

Neutral Reportage Privilege: The Libel Defense Needed in a Struggling Democracy

Christina Mazzeo
Marquette University

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NEUTRAL REPORTAGE PRIVILEGE: THE LIBEL DEFENSE NEEDED IN A
STRUGGLING DEMOCRACY

by

Christina M. Mazzeo

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ABSTRACT
NEUTRAL REPORTAGE PRIVILEGE: THE LIBEL DEFENSE NEEDED IN A
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Christina M. Mazzeo

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This study aimed to understand the U.S. courts reasoning for either accepting or rejecting the neutral reportage privilege, a libel defense that protects individuals who republish defamatory statements for a newsworthy purpose. A systematic analysis of federal and state court cases regarding the privilege was performed to determine how the courts view neutral reportage and what their rationales were for their decisions. The analysis showed the courts' unnecessary reliance on Supreme Court precedent and an inconsistent application of the privilege. This paper offers a proposal for how the courts, journalists, other citizens, and social media platforms should view and utilize the neutral reportage privilege without rewarding the circulation of disinformation.

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I. Introduction

Although the President of the United States, Donald Trump, frequently accuses journalists of reporting fake news and claims that they are “the enemy of the people” (Stewart, 2018), he cannot sue them for libel merely because he does not like what they report. The Supreme Court made clear in *New York Times v. Sullivan* (1964) that public officials cannot sue for libel unless the material published about them was made “with knowledge that it was false or with reckless disregard of whether it was false or not” (p. 280). What has been settled law for over half a century, however, is now up for debate again, after Trump insisted on the campaign trail that he intended to “open up libel laws” to make it easier for plaintiffs to sue, and after Supreme Court Justice Clarence Thomas recently stated that *Sullivan* ought to be reversed, or at least reassessed (*McKee v. Cosby*, 2019).

Without *Sullivan*, journalists would be left without protection if they made minor mistakes in their reporting. They would not have the “breathing space” (*NAACP v. Button*, 1963, p. 433) to investigate public officials and figures if even the smallest misstep would put them in jeopardy. Not only is there a need to maintain robust protections against libel suits by public people, existing libel laws generally do not go far enough to ensure that these people are held accountable and that there is an environment of “uninhibited, robust and wide-open” debate (*New York Times v. Sullivan*, 1964, p. 270). One area that must be strengthened is the neutral reportage privilege. Under traditional libel principles, when someone repeats a defamatory remark, the person effectively claims it as their own and can be sued to the same extent as the original defamer. Although there is nothing newsworthy about false information, there are times

when the making of the false statement is itself newsworthy. If a person like Donald Trump were to defame someone, it would be of public concern because it reveals the character and integrity of the President of the United States. When journalists want to report on events like this, the neutral reportage privilege will protect them when they feel it is in the public's interest to republish defamatory statements even when they have doubts about the veracity of those statements (*Edwards v. National Audubon Society*, 1977).

The neutral reportage privilege was first recognized in 1977 by the U.S. Court of Appeals for the Second Circuit in *Edwards v. National Audubon Society*. The case was between the National Audubon Society (NAS) and a group of scientists the organization had defamed. The NAS accused these scientists of being paid by pesticide companies to lie to the public about the effects of DDT on birds. After the *New York Times* wrote about this story, the scientists sued the newspaper as well as the NAS. The court ruled in favor of the *Times* because they believed 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” (p. 120). In the subsequent four decades, some courts have embraced the neutral reportage defense, but many have not. This thesis seeks to understand the reasons for those mixed outcomes by systematically examining all federal and state court decisions that have addressed the privilege since *Edwards*. The aim is to understand the rationales offered by the courts for accepting or rejecting the privilege, the ways in which the privilege was conceptualized and articulated by the courts (who qualifies for the protection and under what conditions), and

to identify any trends over time. This thesis also offers a proposal and justification for recognition of the privilege, which takes account of the extraordinary ways in which the media landscape has changed.

Since *Edwards*, the internet has become a monolithic power in society. It has reconfigured how people communicate by creating a 24/7 news cycle, spawning social platforms that enable people to effortlessly share information with mass audiences, and allowing people to rapidly absorb massive amounts of information. These changes put all communicators in danger of libel lawsuits, especially journalists who are now sharing all of their work on social media. Without strong legal protections, including neutral reportage protection, citizens and journalists will be more likely to self-censor and to withhold newsworthy information to avoid being sued. A recent example occurred during the 2018 midterm elections. The race for one of Florida's U.S. Senate seats was tightly contested between Florida Senator Bill Nelson and Florida Governor Rick Scott (Griffiths, 2018). Scott was leading by the end of election day, but it seemed like a recount was imminent when Nelson's numbers went up a few days later. As a response to this news, Scott appeared on *Fox News Sunday* and said, "Senator Nelson is trying to commit fraud to win this election" (Griffiths, 2018, para. 2). It is clear that people should know Scott said this, but by repeating these claims against Nelson, news outlets were risking a defamation lawsuit. This gap in defamation law, which chills speech about newsworthy remarks, needs to be filled.

A problem some have with the neutral reportage privilege is that it permits people to feature false and defamatory statements during a time when society is trying to combat inaccurate narratives. There are several reasons why incorporating this privilege into

defamation law outweighs the dangers of promoting false information, and one of them is that sometimes even the *making* of defamatory statements is newsworthy. When prominent figures make such remarks, it serves the public interest for people to know they were made. Public officials and figures can have great influence on society, and the public's need to gauge their behavior and character takes precedence over avoiding the spread of untrue statements. In the case of Rick Scott, journalists were able to publicize the fact that he was trying to undermine an election, but they should not have to do it with the added legal risk of being sued. Reporters who are not backed by strong institutions with vast resources might not have even taken the chance of disseminating this story. People should not fear republishing these types of statements because it allows the public to understand who their government leaders are and consider if they still want them as their representatives in the future.

The consistent implementation of the neutral reportage privilege will also promote a free press. The intended purpose of the First Amendment is to protect citizens' rights to express themselves freely without repercussions. This includes their right to report on an event of public concern. If an article is accurate, fair, and retells a complete account of the events, the individual's First Amendment rights should not be limited because of the legitimacy of what they are republishing. Even if someone is publishing something shorter than a full-length news story, like a tweet for example, they should still have a defense as long as they make the context clear to the reader. They are contributing to the marketplace of ideas where "the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States*, 1919, p. 630). It is unrealistic,

particularly at a time of rapid information flows on social media, for people to be expected to independently investigate every utterance from a public person before sharing that information with others. This issue may not come up as often as other areas of defamation law do, but that does not mean it is not a problem. When neutral reportage situations do arise, both journalists and citizens who share newsworthy information are left without legal protection, and press freedom is hindered.

There is reason to believe situations concerning neutral reportage will rise because of the way social media is used today. Twitter is now a place people turn to for breaking news and announcements from the President, yet there is not a lot of protection for users who republish this content. The platform itself is immune to defamation lawsuits thanks to Section 230 of the Communications Decency Act, which websites and platforms from liability for information posted by third-party users. But journalists who use these apps, platforms and services to report their stories are not provided any unusual protections. As the way we communicate through social media advances, there need to be protections that give “breathing space” to those who report on and share information online. Recognizing the neutral reportage privilege would be a good first step. There will be no harm in providing a safeguard for individuals reporting newsworthy remarks by prominent figures if they do it in an honest, accurate, and unbiased way.

The next chapter addresses the basics of defamation law and discusses the tort’s rationales and relevant case law. It also assesses what the neutral reportage privilege requires and who it protects. Chapter Three reviews the key theories and literature that contribute to the conversation about the neutral reportage privilege. This includes evaluating theories that deal with the meaning and purpose of the First Amendment and

the landscape of defamation law research. Chapter Four presents the research questions and describes the research methods used to gather and analyze the cases for this study. Chapter Five provides the results of the study and Chapter Six critiques these results and offers a proposal of what can be improved upon in this area of law.

II. Legal Context

The neutral reportage privilege is a part of one of the more intricate areas of law, defamation law. Defamation is a multi-layered tort that hinges on context, so the following chapter thoroughly explains the law's essential aspects.

A. The Foundation of Defamation

A person's name and reputation are integral to their personal and professional success. Having a name in good standing is particularly important today because of people's easy access to smartphones and search engines. If people believe their reputations have been harmed, they can seek recourse through the tort law claim of defamation. Defamation is a publication or statement that is false and is damaging to another's reputation (Garner & Black, 2014). As Justice Potter Stewart stated in *Rosenblatt v. Baer* (1966), this area of law was established because "society has a pervasive and strong interest in preventing and redressing attacks upon reputation" (p. 92). Defamation law can help a person rebuild their life through the monetary damages they can receive (*Jewell v. NYP Holdings, Inc.*, 1998). But it can also stall reporting practices of newsrooms and, for better or for worse, make them more cautious with their journalistic efforts (*Henry v. Lake Charles Am. Press, LLC.*, 2009).

Defamation is an overarching term for two related civil tort claims: libel and slander. Libel is commonly defined as written defamatory communication and slander as spoken defamatory communication (Garner & Black, 2014). This differentiation was treated more seriously before the age of broadcast media; the courts measured libel as a harsher offense than slander given that written defamatory statements tend to be more

deliberate and organized (*Sorenson v. Wood*, 1932; *Remington v. Bentley*, 1949). As radio, television, and film gained prominence, purely spoken communication became blended with mediated communication. These platforms all had scripts, recorded footage, and were circulated just as much as written communication (*Varian Medical Systems, Inc., v. Delfino*, 2003; *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 2000). This transition of technology has influenced most state courts to treat the offenses of libel and slander as akin to one another (Wade, 1979; *Grotti v. Belo Corp.*, 2006). The real difference judges and juries now take into consideration is between any published communication and interpersonal conversation (Harmon, 2011). Because most information today is carried through various forms of mass medium, most defamation claims are treated as libel rather than slander (Beattie, 2007).

A factor of defamation is there must be some form of proof that the plaintiff's reputation was injured (McNamara, 2007). If the plaintiff cannot present any evidence that the defendant's statements harmed their reputation, the judge or the jury will typically not grant monetary damages. Although proof is usually difficult to provide in these situations, there are instances when plaintiffs are "libel-proof" (*Cerasani v. Sony Corp.*, 1998). Many would argue that people like Donald Trump, Bill Cosby, and Harvey Weinstein have destroyed their reputations through their actions to a point where certain stories will not harm their reputations further. If someone were to make defamatory statements about their professional or personal life, it would most likely not lower the public's perception of their respectability. Depending on the statement, it would be hard for them to bring a successful libel suit to court because the evidence they present would

not be enough to convince a judge or jury that their reputations have been tarnished (Youm, 1991) and that they have therefore suffered harm.

Another part to defamation law is that a substantial amount of the community has to believe that the plaintiff's reputation is negatively affected by the libelous claims (Kenyon, 2006). The law examines if a reasonable person believed the accusations were defamatory or if the statements were innocuous. (*Clawson v. St. Louis Post-Dispatch, LLC*, 2006) gives an example of this. Patrick Clawson, an investigative reporter and private investigator, sued the St. Louis Post-Dispatch for publishing a paper saying Clawson was a "1970s-era St. Louis journalist turned private eye turned FBI informant" (*Clawson*, 2006). Clawson believed the paper calling him an informant was defamatory and wanted to be known as a whistleblower, which he thought was a more accurate description. Whistleblowers are "courageous law-abiding citizens," he said, whereas informants are "disdained" and "act in their own self-interest" (p. 309). The court concluded that while criminals may believe the term informant stains a person's reputation, the average person would not. This shows that when making judgments about what types of statements or characterizations are defamatory, judges will examine them through the eyes of the average person. These aspects of a libel claim are central to every plaintiff's suit.

