some recognition to a general concept of reportage as a component of the freedom of expression. Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....
2. The exercise of these freedoms...may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others...

Clearly the conditions set forth in paragraph 2 of Article 10 are a far cry from the sweeping language of the First Amendment ‘Congress shall make no law,’ yet decisions from the European Court have found within this somewhat tenuous language the basis for setting aside decisions based on established national law. While the limitations on freedom of expression are broad, they are not unlimited. Significantly, the European Court has interpreted Article 10 to give special protection to speech concerning political debate with less protection for commercial and artistic expression.⁶⁸ As will be discussed below, the recognition of the primacy of expression in matters of political debate brings EU law very much in accord with free speech theory that has been recognised by the US Supreme Court and thereby facilitates meaningful comparisons. In other words, because the theoretical foundations or goals are similar, how matters have been treated by the respective jurisdictions make for meaningful comparison – apples for apples.

⁶⁷ What is commonly referred to as The *European Convention of Human Rights* is formally the *Convention for the Protection of Human Rights and Fundamental Freedoms* and is part of the law of England as the *Human Rights Act 1998* (UK).

⁶⁸ Clare Ovey & Robin White, *The European Convention on Human Rights* (4th ed 2006) 320.

In interpreting Article 10, the European Court has recognised that reporters do have a certain privilege to repeat defamatory statements made by others providing that the statements are useful to imparting information to the public concerning matters of public interest.⁶⁹ Article 10 probably offers protection to the media as long as the defamatory statements are not adopted but are simply reported.⁷⁰ The extent of the reportage privilege can be gleaned from examination of several European Court decisions. Perhaps the leading case is *Thoma v Luxembourg*⁷¹ in which a radio journalist had been successfully prosecuted under Luxembourg law for defaming various persons engaged in the public forestry industry by asking panellists on a program to comment about passages written by a fellow journalist. The quoted passages were not only defamatory but also concerned the integrity of the stewardship of a valued public resource. In setting aside the Luxembourg decision, the European Court stated that the journalist did not have to formally distance himself from the statements but was even permitted to use the statements in a provocative way:

[T]he Court notes that the Court of Appeal [Luxembourg] only had regard to the fact that the applicant had quoted from his fellow journalist and, on that basis alone, found that he had adopted the allegation contained in the quoted text since he had failed formally to distance himself from it.

A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.⁷²

More recently in *Selisto v Finland*⁷³ the European Court set aside a Finnish decision in which the author of a series of newspaper articles concerning medical care and medical negligence in Finland had been successfully prosecuted for defaming an unnamed physician. The

⁶⁹ Andrew Nicol, Gavin Millar & Andrew Sharland, *Media Law & Human Rights* (2d ed 2009) 94.

⁷⁰ See Helen Fenwick & Gavin Phillipson, *Media Freedom Under the Human Rights Act* (2006) 1074

⁷¹ (2003) 36 EHRR 21 (ECHR).

⁷² *Ibid* Paragraphs 61 and 64.

⁷³ (2006) 42 EHRR 8 (ECHR),

Finnish court found that the reporter had a duty to verify facts and that quoting a surviving spouse concerning drunken behaviour by a surgeon who had operated on the man's wife was irresponsible inasmuch as the regulatory body charged with managing physician conduct had elected not to bring charges against the surgeon. The European Court focused on whether the calling into play of the second paragraph of Article 10 could be justified; that is, whether the prosecution for defamation was 'necessary in a democratic society.'⁷⁴ Finland defended its judgment on the ground that the reporter was under a duty to provide bona fide information and should have tried to verify the facts provided by the widower of the patient before quoting them in the article.⁷⁵ In exonerating the journalist, the European Court made a number of findings and observations that provide support to the concept of reportage:

53. Where, as in the present case, measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures ... is called for.

59....The methods of objective and balanced reporting may vary considerably...it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.

63. The information contained in the articles gives...an alarming picture about issues of patient safety.... The certain selectiveness of quotation in the article...cannot be regarded as both a sufficient and relevant reason to justify the appellant's conviction. Generally, journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation.