The elements of a plaintiff's prima facie case are complex and include several layers to establish the claim (Franklin & Bussel, 1984). The plaintiff has the burden of proof and for their lawsuit to succeed they must exhibit that the defendant's statement has these five elements: the statement is published, is about the plaintiff, is defamatory, is false, and the statement was published with some degree of fault (Sack, 1999). The first

task for the plaintiff is to prove that the material in question was published. This may mean that the libel occurred on a nationally broadcast television show or that a local newspaper printed defamatory comments (*Hornby v. Hunter*, 1964). As long as a third party sees or hears defamatory material between the plaintiff and the defendant, it is considered published under defamation law, and the court will consider that part of the claim to be satisfied (Smolla, 1999). There is also a strong possibility that others will republish the libelous statements, in which case those republishers could become libel defendants as well. (*Houston Chronicle Publishing Co. v. Wegner*, 1915). Even if the person does not know they are repeating a defamatory story or are simply relaying what they believe to be a newsworthy item, they could be sued. This can restrict journalists and citizens who are trying to report about public figures who made defamatory comments. When someone who is in the public eye makes a statement like this it becomes a matter of public interest. If a reporter republishes these remarks with the belief that they are not true, they are in as much danger of a lawsuit as the person who made the comments.

The next thing that libel plaintiffs have to prove is that they are identified by the content in question (Sack, 1999). The court in *Hanks v. Wavy Broadcasting, LLC* (2012) ruled that the defamatory statement needs to be “of or concerning” the injured party. Identification can happen in various ways, but enough people need to recognize that the content is undoubtedly referring to the plaintiff for the case to continue. This also relates to the plaintiff’s obligation to show that his or her reputation was harmed. The plaintiff will not win the case if only a small number of people are able to see the connection between the statement and the plaintiff (*Allied Marketing Group Inc. v. Paramount Pictures Corp.*, 2003).

After proving publication and identification, the plaintiff has to prove if and how the statements are defamatory (Sack, 1999). There are not a particular set of words that are automatically libelous because each situation is contextual and the meaning of words change over time. Calling someone a “communist” during the Second Red Scare in the 1950s would most likely have been considered defamatory, but using the word today would probably not have the same effect (*Solosko v. Paxton*, 1956; *Remington v. Bentley*, 1949). The specific situation surrounding the libelous comments also has to be taken into consideration because someone may be making statements in jest or as an opinion and neither of these will be ruled as defamatory (*Milkovich v. Lorain Journal Co.*, 1991). In *Milkovich v. Lorain Journal Co.*, the Supreme Court ruled that the First Amendment protects a statement of pure opinion regarding a matter of public concern. Courts can use precedents like *Milkovich* to guide their decisions, but they have to consider the exact words used and the situation they were used in to conclude if they are false and harmful. They judge this by categorizing defamatory material between libel per se and libel per quod. Libel per se signifies comments that are defamatory on their face (*Levy v. Gelber*, 1941). This may include accusations of criminal conduct (*MacDonald v. Riggs*, 2007), marital infidelity (*Firestone v. Time, Inc.*, 1974), or statements that directly impact a person’s business or livelihood (*McGarry v. University of San Diego*, 2007). These are statements that would affect anyone’s reputation and is apparent to the reasonable person that the content is defamatory.

Libel per quod are statements that require extrinsic knowledge. The statement by itself might not be defamatory, but with further background information, it becomes a libelous accusation. An example of this comes from *Karrigan v. Valentine* (1959). Philip

Karrigan, a single man who lived in Clay Center, Kansas, sued the *Clay Center Dispatch* for printing a story that announced the birth of Karrigan and Betty Ellen Carpenter's daughter. To the average reader, this statement would seem innocuous, but to those who knew that Carpenter was "a woman of ill repute" (p. 53), it conveyed a different and clearly defamatory meaning, so the Kansas Supreme Court ruled for Karrigan, concluding that the newspaper story was a libel per quod. The distinction between libel per se and per quod was stricter at one time than it is today. Plaintiffs only had to prove reputational damage for libel per quod while damages were presumed with libel per se. Today, plaintiffs need to provide evidence of reputational harm for both forms of libel (Sack, 1999).

The fourth element plaintiffs have to prove in a defamation case is falsity (Sack, 1999). Defamatory statements are not opinions, and they are not truthful; they are false statements of fact. Proving falsity is different for public-person plaintiffs versus private-person plaintiffs. There are several types of public plaintiffs including government officials, celebrities, and well-known CEOs. Private plaintiffs are people not in the public eye. All public plaintiffs have to prove falsity to win their libel suits, but that is only the case with some types of private plaintiffs (*Philadelphia Newspapers v. Hepps*, 1986). The Supreme Court ruled in *Philadelphia Newspapers v. Hepps* that a private person only has to prove falsity when the case involves a matter of public concern. The Court has never defined what a matter of public concern may entail, but in *Dun & Bradstreet v. Greenmoss* (1985), the Court stated that the matter must pertain to the statement's "content, form and context" (p. 761). This explanation is vague, yet courts continue to develop a more detailed description of what constitutes a matter of public concern.

The fifth requirement of the plaintiff's burden of proof is fault (Sack, 1999). Fault delves into the defendant's state of mind when they published the defamatory statements. The Supreme Court began to flesh out the different fault standards in 1964 in *New York Times Co. v. Sullivan*.

B. Actual Malice and *New York Times Co. v. Sullivan*

Before 1964, a plaintiff's prima facie case was simple: the defendant could be sued for libel regardless of whether they were aware the statements they published were truthful or not (Lewis, 1991; *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, 1959). The defendant's state of mind was irrelevant, and it did not matter if the error was an innocent mistake. To evade liability, the burden to prove the accuracy of the statement fell on the defendant instead of the plaintiff, because all defamatory statements were presumed false. This facet of defamation law was present in the majority of jurisdictions in America until *Sullivan* (Powe, 1991). *Sullivan* introduced First Amendment protections into defamation law and complicated a relatively simple tort, but in a way that significantly expanded protections for libel defendants. During the 1950s and 1960s, the nation watched the civil rights movement in the South. While newspapers tried to inform the country about the latest developments, those outlets were regularly in danger of southern state officials suing them for libel, even over truthful, accurate news reports. These officials would sue over inconsequential errors to silence their critics and to curb the reporting of their misdeeds (*New York Times Co. v. Sullivan*, 1962). By the early 1960s, news organizations were forced to pay \$300 million in libel damages to southern law enforcement officials who had sued for libel; often over stories that

contained only trivial inaccuracies (Lewis, 1991). Newspapers became overwhelmed by these charges and grew more cautious in their reporting.

The Supreme Court put an end to this in *Sullivan* when the justices ruled in favor of the *New York Times* and a coalition of civil rights leaders after those leaders had placed an ad in the paper that contained some minor errors (*New York Times Co. v. Sullivan*, 1964). The ad accused southern public officials of using violence and participating in illegal activities to subdue the protests of the peaceful civil rights activists. L.B. Sullivan, the Montgomery, Alabama, commissioner in charge of the police, was not named in the advertisement but he believed it defamed him by representing how he and his officers were handling the protests. Although the central accusations in the advertisement were true, some statements were not completely factual. The inaccuracies led a jury in Alabama state court and the Alabama Supreme Court to rule in Sullivan's favor (*New York Times Co. v. Sullivan*, 1962). The U.S. Supreme Court, however, in a unanimous decision, reversed those verdicts, citing the state of mind of the defendant, the inconsequential nature of the errors, and the need for reporting and commentary about public officials to be "uninhibited, robust and wide-open" (*Sullivan*, 1964, p. 270).

Justice William Brennan, the author of the majority opinion, stressed that state libel laws "must be measured by standards that satisfy the First Amendment" (*New York Times Co. v. Sullivan*, 1964, p. 269). Brennan believed a press constrained by liability for innocent mistakes led to "self-censorship" (p. 279) and "dampens the vigor and limits the variety of public debate" (p. 279), which undermines the aims of the First Amendment. It was evident that libel law needed to mitigate the power public officials had over newspapers. To limit their dominance and ensure the freedom of the press, the Court

introduced the actual malice standard. Actual malice concerns the state of mind of the defendant when publishing the defamatory statements and if the statement was made with “knowledge that it was false or with reckless disregard of whether it was false or not” (p. 280). It addresses the defendant’s actual beliefs about the veracity of the claims they published. Instead of presuming the statements were defamatory, public officials now had to prove the press knowingly published false statements or had obvious reasons to doubt the information. This made it more difficult for public officials to win libel lawsuits and gave reporters more leniency to do their jobs without the fear of liability for trivial mistakes. The *Sullivan* precedent of actual malice only applied to public officials, but the Supreme Court extended the standard to public figures in 1967 (*Curtis Publishing Co. v. Butts*).

After *Sullivan*, several aspects of defamation law were altered as a result of a handful of significant libel cases. The Court refined certain burden of proof requirements through the decades by strengthening the definition of reckless disregard (*Curtis Publishing Co. v. Butts*, 1967; *St. Amant v. Thompson*, 1968; *Harte-Hanks Communications, Inc. v. Connaughton*, 1989), allowing private plaintiffs to win on negligence claims (*Gertz v. Robert Welch, Inc.*, 1974), and expanding the protection of defendants for minor inaccuracies (*Masson v. New Yorker Magazine, Inc.*, 1991). In respect to reckless disregard, the Court in *St. Amant v. Thompson* concluded that “recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of [the defendant’s] reports” (p. 732), but the Court later stated in *Harte-Hanks Communications, Inc. v. Connaughton* that the “purposeful avoidance of the truth is in a different category” (p. 692). These explanations fortified the

standard of reckless disregard and were also precursors for *Masson v. New Yorker Magazine, Inc.* The Court held in *Masson* that defamation law “overlooks minor inaccuracies and concentrates upon substantial truth” (p. 516). Similar to *Sullivan*, this guideline gives reporters more breathing room to do their jobs. Despite the efforts of these case decisions to clarify defamation law, the variance between a public and private plaintiff is still intricate.

C. Public Versus Private Plaintiffs

The precedent for public and private defamation plaintiffs starts with two Supreme Court cases, *Curtis Publishing Co. v. Butts* (1967) and *Gertz v. Robert Welch, Inc.* (1974). *Butts* picked up where *Sullivan* left off and extended actual malice to libel plaintiffs who are public figures. The Supreme Court combined *Butts* with another public-figure plaintiff case, *Associated Press v. Walker* (1967), as both cases concerned a defendant’s right of protecting themselves from libel lawsuits brought by public figures. The Court realized that *Sullivan* did not go far enough with the actual malice standard and that public figures had to be held to the same standards as public officials when suing for defamation. Chief Justice Earl Warren indicated that the influence a public figure has on a community is similar to the effect a public official has, and they will usually have a greater opportunity to plead their case to media outlets than a private citizen (*Curtis Publishing Co. v. Butts*, 1967). The discussion around public figure plaintiffs continued several years later in *Gertz*, which started the conversation about private plaintiffs as well.

In 1974, a magazine titled *American Opinion* accused attorney Elmer Gertz of being a “Leninist” and a “Communist-fronter” for representing a family who was suing a

police officer for killing one of their family members. Gertz lost his initial libel suit because the judge believed the magazine was not acting with actual malice. When the case reached the Supreme Court, the Justices concluded that *American Opinion* did defame Gertz, but the precedent set by *Sullivan* and *Butts* did not apply because Gertz was not a public official or a public figure. The Court furthered the distinction of a public figure by breaking the classification down to all-purpose public figures and limited-purpose public figures. An all-purpose public figure is someone who “achieves such a pervasive fame or notoriety that he [or she] becomes a public figure for all purposes and in all contexts” (p. 351). A limited-public figure is “an individual [who] voluntarily injects [themselves] or is drawn into a particular public controversy” (p. 351). The Court specified these definitions because they held that the status of the plaintiff, public or private, establishes the constitutional protection given to the defendant.