70. [T]he Court does not find that the undoubted interests of X [the allegedly intoxicated surgeon] in protecting his professional reputation was sufficient to outweigh important matters of legitimate public concern. In short, the reasons relied on by [Finland]... are not sufficient to show that the interference complained of was 'necessary in a democratic' society.

Accordingly there has been a violation of Article 10 of the Convention.⁷⁶

⁷⁴ Ibid paragraph 35.

⁷⁵ Ibid paragraphs 39 and 43.

⁷⁶ Ibid.

Selisto v Finland certainly seems to firm-up the rights alluded to in the earlier *Thoma v Luxembourg* decision. Significantly, in terms familiar to American legal practitioners, the European Court notes in paragraph 53 that limitations on Article 10 freedoms require ‘careful scrutiny.’ This is certainly at odds with the traditional common law approach where freedom of expression is an exception to the otherwise strict liability defamation laws. Furthermore, the European Court does not require that reporting must be balanced and reiterates that the legitimate expectations of society in addressing matters of public concern are not to be lightly infringed. In a subsequent decision, *Verlagsgruppe News GmbH v Austria*⁷⁷, the European Court again reiterated the basic principles set down in *Thoma v Luxembourg* and set aside an Austrian decision in which a publisher had been prosecuted for reprinting portions of a defamatory letter. In this case, an Austrian appellate court had determined that the publisher had adopted or endorsed the defamatory material. The European Court was not impressed with this argument and rejected the Austrian decision. Interestingly, the European Court actually used the word ‘reportage’ in its decision but not in the context of creating or recognising an Article 10 right.⁷⁸

While the Strasbourg jurisprudence does not provide any particularly novel or original arguments in support of a reportage privilege, the fact the doctrine is to at least some degree recognised throughout the European Union demonstrates the broad reach of the privilege and should indicate that the doctrine should not be lightly discarded in the US. Now, having examined how reportage has been treated in the US, UK and EU, the question remains whether these decisions are sound. To answer this, it is necessary to make use of both doctrinal and theoretical concepts.

⁷⁷ [2007] EMLR 17 (ECHR).

⁷⁸ *Ibid* paragraph 30.

Doctrinal Arguments in Support of Reportage

From a doctrinal standpoint⁷⁹, a reportage defence in the UK is relatively straightforward to justify as being a variant of responsible journalism. In *Roberts v Gable*, Lord Justice Ward's identification of elements to prove the defence shows how it relates to and derives from *Reynolds* itself. Reportage, as an aspect of responsible journalism, should be expected to assume a significant role in defamation law in the UK. This is unlike the situation in the US for a very simple reason. In the UK, reportage could very well become a so-called front line defence whereas in the USA, it will likely remain a defence of last resort after the mainline defences fail. By and large, common law strict liability is still the rule in the UK – any defences must be proven by the defendant. In the US, at least with respect to public persons, the situation is quite different. The presumptions and burdens of proof are reversed – it is the plaintiff who must prove falsity and who must prove that the publisher acted with actual malice. In the US, defences like neutral reportage are only needed when the barbarians are literally at the gates.

While the defence or privilege may be of limited utility in the US, it is also reasonably clear that doctrinal justification under US precedents has not been well-articulated. Indeed, from the viewpoint of existing legal doctrine, it is more straightforward to justify reportage as an extension of the *Reynolds* defence. By and large, American decisions that have found neutral reportage to be a valid defence have been less than clear in the justification under American defamation law. In this respect, Professor Elder's magnum opus criticising neutral reportage is precisely on point.⁸⁰ If David Elder's article proves anything, it establishes the lack of consistency among the American neutral reportage cases. Professor Elder persuasively

⁷⁹ Doctrinal law, as opposed to legal theory, is used in the sense of referring to existing, established and accepted legal principles. In the context of defamation law, doctrinal law would include actual malice under *New York Times* or reasonable journalism under *Reynolds*.