The *Gertz* Court also introduced negligence for private plaintiffs. The Court decided states were free to choose their own fault standard for private plaintiffs, but the minimum requirement is negligence. Historically, the reputation of private plaintiffs has been held in higher regard than the reputation of a public plaintiff, and the Court believed private plaintiffs should not have to offer as much evidence of reputational harm to win monetary damages. Negligence on the part of the defendant is essentially the failure to exercise reasonable care (*Gertz v. Robert Welch, Inc.*, 1974). While actual malice is the knowledge that the statements are false, negligence is not taking the necessary steps to verify the statements. This may be the defendant not performing enough background research, trusting an unreliable source, or being careless when putting the story together. It all depends on if the defendant made a good faith effort to verify the accuracy of their

claims. Although public officials and figures have to prove actual malice to win the case and receive damages, private plaintiffs have the option to prove negligence instead and still collect restitution.

D. Damages

There are not many courses of action a plaintiff can take to repair their injured reputation, so most seek monetary damages as compensation. The plaintiff may be able to have the defendant retract the defamatory statements or issue an apology, but the harm to the plaintiff's reputation has already occurred, and the next best option is financial restitution. Defamation plaintiffs can sue for four different types of damages: actual, special, presumed, and punitive. The plaintiff has to show specific types of evidence for each category of damage. Actual damages are the most common (Bunker, 1992). These are awarded when the plaintiff can prove that they have suffered actual harm, which could be reputational injury, monetary loss, or mental anguish (*Gertz v. Robert Welch, Inc.*, 1974). The process of granting actual damages is imprecise. Whether it be a judge or jury deciding the outcome, there is no way to know how they will react or relate to the plaintiff's case. This is one of the reasons why defendants try to settle the case before going to trial. The awards for special damages are more specific than actual damages because they come from exact fines caused by the defamatory statements (Renas, Hartmann, & Walker, 1990). For example, if the publication leads to the plaintiff being fired, and the plaintiff can prove the he or she lost exactly \$12,173.32 in wages, the plaintiff might be able to recover that exact amount. Special damages only represent a plaintiff's loss of capital, not a loss of standing in the community or personal humiliation.

It is of greater likelihood that private plaintiffs will walk away with these rewards because they only have to prove the defendant acted with negligence.

Presumed and punitive damages are typically more severe than the previous two in terms of award size. Presumed damages are the opposite of actual damages, where the plaintiff does not have to prove injury or harm to receive the compensation (*Gertz v. Robert Welch, Inc.*, 1974). Punitive damages are not there to reimburse the plaintiff but to punish the defendant. They use the defendant as an example of their misdeeds and are meant to deter others from committing similar actions (McGovern, 2010). The caveat to presumed and punitive damages is that both public and private plaintiffs need to prove actual malice to recover these awards (*Gertz v. Robert Welch, Inc.*, 1974). The *Gertz* Court thought that these damages might encourage “juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact” (p. 349). The Supreme Court backtracked these requirements more than a decade later in *Dun & Bradstreet v. Greenmoss Builders* (1985) when the Justices decided that *Gertz* did not apply “when the defamatory statements do not involve matters of public concern” (p. 763). This allows private plaintiffs who are suing about a private issue to collect presumed and punitive damages by only proving negligence. For the most part, plaintiffs have to prove actual malice to win damages unless they are private plaintiffs suing for actual or special damages.

These damage awards may help plaintiffs rebuild their reputations and dissuade others from making defamatory statements, but they also discourage the press from fulfilling their responsibilities. Plaintiffs winning big lawsuits at the expense of news outlets can create a chilling effect on daily reporting. Even when media defendants win

their cases, they still lose a considerable amount of time and money defending themselves. There are several libel defenses defendants can raise to avoid liability, although they are not always effective, and not all of them are recognized in every jurisdiction.

E. Libel Privileges

In the United States, it is vital that people have the right to speak freely and to report news stories without fear. Defamation is one of the few exceptions to these rights, yet there are still defenses, or privileges, people can utilize to protect themselves from defamation lawsuits. One of the privileges that defend false statements of fact is the absolute privilege. The absolute privilege applies to those who are participants in official government proceedings (*Barr v. Matteo*, 1959; *Hutchinson v. Proxmire*, 1979).

Examples of whom this privilege may protect are senators speaking on the Senate floor, an official issuing a press release from the governor's office (*Barr v. Matteo*, 1959) or a witness testifying in court. The absolute privilege encourages the free flow of information to the public by allowing an individual to speak in these situations without worrying about liability for what they say, but the statements need to be spoken or published as a part of administrative proceedings (*Bochetto v. Gibson*, 2004). The qualified privilege also corresponds with government communications, yet it guards the rights of the person reporting about them. Although this privilege varies from jurisdiction to jurisdiction, the qualified privilege defends individuals who accurately and fairly describe the synopsis of public government activities that the reporter themselves believes is true (American Law Institute, 1975).

Other defamation defenses people can use to their advantage are fair comment and the wire service defense. Fair comment is a common law privilege that defends opinions that are fair, factually based, and concern matters of legitimate public interest (Sack, 1999). Food and movie critics are generally safe under fair comment, and the privilege also protects online reviewers who have shared their opinion about myriad of places and services (*Burleson v. Toback*, 2005). The wire service defense is for intermediaries who do not create or alter any of the content they are providing (*Layne v. Tribune Co.*, 1933). Libraries are not liable for the books they offer, and telephone service providers are not liable for the conversations had on their phone lines. There are also anti-SLAPP laws. Strategic Lawsuits Against Public Participation (SLAPP) are defamation suits designed to intimidate and chill the speech of critics (Silver, 2017). The purpose of these suits is not to win damages but to make the defendant spend time and money defending themselves in court. For example, a person who is the subject of a news story may sue the news outlet so the station or newspaper depletes their resources on the lawsuit instead of other journalistic practices. Anti-SLAPP statutes provide a remedy to these suits by allowing the defendant to have the case dismissed at an early stage and even recover fees that are incurred during the legal process (Silver, 2017). Because of anti-SLAPP laws, journalists can do their jobs without the threat of a financial burden to themselves or their newsrooms.

These privileges shield necessary conversations and debate from liability, but two other defamation defenses coincide directly with the focus of this thesis. The fair report privilege is a special class of the qualified privilege, and the neutral reportage privilege expands on the safeguards of the fair report privilege.

F. Fair Report Privilege

Initially recognized in the mid-nineteenth century (*Barrows v. Bell*, 1856), the fair report privilege enables journalists to shine a light on information of public interest (Youm, 1991). Similar to the qualified privilege, the fair report privilege allows the dissemination of defamatory comments that are said in public or official proceedings without liability as long as they are accurate, fair, complete, and not malicious (Prosser & Wade, 1977). The only difference between fair report and the qualified privilege is that the reporter's state of mind is not relevant and they do not have to believe the statements they are publishing are true (*Moreno v. Crookston Times Printing Co.*, 2000). The privilege grants this right for the same reason *Sullivan* established the actual malice standard – so the press can perform its watchdog functions and monitor the conduct of the government (*Wilson v. Birmingham Post Co.*, 1986).

There are a few rationales for the fair report privilege. The first revolves around the theory of agency. When citizens cannot be present at public proceedings, a reporter is an agent for the community (American Law Institute, 1975). This allows the reporter to witness significant events and accurately retell what happened when it is not possible for everyone to attend. The next rationale is supervision. In a free democracy like the United States, the public has the right to supervise their government and vote as they see fit (American Law Institute, 1975). The only way this is feasible is if someone has the power to share details that are not accessible to all, so citizens can hold their representatives accountable. The last rationale for the fair report privilege is information. For a society to be fully informed about public affairs and the controversies that surround them, reporters need the ability to provide citizens with the greatest amount of

information (American Law Institute, 1975). The full appraisal of government actions outweighs the preservation of an individual's reputation.

Justice Oliver Wendell Holmes commented on the fair report privilege while serving on the Massachusetts Supreme Judicial Court in 1884 saying, "... the trial of cause should take place in the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed" (*Cowley v. Pulsifer*, p. 394). The fair report privilege gives reporters the capability to repeat knowledge from or about members of government even if it contains falsehoods, so the public can comprehend who is running their country. A more contemporary example of this is *Gubarev v. BuzzFeed, Inc.* In February 2017, Russian Internet entrepreneur Aleksej Gubarev sued the internet media and news company BuzzFeed for publishing a dossier defaming him. The dossier in question contained intelligence about misconduct between Donald Trump's presidential campaign and the government of Russia leading up to the United States' presidential election of 2016. The contents of the dossier were unverified and claimed that Gubarev and two of the companies he led aided the Russian government in hacking documents from Democratic Party officials. BuzzFeed released the dossier without altering or confirming the validity of the claims. A U.S. district court judge for the Southern District of Florida ruled that BuzzFeed's actions fell under the fair report privilege because they wholly and accurately reported information that was actively being investigated by the FBI and

because the dossier was an artifact of an official government proceeding (*Gubarev v. BuzzFeed, Inc.*, 2018).

The fair report privilege helps with promoting a transparent government, but it does not cover speech or topics of debate outside of government proceedings. Journalists do not have this privilege as a defense if they are to report about a government official's slanderous comments in a restaurant, at a basketball game, or on social media. They are also not protected under this privilege when repeating a famous actor's or professional athlete's remarks. The fair report privilege is only helpful under the confines of government procedures. The neutral reportage privilege remedies these shortcomings.

G. Neutral Reportage Privilege

There are not many states that recognize the neutral reportage privilege, which can defend a person who republishes defamatory yet newsworthy remarks. It was not until 1977 when the 2nd Circuit Court of Appeals first recognized the privilege as a libel defense in *Edwards v. National Audubon Society, Inc.* (1977). U.S. defamation law traditionally holds an individual responsible for repeating libelous statements, but this privilege relieves a defendant of liability when they report newsworthy accusations made by a prominent organization or person against another. As long as they do not act with malicious intent, the privilege protects a reporter regardless of the state of their mind – that is, even if they knew or suspected that the information was false.

In *Edwards*, the National Audubon Society alleged that a group of scientists were being paid by pesticide companies to lie about the effects DDT had on bird populations. When the *New York Times* heard about these accusations, they faced a dilemma because they could either choose to run the story and risk a libel lawsuit or cut the story and avoid

liability. The journalist writing the article did not believe in the environmental organization's claims but also knew that the allegations alone were newsworthy. After the *Times* published the piece, many of the scientists sued the National Audubon Society and the paper for defamation. The court ruled in favor of the *Times* under the neutral reportage privilege stating that "the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend" (p. 123).

Edwards set a precedent by stating the neutral reportage privilege should apply when the statements under question are newsworthy, made by a prominent and responsible organization against another prominent organization or figure, and are reported accurately and impartially. There are a number of rationales behind these guidelines. Newsworthiness is not normally a factor in defamation suits; however, it is relevant to this privilege because the statements that are published are information that is of public significance. For a reporter to be justified in republishing defamatory material, the remarks should come from a place that has some form of influence over society. In the California district court case, *Barry v. Time, Inc.* (1984), the court expanded the privilege from prominent and responsible organizations to public figures as well. For the neutral reportage privilege to apply in the most critical circumstances, the criteria need to cover both prominent organizations and individuals.

Accuracy in reporting is the most important factor of this privilege. To properly raise the defense of neutral reportage, the defendant has to demonstrate that they did not alter or editorialize the story. The purpose of neutral reportage is to allow a reporter to disseminate newsworthy statements that they do not believe are factual. In these

situations, actual malice standards like reckless disregard for the truth are irrelevant as long as the reporter did not set out to “deliberately distort [the] statements to launch a personal attack of [their] own on a public figure” (*Edwards v. National Audubon Society, Inc.*, 1977, p. 120).