⁸⁰ David Elder, 'Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempt to Circumvent *New York Times v Sullivan*' above n 11.

demonstrates that these decisions are frequently the result of courts achieving a result outside of existing law and justifying the result by citing a doctrine that seems to ebb and flow as convenience dictates. This fast and breezy approach goes back to *Edwards* where Judge Kaufman seemed to pluck neutral reportage from the ether. Subsequent decisions have not done much better. However, this doctrinal obfuscation received a good deal of clarification in Justice Castille's concurring opinion in *Norton*. As discussed earlier in this paper, Justice Castille raised serious questions about whether the well-established common law fair report privilege could be applied. He noted that the fair report privilege protected the media when reporting a US Attorney's news conference and questioned whether the existing privilege might not also apply to the remarks of the local councillor.

This paper suggests that Justice Castille was indeed raising the correct inquiry and that, based on existing American common law, the fair report doctrine encompasses or should encompass publications that fall within reportage or neutral reportage. The fair report privilege is a common law privilege but frequently has been codified by the States. It existed prior to *New York Times* and is not based on the First Amendment and it is unclear whether there are constitutional implications underlying this privilege other than to say that many fair report situations would also be encompassed by the rules in *New York Times* and *Gertz*.⁸¹ Consequently the doctrine is not uniform among the fifty states and this discussion will necessarily be somewhat generalised. Because the doctrine is common law based, national uniformity will be difficult because the US Supreme Court does not, unlike the high court of other common law countries such as Australia or England, have jurisdiction to resolve questions of common law on a national basis.⁸² Unless there is a constitutional component,

⁸¹ See *Cox Broadcasting Corp v Cohn*, 420 US 469 (1975). *Cox* is not precisely on point but offers some level of support for the view that accurate reporting of public records cannot support a claim for invasion of privacy.

⁸² See *Erie, Lackawanna RR Co v Tompkins*, 304 US 64 (1938).

the US Supreme Court may not have an opportunity to resolve the validity of the reportage defence.⁸³

At its most basic, the fair report privilege permits the media to republish defamatory statements made in an official proceeding or report as long as the official source of the statement is given attribution. As noted by Judge Sack in his treatise, the jurisdictions vary as to whether the defence is defeated by the publisher's actual malice – knowledge of falsity or reckless disregard for the truth.⁸⁴ The policy justifications for this privilege can be summarised:

1. Government proceedings are actually public and all interested persons would be theoretically permitted to attend. However this is not physically possible and therefore the republication of these proceedings is merely bringing to the attention of the public information that belongs to the public in the first place. This is the *agency* basis.⁸⁵
2. By reporting on governmental activities, the press provides information concerning the performance of public officials which in turn permits the public to perform their essential civic role of popular oversight of the government. This is the *public supervision* basis.⁸⁶
3. The media itself operates as a watchdog providing citizens with information from assorted sources, official or not official, that will assist the public in knowledgeably dealing with matters of public interest.⁸⁷

⁸³ However the Supreme Court's observation in *Harte-Hanks* indicates that there may very well be a constitutional component. See *Harte-Hanks*, 491 US 657, 694-695 (1989).

⁸⁴ Robert Sack, *Sack on Defamation* (3d ed 2007) vol 3, 7-17.

⁸⁵ James Boasberg, *With malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, (1991) 13 *Hastings Communications and Entertainment Law Journal* 455, 465.

⁸⁶ *Ibid.*

⁸⁷ Sack, above n 84, vol 3, 7-20.

Argument number 1, the agency rationale, is somewhat artificial as it is based on a legal fiction. Because the proceeding that was the source of the defamatory statement was open to the public, the public is deemed to have been present during the privileged occasion. The media was ostensibly acting as the agent of the public because all members of the public could not attend the public proceeding.⁸⁸ Arguments number 2 and 3 have the advantage of not being based on any legal fictions and are also harmonious with basic concepts of democratic government. If the people are to govern, they must be knowledgeable of as much factual information as possible and for the people to regulate public officials, the public must have knowledge of what government is doing. While these rationales are relatively easy to apply to fair report of government proceedings, the same logic does not necessarily apply to non-official proceedings, or does it?

Extension of the fair report doctrine from official proceedings to include non-official sources can be supported by examining the evolution of modern First Amendment interpretations. By re-visiting the reasoning behind the extension of the actual malice standard from claims by public officials to all public figures, it is not difficult to extrapolate an argument for neutral reportage being included within the fair report privilege.⁸⁹ *New York Times* established a constitutional privilege with respect to defamatory publications concerning public officials. Several years later in *Curtis Publishing Co v Butts*,⁹⁰ the Supreme Court extended the same privilege to defamatory statements concerning public figures. Public figures included persons of notoriety who through status or accomplishments could influence public opinion in general

⁸⁸ See David Marburger, 'More Protection for the Press: The Third Circuit Expands the Fair report Privilege' (1982) 43 *Univ. Pittsburgh Law Review* 1143, 1147-1148.

⁸⁹ This analogy can only be carried so far as *New York Times* and *Curtis* dealt with status of claimants and not the treatment of materials that could be reported with impunity. Nevertheless the comparison is useful because it shows the willingness of the law to apply common-sense or pragmatism in rejecting artificial distinctions between public and private entities.

⁹⁰ 388 US 130 (1967) ('*Curtis*'). The application of First Amendment protections to defamatory statements about public figures as well as public officials was finalised in its current form in *Gertz* which continues to be operative law in the US.

or in specific areas. In his concurring opinion, Chief Justice Warren explained that the influence on public affairs as between officials and other types of public personalities had become blurred in modern society and that the law should recognise the official mantle of governmental authority was not at all necessary for someone to have a pervasive influence on matters of concern to the public:

To me, differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred.⁹¹

Just as the level of influence on public affairs as between public officials and public figures has become blurred and thereby justifying the actual malice standard in both categories, that same influence of public figures justifies extending the fair report privilege to sources beyond official government proceedings. The same policy considerations that convinced Chief Justice Warren to acknowledge that the pervasive influence of prominent non-governmental persons required the extension of the actual malice standard to these public people, should also be persuasive to extend the reach of the fair report privilege. Just as the law recognises the pervasive influence of all public people for First Amendment purposes, the law should also recognise the influence and importance of findings or statements generated outside of official proceedings. In both situations, the underlying issue is the facilitation of information from influential people or organisations to the public. Furthermore, it is difficult to practically determine when a proceeding is official and when it is not. Indeed one of the challenges in applying the fair report privilege is the preliminary inquiry of determining whether the occasion was official or non-official.⁹² By recognising that non-official proceedings may be just as relevant to debate on matters of public interest, the fair report

⁹¹ Ibid 163.

⁹² The number of cases in California alone dealing with this issue is indicative of the difficulty and artificiality of making the distinction between official and non-official. See B.E. Witkin, *Summary of California Law* (10th ed 2005, supp 2009) vol 5, sections 578-583.

privilege would better accomplish its stated justifications. As an example, if defamatory accusations are contained in a Federal examination into the condition of the natural gas industry or in a Ford Foundation Report, in both cases, the information is likely of equal import to the citizens in determining national energy policy. Of course, this, in turn, raises the more fundamental question of why is the public entitled to receive information which defames another person. What exactly is the social good that stands traditional tort law on its head? To answer that question, we must visit the realm of legal philosophers and theorists.

Application of Free Speech Theory

By examining free speech theory, this paper will seek to work towards two goals. The first is to provide sound arguments for recognising reportage as an extension of the fair report doctrine. Second, an attempt will be made to find a common theoretical thread that supports both American and English doctrinal reportage law. In reviewing the rather voluminous literature generated in the US concerning the neutral reportage defence, it was apparent that one of the difficulties that perhaps has contributed to the jumble of arguments and inconsistent results is that the articles and cases rarely scratch below the veneer of doctrinal law and examine underlying policy or theory.⁹³ Before approaching the theory that may support reportage, it may be helpful to very briefly explain the nature of free speech theory and how it has been used by the US Supreme Court.

There is an enormous and constantly growing body of literature concerning free speech and any attempt at organised discussion is facilitated if the various arguments and theories are organised in some type of taxonomy. For purposes of this discussion, the theoretical structures developed by Professor Ronald Dworkin will be used to approach the theories.