The neutral reportage privilege may seem like it should be a vital facet of defamation law in a democracy, but the courts continue to treat it inconsistently, and it is still only recognized in a minority of jurisdictions. Many courts do not accept the privilege because they believe it is inconsistent with *Sullivan* or that there is already enough protection for defamation defendants (*Dickey v. CBS, Inc.*, 1978). A good case to illustrate the need for the privilege is the Pennsylvania Supreme Court case *Norton v. Glenn* (2004). City Councilman William Glenn, Sr., defamed council president James Norton and mayor Alan Wolfe by claiming they were gay and implying that they were child molesters. A newspaper restated the events accurately and included Norton’s denial in the piece. Both Norton and Wolfe sued the newspaper and Glenn. The jury found the statements to be false, and although the Pennsylvania Supreme Court recognized the fair report privilege, it did not recognize the neutral reportage privilege, so the newspaper lost, because the claims were made outside the context of an official government proceeding.

Glenn’s outburst about these two men occurred during a city council meeting and continued once the meeting was over and they left the council chambers. Under Pennsylvania law, the journalist was safe to report the comments made inside the meeting but not what was said afterward. The court’s ruling takes away the public’s right to know about the actions of their representatives. Even though the statements about Norton and

Wolfe were not true, the comments reflect Glenn's fitness for office. This ruling places a chilling effect on these types of comments and stories, and keeps information about community leaders from the average voter.

The neutral reportage privilege does not encourage the destruction of a person's reputation or the spread of inaccurate news. Instead, it supports a free press, a transparent government, and the public's right to know about prominent figures. The privilege does not create a free pass for reporters; it encourages them to report both sides of a story and expose what is false. In doing so, the privilege supports the broader First Amendment goal of encouraging "the widest possible dissemination of information from diverse and antagonistic sources" (*Miami v. Tornillo*, 1974, p. 252).

III. Literature Review

This review of relevant literature will provide insight into the current research on the neutral reportage privilege. It will start with foundational theories of the First Amendment and then discuss scholarly work that assesses defamation law in general and the neutral reportage privilege more specifically.

A. First Amendment Theory

The purpose of the First Amendment has never been set in stone and there has yet to be a consensus about the theories and philosophies that support it. Legal scholars have debated the framers' intent for centuries and continue to question the amendment's meaning and scope. These deliberations have led to First Amendment theories that have various ideas about free expression and have made their way into several Supreme Court decisions. The central tenets of these theories recognize the ways in which protecting freedom of expression enables individuals' search for truth, their pursuit of their own self-fulfillment, and their efforts to engage in democratic self-governance (Emerson, 1963). The search for truth is the basis for the marketplace of ideas theory, which argues that it is more likely that truth will prevail in a system that allows people to express themselves freely rather than one in which limits are placed on who can speak and what they can say (Blocher, 2008). John Milton and John Stuart Mill developed this theory, but Supreme Court Justice Oliver Wendell Holmes introduced the theory as a First Amendment rationale in the 1919 case *Abrams v. United States*.

The principle of self-fulfillment proposes that everyone should have the right to speak, no matter its value. While the goal of the marketplace of ideas theory is to achieve

an objective for society's sake, the goal of the self-fulfillment theory is to protect people's individual autonomy and their pursuit of their own realization (Smolla, 1992). This idea tends to contrast with the third rationale of First Amendment theory, self-governance, a notion that is most famously supported by Alexander Meiklejohn who posits that citizens govern themselves in a democratic society by assuming both roles of the governors and the governed (Meiklejohn, 1948). He believed that the First Amendment was concerned with the power of the citizenry as a whole and not individual rights by asserting "what is essential is not that everyone shall speak, but that everything worth saying shall be said" (Meiklejohn, 1960, p. 26). The theory of self-governance also coincides with the checking value, a theory that deems free expression as an equalizer to an oppressive government. Also known as the watchdog theory, it promotes self-government by encouraging the press to hold the ones in power accountable. As attorneys David Anderson and Marc Franklin note, "there is no necessity to choose one exclusive justification for protecting speech" (1995, p. 29). Given the circumstances, one of these theories may be more salient than the others, but they are not mutually exclusive. Even though each of these values may view the meaning of the First Amendment differently, there is not one that is the ideal when validating free speech and free expression.

i. Marketplace of ideas.

The objective of the marketplace of ideas is for truth to be uplifted in a competitive system that acknowledges all viewpoints and speech (Baker, 1989). This notion started to form in the 17th century when writer John Milton admonished censorship by the English parliament in his essay *Areopagitica* (Milton, 1792). He opposed restricting certain works from dissemination and believed that truth would

survive in a market that permitted all ideas to be expressed. Milton stressed that sanctioning some ideas while repressing others would stifle discourse throughout society. He reasoned that as long as people were free to publish and debate about what they wish, the material with veracity would prosper. Milton's philosophy was furthered 200 years later by John Stuart Mill and his essay *On Liberty* (Milton, 1975). Both men worried about the influence powerful majorities held and their capability of silencing minorities and regulating their expression. Mill thought for a society to be uninhibited by this type of power, it needs to accept all mindsets and allow minority viewpoints to be freely expressed. He argued that all expression in society, true and untrue, has value, and stated "the peculiar evil of silencing the expression of an opinion is that it is robbing the human race ... those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception ... of truth, produced by its collision with error" (p. 76).

The values emphasized by Milton and Mill were incorporated by Justice Oliver Wendell Holmes into his dissenting opinion in one of the first Supreme Court cases concerning the First Amendment. The case, *Abrams v. United States*, examined the free speech rights of individuals who distributed leaflets about undermining the U.S. war effort during World War I. *Abrams* came only a few months after *Schenck v. United States* (1919), in which the Court made clear that protections for speech were lower during wartime. When the Court upheld the defendants' conviction in *Abrams*, Holmes dissented, contending that "the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the

competition of the market ...” (p. 630). He considered a marketplace of ideas to be the best way to evaluate their truth and for the public to be able to scrutinize all statements instead of prohibiting them.

Since *Abrams*, the Supreme Court has regularly utilized the marketplace of ideas as a rationale in First Amendment cases (Hopkins, 1996). Not all Court justices have agreed with justifying the theory, yet it has been used as validation for all types of speech from the highly protected political speech (*McIntyre v. Ohio Elections Commission*, 1995) to the vulnerable commercial speech (*Bigelow v. Virginia*, 1975). The marketplace of ideas has a couple of weaknesses, however, one being that privileged individuals have more access to financial or communication resources than others to circulate their opinions (Smolla, 1992). In *Gertz*, the Court noted the special influence that public people can wield in their communities, and in *Tornillo* it noted that public people tend to have easier access to the media, and therefore more tools and opportunities to vindicate their reputations, than private people. The Court added in *Tornillo* that there may have been a true marketplace of ideas when media content came at a low price for everyone, but increased prices and the dependence on electronic mediums have generated economic circumstances that were not there before and have distorted a fair marketplace.

Another fault of the marketplace of ideas is that statements that are prejudiced or are false tend to circulate efficiently (Baker, 1989; Smolla, 1992). There are times when pieces that are inaccurate or stir hate and division do better than honest reporting because they are sensationalized. In *Hustler Magazine, Inc. v. Falwell* (1988), the Court noted that “false statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation

that cannot be repaired by counterspeech, however persuasive or effective" (p. 52). The marketplace theory has its weaknesses, yet it is still a dominant First Amendment rationale. The appearance of the theory in several Supreme Court cases (*Lamont v. Postmaster General of the United States*, 1965; *Rosenberger v. Rector and Visitors of University of Virginia*, 1995) shows the role it plays in shaping the Court's First Amendment doctrine. Even though false statements of fact are valueless, the marketplace of ideas and the neutral reportage privilege support a system that elevates the truth and gives others the ability to refute a person's false remarks.

ii. Self-governance.

Self-governance was key to the framers of the Constitution and continues to be of importance through the work of Alexander Meiklejohn and the Supreme Court. The basis of the theory is for citizens in a democracy to be able to participate in their government and hold one another accountable (Meiklejohn, 1948). If people can follow the laws that they themselves have established, Meiklejohn reasons, then the notion of free speech will be enhanced. One of the caveats to Meiklejohn's idea of self-governance is that he argues the First Amendment is in place to protect political speech. He claims the purpose of free speech in a self-governed society is to guarantee that citizens are cognizant of and able to contribute to political decisions (Meiklejohn, 1948) and contends that "wise decisions about public policy issues require that all facts and interests relevant ... shall be fully and fairly presented" (1960, p. 26). Meiklejohn is not alone in this thinking. Judge Robert Bork wrote in 1971 that "constitutional protections should be accorded only to speech that is explicitly political" (p. 20). The intention behind this way of thinking goes back to the necessity of citizens being as informed as possible. If the public discourse is limited

in a way that best serves the voters, then this ensures the community is well-informed while continuing to endorse free speech.

Although Meiklejohn's approach to self-governance limits expression, the theory influenced the Supreme Court, which leaned on this rationale in *New York Times v. Sullivan* (1964). Justice Brennan, writing for a unanimous court, emphasized that the "central meaning" of the First Amendment was to advance self-governance and the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (p. 270). Because this is a self-governing society, Justice William Brennan wrote, speech about or against the government should be constitutionally protected as long as the statements are not made with actual malice. A year after *Sullivan*, Brennan mentioned the similarities between his opinion for the majority in *Sullivan* and the work of Meiklejohn (Brennan, 1965). He said the Justices were guided by Meiklejohn's outlook of the First Amendment and discussed other cases where the court took a Meiklejohnian approach. Self-governance is not the sole theory to support the First Amendment, but Brennan reiterated that "speech concerning public affairs is more than self-expression; it is the essence of self-government" (*Garrison v. Louisiana*, 1964, p. 75).

iii. Checking value.

The purpose of the First Amendment is not only to expand free expression but also to guarantee the right of the people, especially the press, to serve as watchdogs of government. One of the clearest markers of a free society is the ability of people to criticize public officials without punishment. This is the main focus of *New York Times v. Sullivan* (1964), where the Court references James Madison's view of press freedom and

states “the right of free public discussion of the stewardship of public officials [is]...a fundamental principle of the American form of government” (p. 275). A country is not truly free if the people are not able to comment on or have knowledge about the actions of their government.

This theory has many names, but one of the most popular is the checking value. Law scholar Vincent Blasi coined this term in his 1977 article “The Checking Value in First Amendment Theory.” In the paper, he discusses that even though values like self-fulfillment and the search for the truth are important, keeping the government in check was a top priority for the drafters of the Constitution. He continues by noting the types of ideals the theory promotes including self-governance, autonomy, and diversity. These values apply to several areas of First Amendment law and mass communication like defamation, access to media, and newsgathering (Blasi, 1977). Access to media and newsgathering are two of the only ways to keep an eye on the government and adequately inform the public, but scholars Edward S. Herman and Noam Chomsky have insisted that the news media do not always serve the public (1988) because they defer to government authority and give attention to what political leaders want citizens to know. This practice marginalizes the priorities of other parties and creates dysfunction in the marketplace of ideas. A society that is self-governed strives for autonomy, yet it does not always produce equitable outcomes.

Versions of the checking value have appeared in a number of Supreme Court cases (*New York Times v. United States*, 1971; *Branzburg v. Hayes*, 1972), with several Justices supporting the philosophy. Also, in his essay “Or of the press,” Justice Potter Stewart (1975) argued that the First Amendment protects the press as an institution,

which was designed to serve as a monitor of government power. In Justice Hugo Black's concurrence in *New York Times v. United States* (1971), he wrote "the Government's power to censor the press was abolished so that the press would remain forever free to censure the Government" (p. 717). Black continues by explaining the rights and protections the press have when it comes to reporting about the government, revealing its secrets, and notifying the public. Both justices emphasized the deep historical origins of press freedom and its unique role in preserving balance in democratic societies. The ideas of self-governance and the checking value go hand-in-hand with the neutral reportage privilege. With a government that is controlled by the people, the people also need the protection to report about what officials say no matter what it may be.

iv. Self-fulfillment.