⁹³ Even in Professor Elder's magnum opus of criticism, the discussion is generally confined to doctrinal criticism rather than free speech theory. See above n 11.

Ronald Dworkin maintains there are two basic justifications for free speech: the instrumental justification and the constitutive justification. As defined by Dworkin, the instrumental justification for free speech is based on the consequences or effects of free speech - free speech allows society to perform better if free speech flourishes.⁹⁴ Free speech assists in the achievement of specific goals. On the other hand, the constitutive justification holds that freedom of speech is valuable not just as an instrument to help create a better society but because freedom of speech is an essential constituent part of a just society and is an essential part of human dignity.⁹⁵ The constitutive justification perhaps can be distilled as meaning that free speech is intrinsically a good thing without regard to how well it helps to achieve specific goals such as democracy or self-government.⁹⁶ The instrumental justification breaks down into philosophical reasons and political reasons.

Perhaps the most cited and well-known philosophical argument in favour of free speech appears in the mid-19th Century writings of John Stuart Mill.⁹⁷ Fundamentally, Mill maintained that free and open discussion was essential to the ultimate discovery of the truth.⁹⁸ Mill's theory has also been described as the 'best perspectives or solutions' theory.⁹⁹ The premise is that the absence of restraints on speech will facilitate discovery of the truth.¹⁰⁰ Mill apparently derived his theory from John Milton's *Areopagitica: A Speech for the Liberty of Unlicensed Printing* that appeared in 1644. In the first half of the 20th Century, US Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis adapted Mill's theory into more

⁹⁴ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 199-200 ('Freedom's Law').

⁹⁵ Ibid 200. Essentially this concept very much follows in the tradition of Immanuel Kant's belief in the autonomy of the individual.

⁹⁶ Democracy and self-government are used interchangeably as they are similarly used by free speech theorists.

⁹⁷ Frederick Schauer, *Free Speech: a Philosophical Enquiry* (1982) 15.

⁹⁸ John Stuart Mill, *On Liberty* (1859, Folio edition 2008).

⁹⁹ C. Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1977-1978) 25 *University of California Law Review* 964.

¹⁰⁰ Ibid.

contemporary language and spoke in terms that free speech was desirable because it fostered a marketplace of ideas.¹⁰¹ The truth and marketplace of ideas theories have been very influential in the development of all contemporary free speech theory. The marketplace of ideas formulation falls within the concept of instrumental free speech because the marketplace of ideas was intended to lead to good choices and sound decisions being made by individuals and society as a whole. The Holmes/Brandeis formulation was not so much a new theory as a new rationale as to why free speech will lead to discovery of the truth.¹⁰²

As an alternative to the philosophical reason that free speech is valuable because it ultimately leads to the discovery of the truth, there also exists a political reason to the effect that free speech is essential to a well functioning democratic self-government. This is the clearest example of an instrumental justification because the connection between free speech and democracy is more direct and less controversial than the more philosophical reasons. The political reason is supported by the democracy theory which essentially holds that free speech is essential for collective decision making and promoting citizen participation in government. The relationship between free speech and democracy is so close that it has been suggested that it is not possible to understand democracy or free speech without considering them together.¹⁰³ Although related to the truth theory, the democracy or self-government theory is more direct and has been given substantial recognition by courts in some countries including both the US and the UK. One of the best-known exponents of the democracy theory was Professor Alexander Meiklejohn.¹⁰⁴ Significantly, Justice Brennan relied quite clearly on the democracy theory in *New York Times*. More particularly, Justice Brennan relied on free

¹⁰¹ Wojciech Sadurski, *Freedom of Speech and Its Limits* (1999) 8.

¹⁰² H.L. Pohlman, *Justice Oliver Wendell Holmes – Free Speech and the Living Constitution* (1991) 10.

¹⁰³ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2001) 354.

¹⁰⁴ See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948, reprinted 2004) 1-27.

speech theory articulated by Professor Meiklejohn and in certain respects, the Supreme Court declined to fully accept Mill's more generalised truth theory. Mill did not differentiate between an unintentional error and an intentional falsehood. To him, all contributed to the discovery of the truth. However, the US Supreme Court has never sanctioned or given a free pass to intentional falsehoods.¹⁰⁵

Although Professor Meiklejohn's contribution to the free speech debate was not cited by Justice Brennan in *New York Times*, Justice Brennan described the centrality of Meiklejohn's contribution to the Court's decision in a speech given the following year at Brown University.¹⁰⁶ Furthermore, in the criminal libel case, *Garrison v Louisiana*, decided later in 1964, the Court's language bears striking similarity to Alexander Meiklejohn's own words. In that same speech at Brown University, Justice Brennan quoted words from *Garrison* that resonate with Meiklejohn's teaching: 'for speech concerning public affairs is more than self-expression; it is the essence of self-government.'¹⁰⁷ Justice Brennan observed in his speech:

Doubtless some of you may think that the sentence of the opinion [*Garrison*], 'for speech concerning public affairs is more than self-expression; it is the essence of self-government,' echoes Dr. Meiklejohn's statement, 'the Freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government.'¹⁰⁸

When he first articulated the democracy or self-government theory in 1948, Alexander Meiklejohn argued that constitutional free speech applied only to matters directly concerning

¹⁰⁵ However Justices Black, Douglas and Goldberg in their concurring opinions advocated a more absolute First Amendment right for the public and the press to criticise officials concerning official conduct. *New York Times*, 376 US 254, 293-305.

¹⁰⁶ W. Wat Hopkins, *Mr. Justice Brennan and Freedom of Expression* (1991) 83-86.

¹⁰⁷ 379 US 64, 74-75 (1964).

¹⁰⁸ William J Brennan, Jr, 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 *Harvard Law Rev* 1, 18.

self-government.¹⁰⁹ Professor Frederick Schauer offers this summary of Meiklejohn's original theory:

The argument from democracy views freedom of speech as a necessary component of a society premised on the assumption that the population at large is sovereign. This *political basis* for a principle of freedom of speech leads to a position of prominence under the argument for speech relating to public affairs, and even more prominence for criticism of government officials and policies.¹¹⁰

However, by 1961, Meiklejohn expanded his explanation to include many more elements of speech that might indirectly affect as well as directly concern self-government. Consequently, education, science, philosophy, literature, arts and all manner of individual or group expression could fall within the concept of protected free speech if they affected self-government.¹¹¹ Before connecting this theory with arguments for an expanded fair report doctrine, it is important to note that Meiklejohn's concepts have received recognition from both the US Supreme Court and the House of Lords. Despite Lord Nicholls' language in *Reynolds* in which he felt it would be 'unsound' to accord political matters special consideration,¹¹² more recently, in the context of a privacy case, Baroness Hale had occasion to prioritise free speech categories:

Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important

¹⁰⁹ Meiklejohn, above n 104. There are a number of scholars who still adhere to this limited application of First Amendment free speech theory. See Cynthia Estlund, 'Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Theory' (1990) 59 *George Washington Law Review* 1, fn12.

¹¹⁰ Frederick Schauer, *Free Speech: a Philosophical Enquiry* (1967) 37.

¹¹¹ Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245, 256-257.

¹¹² [2001] *Reynolds*, 2 AC 127, 204 [HL].

for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.¹¹³

Baroness Hale's approach clearly envisages protection for speech in a hierarchy not dissimilar from Meiklejohn's expanded explanation.¹¹⁴ From the perspective of judicial acceptance, Meiklejohn's concept of free speech enjoys recognition in both the US and the UK. Given this acceptance of democracy or self-government free speech theory, it remains to demonstrate how Meiklejohn's theory supports or relates to doctrinal law.

As discussed in the preceding section, there are generally recognised three arguments in support of the fair report doctrine. The first or agency theory is the most artificial and will not be considered further. The second or public supervision theory is absolutely and clearly connected with Meiklejohn's concept of self-government. The public must know what public officials are doing if the popular franchise is to be intelligently exercised. However, the third justification which looks at information from all sources, official or not, finds theoretical support in Meiklejohn's expanded concept of self-government where all nature of matters are fair game for free speech if they are connected to self-government even if outside the realm

¹¹³ *Campbell v MGN Ltd* [2004] 2 AC 457, 499-500 [HL].