While the marketplace of ideas and self-governance serve certain objectives outside of the speaker, some believe personal gratification is enough justification for freedom of speech (Franklin & Anderson, 1995). Self-fulfillment does not concentrate on the effect speech has on society but on how it helps with an individual's growth and autonomy. It largely contrasts with the views of Meiklejohn and self-governance because it encourages expression from all, no matter what it is or if it is of value to others. Not restricting what a person can say benefits the development of their identity and their character. Thomas Emerson, First Amendment scholar and strong proponent of the self-fulfillment rationale, asserted that "suppression of belief, opinion, and expression is an affront to the dignity of man, a negation of man's essential nature" (1963, p. 5).

Emerson wrote that First Amendment theory should not only recognize self-governance but self-fulfillment as well, so the scope of free expression is balanced.

Emerson posited that self-fulfillment rationalizes free expression because humans have the capacity to think and communicate, and everyone should have the opportunity to comprehend life and the world around them without being impeded. People should be free to express themselves, form a set of values, and achieve their own self-realization. Inhibiting these processes impairs people's self-worth, so Emerson stresses that "freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society" (1970, p. 6).

Legal scholar C. Edwin Baker offered some examples of what would help a person's development and self-fulfillment. He says there are solitary uses and non-solitary uses of speech, both of which enhance self-fulfillment (Baker, 1989). A solitary use is any expression that fosters self-growth even though no one else will see or hear it. This may be writing a story or painting a picture. Non-solitary use is speech or expression in public that will not have a significant effect on other members or aspects of society. Baker describes, as an example, a person who is at a public demonstration protesting a war. The protester might not ultimately influence the state of the war, but by participating, the protestor can define themselves through the experience, realize what they value, and possibly gain some pride in the process. Baker explains that "any time a person engages in chosen, meaningful conduct, whether public or private, the conduct usually expresses and further defines the actor's identity and contributes to his or her self-realization" (p. 53). The Supreme Court case *Cohen v. California* demonstrates why this use of speech is warranted. In 1971, Paul Cohen wore a jacket inscribed with the words "Fuck the Draft. Stop the War" to a public courthouse. The Court ruled in Cohen's favor, stating he did not direct the expletive toward anyone in particular and no one would be

provoked to take action after looking at his jacket. Justice John Harlan added that “one man’s vulgarity is another’s lyric” (p. 25). Cohen expressed himself by wearing the jacket, which was conducive to his sense of being and identity.

The theory of self-fulfillment might not be as commonly cited as the marketplace of ideas or democratic self-governance, but it has not been overlooked by the Court. In *Whitney v. California* (1927), for example, a case that involved allegedly threatening speech, Justice Louis Brandeis wrote in his concurrence that “those who won our independence believed that the final end of the State was to make men free to develop their faculties They believed liberty to be the secret of happiness and courage to be the secret of liberty” (p. 375). The capability of expressing oneself without boundaries is vital, yet this type of autonomy needs to be limited if speech entails “violence or coercion” (Baker, p. 54). Forcing a person to believe certain things or make certain choices does not fall under the scope of the First Amendment. The same goes for speech that is violent or threatens violence. Self-fulfillment is a cornerstone of free speech but is not always protected if it causes harm to others.

B. The Progression of Defamation Law

As one of the most complex areas of law (Gillmor, Barron, Simon, & Terry, 1990), legal scholars relentlessly debate the nuances of defamation. Two tort-law scholars, W. Page Keeton and William Prosser (1984), agreed with this description, saying that defamation law “contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm” (p.

771). The byzantine rules of defamation law are frustrating to many, but the intricacies can be for the better. These laws come from the values of the First Amendment which supports openness rather than repression (Smolla, 1992). Because everything is easily shared in a world where everyone is connected through smartphones, online newspapers, and social media applications, regulating or silencing speech online can be tempting. Ideas and stories can spread so quickly that a person's reputation could be completely ruined in a matter of a few hours. Controlling speech online is a reason why "censorship anywhere can become censorship everywhere" (Bollinger, 2010, p. 113). While the advancement of technology has given a voice to the voiceless, it has also made defamation law much more convoluted. If someone were to post something on Twitter, the factors of a defamation lawsuit could depend on how many people saw the tweet, how many retweets it received, and if the plaintiff could prove the defendant was stating fact and not making a joke or being sarcastic – something tweets are known for. The tort's role has begun to change due to the ubiquitous nature of the Internet and the anonymity of the people who use it (Sanders, 2007). It is difficult to protect an individual's reputation when the defamer may be an unidentifiable user of a chat room or social media platform.

There are discrepancies in defamation law that may favor one medium over another. An example of this is the republication doctrine. Traditionally, when someone repeats, shares, or reposts someone else's libelous statement, they claim it as their own and are just as liable as the original defamer. Under Section 230 of the Communications Act, however, operators of websites cannot be held liable for content posted to their sites by third-parties. "No provider or user of an interactive computer service," the law states,

“shall be treated as the publisher or speaker of any information provided by another information content provider” (47 U.S.C. § 230, p. 80). This safeguard is not available to print media and gives special protection to online media outlets.

The traditional republication doctrine also hinders individuals trying to utilize the neutral reportage privilege because the rule does not differentiate between someone repeating the libel to increase who knows about it versus repeating it to question or expose the defamer (Laidman, 2010). David McCraw (1991) says there are two tiers of truth or falsity in libel republication cases. The first tier is the defamatory remark itself and the second tier is the report about the defamatory remark. If someone is republicating a defamatory comment, people need to question why they are publishing it and if they are publishing it accurately. McCraw reasons that protecting a person’s right to republish is consistent with the First Amendment, as long as the original statement is accurately reported. The basis of the neutral reportage privilege supports these tiers of truth or falsity and abides by the accuracy of a statement. If a reporter repeats defamatory statements in a story, it is important that their reader understands the context of the situation and can comprehend that the statements are not reliable. Unlike actual malice, the neutral reportage privilege focuses on what the words of the story are instead of only concentrating on the reporter’s intent. When someone claims neutral reportage, they are already admitting that they doubted the veracity of the statements they republished. That is why a person needs to be accurate in their retelling of the comments, so they do not mislead their readers.

C. Responsibilities and Ethics of a Journalist

Journalism ethics is an important factor concerning the neutral reportage privilege. A journalist is responsible for the accuracy of a story when repeating a person's defamatory remarks and it is their duty to ensure that they are not misleading their readers.

i. Responsibilities.

Laws regarding defamation, the neutral reportage privilege, and online-publisher liability need to evolve, but journalists still need to take some responsibility for what they disseminate and readers need to consume the news intelligently. There are plenty of suggestions from scholars of what journalists can do to remain ethical in their reporting. Richard Peltz (2008) suggests that writers can attempt to be more sensitive about an individual's privacy and reputation in order to minimize harm in their reporting. He adds that media outlets should work on developing their online corrections so they can avoid future reputational harm. These actions may help in some cases, but scholars like Randall Bezanson argue that the most important thing a journalist can do when republishing defamatory comments is to make clear to the reader that there is doubt the statements are accurate (Huber, 2002). Steps journalists can take to ensure an accurate account of the defamatory material without misleading the readers are including the full context of the story, allowing denials from the accused, and incorporating evidence of the defamer's credibility (Bezanson, 1985; Smolla & Gaertner, 1989).

If the reporter makes these efforts, the question to ask is if "the story reasonably put readers on notice that the disputed allegations were not assertions of truth by the

publication and should not be read as such” (McCraw, 1991, p. 365). An example of when the responsibilities of a journalist were important was during the hearings for Supreme Court Justice Brett Kavanaugh. In the summer of 2018, as Congress was questioning Brett Kavanaugh for a seat on the U.S. Supreme Court, Christine Blasey Ford accused him of sexual assault while they were in high school together (St. Félix, 2018). Ed Whelan, a well-known conservative activist and president of the right-leaning Ethics and Public Policy Center, posted several tweets refuting these claims (Coaston, 2018). In the tweets, Whelan said someone who looked like Kavanaugh and who went to high school with Kavanaugh and Ford was actually the person who assaulted Ford. Whelan tweeted out this person’s name, address, and yearbook photo. After Whelan published his theory, Ford said there was “zero chance” (Coaston, 2018, para. 5) she confused Kavanaugh with this classmate. These events are clearly matters of public concern, but when journalists repeated what Whelan tweeted, they were at risk of a lawsuit from the classmate for defamation. Without the promise of protection from the neutral reportage privilege, this could lead to a chilling effect of reporting that could affect the public’s understanding of this situation. Under these circumstances, the journalists need to make sure their readers understand that Whelan’s claims are false by following the advice of Bezanson and report the full context of the Kavanaugh hearings, include the denial from Ford, and write about the lack of evidence from Whelan.

No matter what a journalist does, a “reasonable reader” may still blame the reporter for spreading defamatory content and further harming a person’s reputation. This blame is prevalent in defamation cases when a third-person effect influences jurors. The third-person effect occurs when a person assumes a persuasive form of communication

will have more of an effect on others than it will on themselves (Davison, 1983). In a defamation trial, the jurors are more likely to rule in favor of the plaintiff instead of the journalist (Cohen, Mutz, Price, & Gunther, 1988). This is because the jurors do not think of themselves when considering if the plaintiff's reputation was harmed but how others might view the plaintiff's reputation after seeing the libelous material. Laurie Mason (1995) discovered that people have the habit of distrusting the republisher more than the person who originally stated the accusations, noting that people "appear to see others as more vulnerable to a message that is delivered by someone other than the message originator" (p. 617). The results from Mason's study show the need for a libel defense that allows the trial to be based on how the reporter presented the defamatory statements instead of focusing on their state of mind when publishing the content. And moving past the simple question of whether the statement was true or false.

ii. Ethics.

Ethics is an integral component of the neutral reportage privilege because the protection of the privilege is conditional and will be surrendered in situations in which a reporter does not act ethically. This is consistent with the responsibility of the journalist and how they present the story to their readers but pertains to the journalist's motive for the statements they are publishing as well. With the neutral reportage privilege, it is more important to focus on why the reporter is disseminating the accusations instead of focusing solely on the accuracy of the claims (Harmon, 2011). Is the journalist reporting the story to expose someone or to spread false information? The Fox News channel is infamously known for their extremely biased and partisan reporting. The channel is even described by some as a "propaganda operation" and "state TV" (Illing, 2019). If an

anchor on the channel were to say something defamatory, like a conspiracy theory about Hillary Clinton or House Representative Alexandria Ocasio-Cortez, it is vital that other journalists have a defense to report on what the Fox News anchors are saying so they can refute the falsities. A protection would enable the journalists to reveal what type of reporters Fox News is made of instead of having to ignore it and letting viewers believe what they are saying.

Without considering the outcomes of their actions and the ethics behind their decisions, the media have the ability to hurt innocent people through carelessness or malice (Peltz, 2008). The Society of Professional Journalists' Code of Ethics (2014) tells members to minimize harm by “balanc[ing] the public’s need for information against potential harm or discomfort[,] show compassion for those who may be affected by news coverage[,] avoid pandering to lurid curiosity, [and] consider the long term implications of the extended reach and permanence of publication” (p. 1). Not only is ethics fundamental to good journalism, it is also encouraged in libel defenses (Peltz, 2008). The values of neutrality, accuracy, and fairness are obligatory for privileges like fair comment and neutral reportage to be accepted by the courts. If a plea of neutral reportage is meant to be accepted, the claim needs to be grounded in similar ethical principles. In short, the neutral reportage privilege should not be misunderstood as blanket immunity for the press but rather as a conditional privilege that protects those engaged in responsible reporting but not those acting in bad faith.

D. Neutral Reportage Privilege

There are various criticisms of the neutral reportage privilege. Opponents argue that case law makes it unnecessary (*Gertz v. Robert Welch, Inc.*, 1974; *New York Times v.*

Sullivan, 1964), because the actual malice standard already protects those who innocently report false and defamatory information about public people (*Norton v. Glenn*, 2004), and that allowing this privilege would enable demagogues (Rovere, 1959). These reasons are why many courts have been unwilling to recognize neutral reportage and has left people, specifically journalists, without a defense. Nevertheless, these seemingly valid points can be refuted by past research and a clearer understanding of what the privilege actually protects.