¹¹⁴ Former US Court of Appeals Judge Robert Bork argued that Meiklejohn's original concept of free speech that was limited to matters directly related to 'governmental behaviour, policy or personnel' was correct and that it is erroneous to include 'scientific, educational, commercial or literary expressions' even though they may have an effect on politics. Robert Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 26-28. However the clear error of Bork's simplistic and limited definition of free speech is demonstrated by examining an example of expressive conduct that would fall outside of a direct relationship to self-government but which would likely fall within the indirect relationship and which has clear political overtones. Consider the clear political implications of Diego Rivera's famous, incomplete, and short-lived mural, in Rockefeller Centre in New York that featured a depiction of Lenin and other socialist themes. Rivera was expressing his endorsement or favourable view of Marxist-Leninist philosophy. Similarly, the destruction of that work of art at the direction of its owners might also be viewed as indirectly relating to self-government. The political message conveyed by the destruction of the mural was the opposition of the Rockefeller family to the Marxist-Leninist ideals endorsed by Rivera. While the conduct of both Rivera and the Rockefellers would fall outside of the democracy theory as originally articulated and as endorsed by Judge Bork, it would be included under Meiklejohn's expanded definition. See generally, Cary Reich, *The Life of Nelson Rockefeller – Worlds to Conquer 1908-1958* (1996) 106-111.

of direct political activity. To distinguish between official proceedings and unofficial proceedings is just as artificial as distinguishing between public officials and public figures. Just as Chief Justice Warren pointed out in *Curtis* that public officials and public figures need to be treated similarly because their impact on the public does not recognise whether they have the title of president or actor, similarly reports of proceedings official or unofficial need to be treated the same because whether a report emanates from the official Waukegan City Council or the unofficial Council on Foreign Relations, the public has a right to know in order to carry out the duties of citizens in a democratic society.

Reportage supports self-government as does reasonable journalism (*Reynolds*) and the actual malice standard (*New York Times*). Reportage permits the flow of information to better equip the general population to ask meaningful questions and to be more knowledgeable about the character of public persons – both those making charges and those who are the target.¹¹⁵ As long as reportage is limited to public issues, it finds solid theoretical approach. That essential limitation is provided in the UK by the very terms of *Reynolds* which is limited to matters of importance to the public. Similarly, the applications of the fair report doctrine in the US necessarily involve some matter of public controversy, a situation sometimes referred to as newsworthiness. As structured by the courts in the UK and the US, reportage empowers the public to make informed decisions concerning matters of public interest and thereby promote self-government. In sum, reportage is well-founded in recognised free speech theory.

¹¹⁵ David McCraw, 'The Right to republish Libel: Neutral Reportage and the Reasonable Reader' (1991) 25 *Akron Law Review* 335, 355-358. Geoffrey Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40, 44-48.

As a rather compelling summary, the California Supreme Court, although never having explicitly sanctioned the defence, noted that the doctrine of neutral reportage can be a valuable aspect of free speech by enabling the public to make better choices concerning public issues:

The theory underlying the privilege is that the reporting of defamatory allegations relating to an existing public controversy has significant informational value for the public regardless of the truth of the allegations: If the allegations are true, their reporting provides valuable information about the target of the information; if the allegations are false, their reporting reflects in a significant way on the character of the accuser. In either event, according to the theory, the very making of the defamatory allegations sheds valuable light on the character of the controversy (its intensity and perhaps viciousness).¹¹⁶

While reportage can be defended as an integral aspect of free speech in a democratic society, there remains the practical issue of limiting the defence to situations where the defamatory publication is useful to the public debate rather than merely destructive to character and reputation.