Legal scholars who oppose the neutral reportage privilege typically emphasize *Gertz v. Robert Welch* (1974) and *New York Times v. Sullivan* (1964) (R.W.C, 1983), which they believe offer sufficient protections. Both Supreme Court decisions applied the First Amendment to libel law, and also set precedents that makes various courts believe other types of libel defenses are redundant (*Barry v. Time, Inc.*, 1984). Some believe there is an inconsistency between the *Gertz* ruling and the premise of neutral reportage (Dobbels, 1982). The *Gertz* decision held that the public or private status of the plaintiff, not the newsworthiness of the story, should be used to determine the level of protection the First Amendment affords media defendants. While it seems that this ruling contradicts one of the principles of the neutral reportage privilege, newsworthiness is not a requirement in the privilege's landmark case, *Edwards v. National Audubon Society, Inc.* As the judge defines the elements of the privilege, newsworthiness is not referenced as a required condition. The term is mentioned shortly after neutral reportage is outlined, but it is not a fundamental of the privilege. Chief Judge Irving Kaufman stated, "when a responsible, prominent organization ... makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges,

regardless of the reporter's private views regarding their validity ... What is newsworthy about such accusations is that they were made" (1977, p. 120). *Edwards* even follows *Gertz* precedent by evaluating if the plaintiff qualifies as a public figure instead of relying on the public value of the accusations. This shows that *Gertz* and neutral reportage are able to coexist because the primary attributes of the privilege do not mandate newsworthiness.

Another reason many courts do not recognize neutral reportage is because the *Sullivan* actual malice standard already provides substantial protection in neutral reportage situations (Lewis & Ottley, 2014). The Pennsylvania Supreme Court made this argument in *Norton v. Glenn* (2004). Even though the court presented these reasons to rebuff the privilege, they did not explain how actual malice would protect defendants in neutral reportage circumstances. Because they did not go into the safeguards of actual malice, they also did not attempt to clarify that there are contrasts between actual malice and the neutral reportage privilege.

When analyzing a libelous statement, there is a difference in proving actual malice and neutral reportage (Sack, 1999). The differences can be explained through a hypothetical example of a public figure's defamatory comments. It would be of public interest if the current quarterback of the Minnesota Vikings, Kirk Cousins, were to post a defamatory tweet saying his rival Aaron Rodgers, the franchise quarterback for the Green Bay Packers, takes performance enhancing drugs. When journalists report about Cousins' claim, it would be a situation of actual malice if they found Cousins' remarks believable. It would be a situation of neutral reportage if reporters doubted the statements by Cousins but believed that Cousins defaming Rodgers was newsworthy itself.

It is difficult to ascertain clear evidence from libel cases when trying to prove actual malice because the judge or jury has to understand what the reporter's state of mind was before they published the statements, which can lead to second-guessing and uncertainty of motives (McCraw, 1991). It is slightly easier to comprehend the objectives of a journalist in neutral reportage cases because judicial attention is focused on the words of the article itself. The court can question if the story was presented entirely and accurately and if all parties involved were written about fairly. When a defendant claims neutral reportage, the state of their mind is clear cut since the privilege is useless without actual malice (Sack, 1999). This reasoning demonstrates there are times where the neutral reportage privilege can protect a journalist when actual malice cannot; the journalist can have a defense for publishing something they did not think was truthful but believed it was something the public needed to know. Floyd Abrams, who represented the *New York Times* in *Edwards*, reasons "if a journalist has to be in a position to believe in the charge, Watergate wouldn't have been reported" (Huber, 2002, p. 15).

Another concern among critics of the neutral reportage privilege is that it will empower demagogues. Attorney Alan Fein fears the privilege "would protect someone like Joe McCarthy because it allows people to make false allegations as long as they're newsworthy" (Huber, 2002, p. 16). Senator Joseph McCarthy spewing harmful statements during Senate proceedings and the media disseminating the events under fair report privilege is a cautionary example used by opponents of neutral reportage. Although this is a legitimate concern, the apprehension of letting people like McCarthy make false allegations favors the proper use of the neutral reportage privilege because it

would not be possible for the press to expose individuals like him without the ability to print the accuser's own words and convey the extent of their actions.

The final argument against adopting the neutral reportage privilege is that the issues the privilege protects do not come up often enough, so the press can survive without it. Results from a 2010 survey show otherwise (Laidman). Journalists who report on municipal and state government responded to a survey about their experiences as a reporter and if they have ever been in a situation where they feel a neutral reportage privilege is needed. Out of all the respondents, 72% of them said they have encountered events when a public figure has made a defamatory and newsworthy statement, yet they would not be protected by any current libel privileges if they were to report about these occurrences. This demonstrates a lack of First Amendment protection in an area that comes up more often than the courts realize. While the press may not require a neutral reportage privilege for reporting on private figures, they are not able to freely perform their responsibilities of reporting on public officials and figures without a libel defense that covers these instances. Other evidence from the Laidman survey shows that jurisdictions with a neutral reportage privilege do not promote irresponsible journalistic behavior (Laidman, 2010). The fear that reporters will take advantage of this privilege is unfounded as long as they follow the criterion of neutral reportage. This includes reporting the story completely, accurately, and not omitting information that would lead to reader misunderstanding. Jurisdictions that recognize a neutral reportage privilege are only shielding responsible and ethical journalism – something that should be the utmost priority in the United States.

The next section of this thesis will be to see how the theories and ideas regarding the neutral reportage privilege are reflected in the opinions of the courts. This analysis will show if the courts believe the privilege coincides with First Amendment theory and how differently the courts view the privilege compared to scholars' attitudes toward the privilege. The previously reviewed principles and critiques of the privilege also serve as the context for the proposal for why courts should more consistently recognize the privilege and how they should implement it.

IV. Method

This thesis utilized legal research methods to examine the current state of the neutral reportage privilege in the U.S. The study focuses on understanding how the courts have approached the neutral reportage privilege and its validity by analyzing cases in which courts have discussed the defense. The aim was to provide a comprehensive examination of all U.S. court decisions addressing the privilege in order to identify the extent to which it is recognized across the country, the rationales used by the courts to support their decisions, and the trends over time. The search for relevant cases was limited to the years 1977-2018. The year 1977 was chosen as the starting point because it is the year the Second Circuit decided *Edwards v. National Audubon Society, Inc.*, the first and highest court case to recognize the neutral reportage privilege. The case has set the strongest precedent for the privilege, and it is what courts cite most often when presented with a similar case. The primary source used to gather these cases was the *Media Libel Law 2017-2018 Media Law Resource Center 50-State Survey*. This resource includes the current developments in media libel law, which is prepared by media attorneys and law firms in every state and U.S. territory. Every aspect of libel law is covered, and every case that has discussed the neutral reportage privilege in circuit and state courts is contained within the most recent edition.

The U.S. Supreme Court has never addressed the neutral reportage privilege, so the starting point of this analysis was to identify relevant federal circuit court decisions. Because only 24 circuit court decisions were found in which the courts addressed the privilege, the sample was broadened to include state court cases as well. Another reason for analyzing state court cases was because several of the cases are frequently referenced

in scholarly literature on the neutral reportage privilege and are valuable components to the neutral reportage precedent. Despite state courts not having as much influence as federal courts, they have had a significant impact on today's neutral reportage privilege. It would not be a complete analysis of the neutral reportage privilege if prominent state court cases were not included. There were 80 cases from 32 states and D.C., which put the preliminary total number of cases to 104. Each case was then searched on LexisNexis and Shepardized in order to see if other cases cited them, to evaluate the full opinions, and to identify if any relevant cases were not listed in the Media Law Resource Center book.

After this search was performed, the list of cases was reduced by applying certain criteria. Cases where the courts applied a privilege that was too similar to fair comment or fair report privilege were not included. Also, cases were removed when the court only mentioned the privilege in the footnotes or briefly referenced it in the main text of the opinion but without any analysis. The final number of cases that were analyzed was 75. There were 17 circuit court cases and 58 state court cases. Of the federal circuit cases, two were from the First Circuit, four from the Second Circuit, one from the Third Circuit, one from the Fourth Circuit, three from the Sixth Circuit, one from the Seventh Circuit, one from the Eighth Circuit, three from the Ninth Circuit, and one from the Tenth circuit. All 75 cases were examined to see whether the courts accepted or rejected the privilege and to understand their rationales. Cases in which the courts accepted the privilege were further examined to identify the ways in which the courts defined the privilege and the conditions it applied. When looking for how the courts defined neutral reportage, the factors the researcher evaluated were how the journalist wrote about the defamatory

remarks, if the court found the statements – or the mere fact that the statements were made – to be newsworthy, and whether the plaintiff was a public or private figure. When analyzing why the privilege was accepted or rejected, the researcher assessed what precedents the courts considered for their decisions, the state of mind of the defendant, the value of public interest versus the plaintiff’s reputation, and the accuracy and neutrality of the republication of the defamatory statements.

A. Research Questions

The specific questions asked were as follows:

1. How do courts define the neutral reportage privilege?
2. Which courts have accepted or rejected the neutral reportage privilege?
3. What rationales have courts used to justify their acceptance or rejection of the neutral reportage privilege?
4. Are there jurisdictional variations in the courts’ treatment of the neutral reportage privilege?
5. Are there variations over time in the courts’ treatment of the neutral reportage privilege?

V. Case Analysis Results

The 75 cases included in this study were analyzed in order to answer five research questions. The questions were answered after each case was evaluated with the same set of criteria. What was revealed is that the definition of the neutral reportage privilege varied from jurisdiction to jurisdiction, but there were some key aspects of the privilege that were recognized by all or most of the courts. The analysis also presented the courts' rationales for either accepting or rejecting the privilege. Jurisdictional and time trends of the cases were compared and analyzed as well.

A. Definition of the Neutral Reportage Privilege

There are a number of conditions the courts applied before the defendants could claim the privilege. One is that the journalist needs to report the defamatory remarks fully, accurately, and fairly. In the First District Court of Appeal of Florida case *Huszar v. Gross* (1985), attorney Arlene Huszar sued the Gainesville Sun newspaper and Michael Gross, an employee in the Office of the Comptroller, for libel after Gross described her as "unethical" (p. 514) in an article about a case she was working on. The court stated that the article in question "was a fair and accurate report of Gross' official statements," and that "[s]uch neutral reportage is protected by the First Amendment" (p. 515). The court added that accurate and complete reports about official government proceedings and meetings open to the public are privileged under fair report and that neutral reportage is just an extension of those protections to other settings. Several cases noted that if the report is "substantially accurate," neutral reportage should apply (*Young v. Morning Journal*, 1996; *Young v. Gannett Satellite Information Network, Inc.*, 2013), but other

courts applied additional criteria. In *Ryan v. Herald Association, Inc.* (1989), the Supreme Court of Vermont denied the privilege to a reporter who did not report the original defamatory allegations word for word. On the other hand, the Court of Appeals of Georgia held in *Lawton v. Georgia Television Co.* (1995) that reporters do not have to repeat accusations verbatim. They can be abridged or condensed as long as the statements are not edited or arranged in a way that creates a defamatory meaning.

Many of the courts indicated that a full, accurate, and fair account of the allegations is one of the essential features of the neutral reportage privilege because that requirement was integral to the *Edwards* (1977) decision. *Edwards* provided a template that clearly shaped how other courts later defined the privilege and the contexts in which they would allow it. In *Cianci v. New Times Pub. Co.* (1980), the *New Times* magazine pulled quotes from a previously published article accusing the Mayor of Providence, Rhode Island, Vincent Cianci, Jr., of sexual assault. The *New Times* article did not include Cianci's side of the story or mention that he was never found guilty. The Second Circuit held that the magazine fulfilled "almost none of the conditions laid down in *Edwards*" and that the plaintiff cited "examples which would undermine a claim of 'fair' and 'neutral' reporting" (p. 69). Courts were consistent in emphasizing the importance of neutrality. As the United States District Court for the Northern District of California noted in *Barry v. Time* (1984), "the neutrality of the report ... is critical" (p. 1127) when determining the applicability of the privilege.