Reconciliation and Conclusion

This paper rather ends where it began, with a look at *Norton v Glenn*. The Pennsylvania Supreme Court declined to find a neutral reportage privilege because the Court could not find any evidence of such a privilege in US Supreme Court First Amendment jurisprudence beyond veiled allusions to the doctrine in the *Harte-Hanks* decision. While it is correct that the US Supreme Court has never found such a constitutional privilege, that observation should not have been the end of the Court's inquiry. Rather, the inquiry should have taken up the issues raised in Justice Castille's concurring opinion concerning the fair report doctrine. Justice Castille noted how the distinctions between official and unofficial proceedings were unclear at best. Applying Judge Warren's thinking from *Curtis*, artificial distinctions

¹¹⁶ *Khawar v Globe International, Inc*, 965 P.2d 696, 704-705 (Cal 1998).

between official and unofficial do not serve the public interest – the query should be whether the source is capable of influencing public opinion on matters of public interest. If so, it should not matter whether the source is in government or outside of government.

Viewed through the lens of Meiklejohn's democracy or self-government theory, the importance of the source must not be limited to government reports. Rather, free speech is triggered by the nature of the information and its influence on matters of public importance. To limit accepted free speech theory to activities which strictly fall within political activity does a great disservice to the public because debates do not have to emanate from Congress or Parliament to have a key role in shaping public opinion or in enabling the public to exercise its sovereignty in a knowledgeable manner. But if fair report is extended beyond 'official' reports and proceedings, there clearly must be parameters or the defence could swallow defamation law. If the mere fact that someone or anyone made a defamatory allegation could immunise a publisher who repeats the allegation, there would not seem to be any limit on what could be protected as reportage.

As presently constituted, the official reports defence has some degree of restraint because the source must be 'official' to impart the defence and, presumably, 'official' sources are rarely completely irresponsible and even if irresponsible, the fact that such statements are being officially made is newsworthy itself. But the same cannot be said for every unofficial allegation or statement. The fact that some anonymous 'man on the street' thinks that the chief justice is taking bribes is not informative or useful to the public. On the other hand, a report from a citizen's committee for juridical evaluation that reaches the same conclusion might be very important to the citizens even though the report is without official sanction. In

this important respect, existing doctrinal laws in the UK and the US establish workable parameters. In the UK, *Roberts v Gable* required as the first element of the reportage defence that the information must be in the public interest.¹¹⁷ Similarly, in the seminal US decision, *Edwards*, Judge Kaufman limited the defence to situations where the allegation emanated from a responsible entity and were directed against a public figure.¹¹⁸ In both jurisdictions, the defence requires reasonableness – explicitly in the UK and by implication in the US – and tempered with reasonableness, the defence is but a modest extension of the long-standing fair report defence.

Neutral reportage may never occupy a central place in American defamation law because so much of the common law has been displaced by the First Amendment. However the First Amendment has never completely displaced the common law but rather merely places minimal standards beyond which the common law may not constrict freedom of speech. The First Amendment does not define American defamation law; it merely sets the floor or minimum rights. The fair report privilege has easily coexisted with the First Amendment and the extension of the fair report doctrine to include reports or proceedings that are not quite official would seem as sensible as the actual malice standard being extended from public officials to public figures. The extension of the doctrine also helps to bring some sense to the law. Again, recourse to *Norton v Glenn* is helpful. Had the councillor confined his bizarre statements to the actual city council meeting, his comments and the reports thereof would have been clearly privileged. The fact that some of the statements were made after the formal adjournment should realistically not have any legal impact on whether the newspaper could report the statements. To hold otherwise is to exalt form over substance.

¹¹⁷ *Roberts*, [2008] QB 503, 527 (CA).

¹¹⁸ *Edwards*, 556 F.2d 113, 120 (2d Cir 1977).

Finally, Professor Elder is correct that the advocates for a distinct neutral reportage privilege have in certain respects failed to make a cohesive case. The decisions supporting or rejecting the doctrine have been strained and inconsistent. However, these tangled judgments do not detract from the fact that media reports of unofficial proceedings and reports are worthy of protection. Depending on the jurisdiction, a basis for protection already exists under either the fair report doctrine or reasonable journalism. The stroke of a meeting's gavel should not be the determining factor over whether the town councillor's remarks were privileged. The law demands a more logical result. At least in the US, a separate defence of neutral reportage may not be needed but fair report should be boosted to include reportage-type situations. In some states, this may only require an extra vitamin or two, and in others, well, maybe the steroids are in order.