To demonstrate neutrality, journalists must show that they did not purposefully distort the statements to make them more newsworthy or harmful to the plaintiff. In the *Flowers v. Carville* (2002), the Ninth Circuit rejected the defendant's claim of neutral

reportage because the defendant “selectively edited” (p. 1122) the original statements that created a defamatory meaning. The court ruled that the privilege was “inapplicable because the context in which these statements were made belies any claim that they were merely neutral reports of earlier news stories” (p. 1133). Some courts have added that accurate reporting is not always enough for journalists to claim the privilege; they must also present each side of the controversy and describe the context of the dispute. In *International Association of United Mine Workers Union v. United Mine Workers of America* (2006), several newspapers were sued for libel over their reporting on a labor dispute. The district court in U.S. District Court for the District of Utah granted the protection of the neutral reportage privilege to two of the newspapers because they obtained “each party’s position” (p. 86) and adequately displayed the standpoint of each organization in the dispute. The other newspapers, which did not maintain neutrality and did not feature the “perspective of both” sides (p. 89), were denied the privilege.

The next defining factor of the neutral reportage privilege is that published allegations need to be newsworthy and of strong interest to the public. Many of the cases turned to an often cited quote from *Edwards* (1977): “What is newsworthy about such accusations is that they were made” (p. 120). Newsworthiness was not the reason why the Second Circuit allowed the privilege in *Edwards*, yet many jurisdictions relied on this characteristic when evaluating the defamatory statements. In *Herron v. Tribune Publishing Company* (1987), the Supreme Court of Washington specifies “that the purpose behind recognizing a conditional privilege of this type is to allow the public to learn of newsworthy allegations ... even when the allegations are false” (p. 183). The cases emphasized the need to protect defendants who publish information that is of public

concern. The U.S. District Court judge for the Central District of California, who presided over *Ward v. News Group International, Ltd.* (1990), affirmed that “the whole purpose of the privilege is to inform the public and let it judge which side is true. To do otherwise would have a chilling effect on speech and dissemination of information” (p. 84).

Another part of the courts’ definition of neutral reportage was the public or private status of the plaintiff. Unless a private citizen decides to enter the public spotlight through their own actions, the privilege does not shield a defendant for republishing defamatory remarks about the plaintiff (*Khawar v. Globe Int’l, Inc.*, 1998). The Court of Appeals in Kansas added in *Haskell v. Stauffer Communications, Inc.* (1999) that even when a defendant makes a convincing argument for neutral reportage, the defendant can only invoke the privilege when the plaintiff is a public official or figure. This was the approach taken by a majority of the courts, except the Court of Appeals in Ohio. In *House of Wheat v. Wright* (1985) and *April v. Reflector-Herald, Inc.* (1988), the court prioritized public concern over the private status of the plaintiff. In *April*, the county sheriff told a reporter that he fired Mary April, the plaintiff, from the sheriff’s office for stealing. The court asserted that they saw “no legitimate difference between the press’s accurate reporting of accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest” (p. 98). *April* and *House of Wheat* were anomalies, however, since every other private citizen case rejected the neutral reportage privilege.

B. Rationales for Accepting or Rejecting the Privilege

The courts provided various rationales for why they either accepted or rejected the neutral reportage privilege as a defense. One of the most prevalent rationales was case precedent. While the courts for two cases in the sample did not acknowledge the privilege because their state Supreme Courts rejected it (*Trover v. Kluger*, 2007; *Bahen v. Diocese of Steubenville*, 2013), the courts for 10 other cases did not accept the privilege due to U.S. Supreme Court precedent. In four of the ten cases, *New York Times v. Sullivan* (1964) was cited (*Postill v. Booth Newspapers*, 1982; *Janklow v. Viking Press*, 1985; *Spreen v. Smith*, 1986; *Rouch v. Enquirer & News of Battle Creek*, 1992). The justices on the Supreme Court of South Dakota in *Janklow v. Viking Press* (1985) provided the primary reason why these courts referred to *Sullivan* when they stated “that the media already enjoys the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact and opinion” (p. 881). Courts in four other cases cited *Gertz v. Robert Welch, Inc.* (1974) (*McCall v. Courier-Journal & Louisville Times*, 1981; *Hogan v. Herald Co.*, 1982; *WKRG-TV, Inc. v. Wiley*, 1986; *Little v. Consol. Pub. Co.*, 2011). The reason the Supreme Court of Alabama considered *Gertz* in its ruling in *WKRG-TV, Inc. v. Wiley* (1986) is because the court deemed “it instructive that the United States Supreme Court ... rejected a “newsworthiness” test for determining whether a defamatory publication is protected by the First Amendment. Such a test ... was disapproved in *Gertz v. Robert Welch, Inc.* ...” (p. 619). There were also two cases in which courts based their decision on *St. Amant v. Thompson* (1968) (*Dickey v. CBS*, 1978; *Norton v. Glenn*, 2004). In *St. Amant*, the Court ruled that for public figures to prove a defendant defamed them, they need to present evidence that the defendant said or

published these statements with serious doubts about their veracity. The Third Circuit applied this holding in *Dickey v. CBS* and concluded “that a constitutional privilege of neutral reportage is not created ... merely because an individual newspaper or television or radio station decides that a particular statement is newsworthy” (p. 1226).

Another repeated rationale was the notion that there are circumstances in which it is more important for the public to be informed than it is to protect a person’s reputation. When justifying this stance, many courts pulled from the *Edwards* decision that cites “the public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them” (p. 49). Some courts said the reason the privilege exists is so public knowledge of relevant controversies can take precedence over legal recourse for the defamed party (*Stockton Newspapers, Inc. v. Superior Court*, 1988; *McCracken v. Gainesville Tribune, Inc.*, 1978; *Ward v. News Group International, Ltd.*, 1990). The cases in which the court did not prioritize the public interest over the plaintiff’s reputation were in situations when they did not believe there was a newsworthy controversy in the first place (*Lasky v. ABC*, 1986; *Condit v. Dunne*, 2004).

The state of mind of the defendant was also something the courts considered as a part of their rationale for the privilege. This meant that if the journalist believed they accurately conveyed the story, they should be able to claim the privilege. In *Davis v. Oberly* (1995), the Third Circuit explained that if the journalist is acting in good faith and reasonably believes the accuracy of what they reported, the neutral reportage privilege should apply. In *Krauss v. Champaign News Gazette* (1978), the Illinois Fourth District Appellate Court concurred: “Unless it is shown that the journalist deliberately distorts

these statements to launch a personal attack of [their] own upon the public figure or the program, that which [they] report under such circumstances is privileged” (p. 747). A related criterion that appeared in various cases is the amount of burden the journalist has with proving the truth of the accusations. None of the courts in the cases studied required the defendant to conduct an independent investigation of the statements they reported. In fact, some courts addressed this directly and explicitly rejected the idea. In *Minton v. Thomson Newspapers, Inc.* (1985), for example, the Court of Appeals of Georgia asserted that the journalist or news organization do not have to perform an independent investigation. The same court in *McCracken v. Gainesville Tribune, Inc.* (1978) reasoned that there is “no indication that the republisher has any burden except fairness, honesty, and accuracy” (p. 276).

Two courts in Vermont went as far as to say that a journalist could be covered by the privilege even when reporting anonymous accusations (*Burns v. Times Argus Association, Inc.*, 1981; *Paquette v. Vanguard Publishing Co.*, 1982). The Supreme Court of Vermont reasoned that “quoting from an anonymous letter, although perhaps lacking in responsibility, did not constitute an actionable offense” (*Burns v. Times Argus Association, Inc.*, 1981, p. 778). The judges admitted that statements from an anonymous source may not be as legitimate as those from an identified source, but they turned to a section in the *Edwards* (1977) opinion to support their decision: “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” (p. 120).

Another factor the courts considered, and about which there was some disagreement, was whether defendants could be denied the privilege when they have a

bias against the plaintiff, even if there is nothing biased about their reporting of the accusations at the heart of the lawsuit. In *Price v. Viking Penguin, Inc.* (1989), the Eighth Circuit holds that it does not matter if the journalist has favorable or unfavorable feelings for the individuals involved in the story, they can claim the privilege as long as they report the events entirely and fairly. Despite the defendant's evident support for one of the subjects of the piece, the court concluded that "the primary focus must be on the defendant's attitude toward the truth of the statements, rather than on the defendant's attitude toward the plaintiff ... [It matters] whether the reports were accurate reflections of what was said or done. Evidence of the author's general disposition towards his topic does not establish whether he espoused each particular allegation" (p. 1434). In contrast, other courts decided that the neutral reportage privilege should only apply if the reporter was unbiased toward the parties involved and the article was "disinterested reporting of the information" (*Schwarz v. Salt Lake Tribune*, 2005, p. 195; *Smith v. Taylor County Publishing Co., Inc.*, 1983; *Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.*, 1989).

In a handful of other cases, the courts mentioned the neutral reportage privilege but chose not to apply it because the claims were easily resolved by applying more conventional libel principles. The Court of Appeals of Louisiana in *Romero v. Abbeville Broadcasting Service* (1982) found "it unnecessary to apply the [privilege] here, because ... the defendant did not recklessly disregard the truth" (p. 1250). In a First Circuit case, *Pan Am Systems Inc. v. Hardenbergh* (2015), the court cited the neutral reportage privilege approvingly but offered similar reasoning as *Romero*, saying the defendant's comments were protected opinion. Courts in other cases did not apply the privilege

because they affirmed a lower court's decision on other grounds, like the Seventh Circuit case, *Woods v. Evansville Press Company* (1986), in which the court could not find enough evidence of actual malice to sustain the plaintiff's claim.

Finally, in six cases the courts did not fully accept or fully reject the neutral reportage privilege. In half of these cases, the courts approved something comparable to the neutral reportage privilege but did not specifically name it. The U.S. District Court for the Northern District of Oklahoma decided in *Ackley v. Bartlesville Examiner-Enterprise* (2007) that "when assessing the truth of a report concerning an investigation, a defendant is under no requirement to show that the allegations against the plaintiff are true, but must only show that the allegations were made and that the allegations themselves were accurately recited" (p. 5), yet the court never categorized this ruling as a neutral reportage privilege.

Another two cases were decided by courts that approved the idea of neutral reportage, but, like the courts that cited the *Sullivan* precedent, believed privileges like fair report were equivalent and provided sufficient protection (*Costello v. Ocean County Observer, et al.*, 1994; *Howard v. Antilla*, 2002). And, in *Chapin v. Knight-Ridder, Inc.* (1993), the Fourth Circuit chose not to take a stance on the privilege until it had a more appropriate case in which to address it. "Until we face a case with a 'prominent, responsible,' but nongovernmental speaker, we need not cast our lot one way or the other on the full *Edwards* neutral reportage privilege" (p. 1097). In the 26 years since *Chapin*, the Fourth Circuit has not heard a case involving neutral reportage.

C. Jurisdictional and Time Trends of the Neutral Reportage Privilege Decisions

After analyzing the case data first as a whole and then separating the data between the circuit court and state cases, jurisdictional and time trends emerged. As shown in Figure 1 and Table 1, the number of cases heard overall was highest in the 1980s and took a sharp decline in the decades after. What most likely contributed to the initial incline was the Second Circuit's recognition of the privilege in *Edwards v. National Audubon Society, Inc.* in 1977.

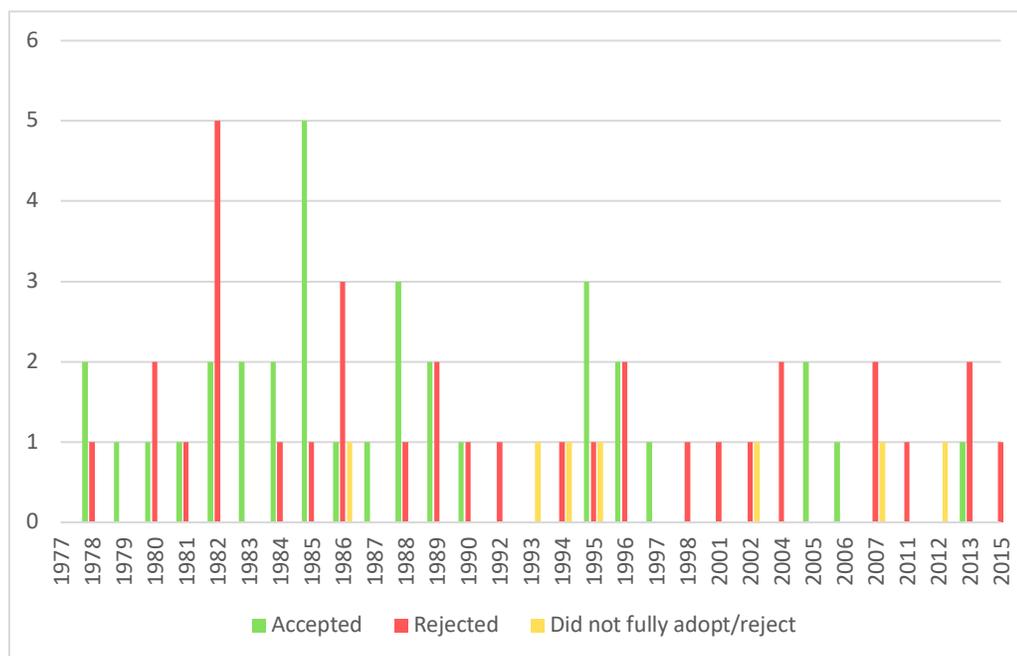


Figure 1: Rulings for the Neutral Reportage Privilege

Decade	Number of Cases	Accepted	Rejected	Did not fully accept or reject
1970s	5	4	1	0
1980s	37	20	16	1
1990s	16	6	7	3
2000s	11	3	6	2
2010s	6	1	4	1

Table 1: Frequency of All Neutral Reportage Cases

The same phenomenon happened with the acceptance of the privilege versus rejection. The privilege was accepted slightly more often in the 1970s and 1980s than it was rejected. This trend started to reverse in the 1990s and continued through the 2000s and 2010s. Figure 2 shows that courts are not addressing the neutral reportage privilege as often as in the past, and they are now more likely to reject it than accept it.

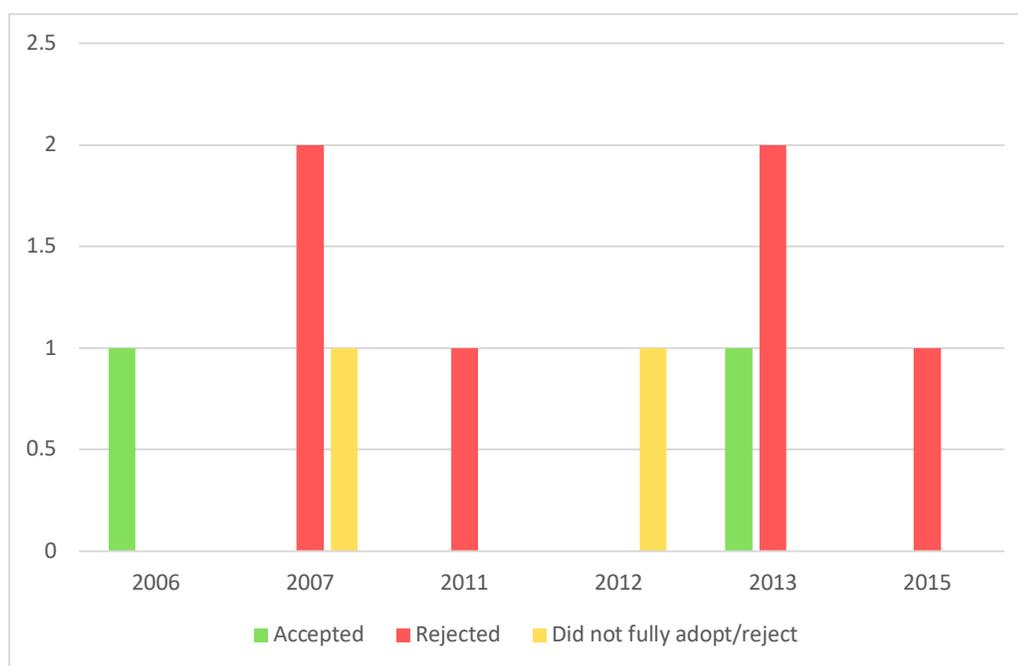


Figure 2: Most Recent Trends of Neutral Reportage Decisions

In the first twenty years of the study, when the privilege was accepted more often, the most common rationales the courts gave were: 1) the statements were newsworthy and therefore were of public interest even though they were defamatory; 2) the article was neutral and accurate; and 3) the journalist did not have the burden to prove the validity of the remarks before publishing them. Over the last 20 years of the study, when the courts were more likely to reject the privilege, many of the courts ruled that the stories were not neutral or accurate enough or that the U.S. Supreme Court cases *Sullivan* and *St. Amant* already provided enough protection for libel defendants. These reasons for rejection show that the courts' standards for neutral reportage became more strict, or that those courts simply did not believe the privilege added anything significant to existing defamation law.

Although there is a slight decline in the number of cases where the court accepts the privilege, the decisions by the courts after 1988 are mostly inconsistent. Between 1989 and 2015, there was a lot of variation in the courts' recognition of the privilege. There is no discernable trend during that period. Out of all 75 cases, the courts accepted the neutral reportage privilege 34 times, rejected the privilege 34 times, and did not fully accept or reject it seven times. Because of this uneven application, the law is unpredictable for journalists and other communicators. It is difficult for them to know when they will and will not be protected. The variance in these decisions does not provide enough guidance for whether an individual has the freedom to republish defamatory statements without punishment.

Decade	Number of Cases	Accepted	Rejected	Did not fully accept or reject
1970s	2	1	1	0
1980s	4	2	1	1
1990s	3	1	1	1
2000s	6	0	4	2
2010s	2	0	2	0

Table 2: Frequency of Circuit Court Cases

Decade	Number of Cases	Accepted	Rejected	Did not fully accept or reject
1970s	3	3	0	0
1980s	33	18	15	0
1990s	13	5	6	2
2000s	5	3	2	0
2010s	4	1	2	1

Table 3: Frequency of State Court Cases

Data from all the analyzed cases is reflected in Table 2 and Table 3, divided between federal and state cases. The state court cases did not show anything significant but the circuit court cases revealed some tendencies. Out of the 17 circuit court cases in the study, the courts only accepted the neutral reportage privilege four times. One of these cases was *Edwards* at the beginning of the study in 1977, and the other three cases came from the 8th (*Price v. Viking Penguin, Inc.*, 1989) and 9th Circuits (*Barry v. Time*, 1984; *Ward v. News Group International, Ltd.*, 1990). The privilege was applied in these cases because the statements in question were newsworthy, and the articles published were neutral or accurate.

Circuit	Year	Rationale
1st Circuit	2015	Privilege was unnecessary.
2nd Circuit	1980	<i>Sullivan</i> precedent.
2nd Circuit	1995	Privilege was unnecessary.
2nd Circuit	2004	<i>Gertz</i> precedent.
3rd Circuit	1978	<i>St. Amant</i> precedent.
6th Circuit	2007	Privilege was unnecessary.
6th Circuit	2007	State Supreme Court precedent.
6th Circuit	2013	Privilege does not apply to inaccurate statements.
9th Circuit	2002	Privilege does not protect doctored statements.

Table 4: Rejected Circuit Court Cases

Of the nine rejected circuit court cases, Table 4 shows a majority of them are well after the *Edwards* decision and after the few accepted cases by the 8th and 9th Circuit as well. The rationales the courts gave for not accepting the privilege are similar, including that the story was not neutral or accurate or that the court believed the privilege was not necessary. Something else to note with the circuit court cases is that the 2nd Circuit, the court that decided *Edwards*, rejected every other neutral reportage case that it heard. This shows how highly fact-specific not only neutral reportage privilege cases are but defamation cases in general and that it is most likely impossible to create a bright line test for every court to follow with these cases.

VI. Proposal

When the courts amend defamation law, one of their top priorities is to strike a proper balance between the freedom of speech and press and the need to protect one's reputation. This proposal will try to do the same by offering recommendations to the courts about how to conceptualize and apply the neutral reportage privilege while also advising journalists and those sharing information on social media about how to use it. The neutral reportage privilege promotes a free press, but it does not reward the sharing of baseless accusations for the purpose of spreading a false narrative. People are constantly lying. Whether it be a pundit on a cable news network or the leader of the free world, people are and will continue to contaminate the marketplace of ideas with disinformation. The point of the neutral reportage privilege is not to enable this but to combat it. It is meant to give citizens the freedom to share newsworthy information in a way that ultimately exposes the people making false allegations so that they can be held accountable.

It is crucial that journalists and others have protection to rebut inaccuracies when they are presented as fact. For example, when Donald Trump criticized pro-choice advocates at an April 2019 rally in Green Bay, Wisconsin, he told the almost 10,000 attendees (Schneider, BeMiller, & Soellner, 2019) that after a baby is born, pro-choice doctors and mothers "determine whether or not they will execute the baby" (Cameron, 2019, para. 1). This fabricated story cannot be classified as defamation because he did not identify anyone by name. If he had, however, journalists would not have been able to report his statements without risking a libel suit. A story like this will not go completely uncontested, but if journalists feel like they could be in danger of a lawsuit, it is likely

they will not report the whole story in the hopes of avoiding liability. They could decide not to print Trump's full quote or not report parts of the story thinking this will help their case. Not only does this not help them, it contributes to the distortion of the truth. The concern for what journalists will publish if protected by the neutral reportage privilege should not be as great of a concern as letting these stories circulate without being accurately fact checked. When someone fully and accurately reports an event with good motives, they should be able to claim neutral reportage. They did not alter any storylines or make accusations of their own. There are certain guidelines that people should follow and that the courts should accept for neutral reportage protection to apply. If these guidelines are met, the journalists should be protected, which will not only strengthen freedom of the press but will empower citizens by ensuring they have access to the information they need to understand the full context of these situations.

A. How a Story is Presented

What a reader takes away from a story after reading it is dependent on how that story is told. How a journalist illustrates the events that transpired and the actions of the parties involved shapes the narrative and alters a reader's viewpoint. What a writer decides to include in an article and how in depth their reporting is can be small but relevant factors to neutral reportage circumstances and ones that the courts should consider when deciding if they should validate the privilege.

i. Good faith v. spreading disinformation.

The motive for why a writer publishes a story containing defamatory statements is necessary to understand when considering whether the neutral reportage privilege should

protect a libel defendant. The pizzagate conspiracy theory can be used as an example of this. During the 2016 U.S. presidential election, a conspiracy theory entered mainstream public discourse when the private email account of John Podesta, Hillary Clinton's campaign manager, was hacked (Lopez, 2016). When the hackers released Podesta's emails to the public, conspiracy theorists began to claim that the emails contained coded messages that translated into information about human trafficking and Democratic public officials' involvement in a child-sex ring located in a Washington, D.C., pizzeria. This was all debunked, but it spread throughout social media and was even mentioned on some more prominent news outlets. If Podesta were to sue any of the journalists who reported on these rumors, or others who shared the information online, the defendants could invoke the neutral reportage privilege, at least where they shared the information in good faith. Good faith is grounded in the intentions of the writer. This means they are not reporting the story as truth but as a newsworthy event. Even though the pizzagate conspiracy was entirely fictitious, it was still of public interest that opponents of a presidential candidate were trying to harm her campaign by spreading dangerous conspiracies. The neutral reportage protection should not apply, however, to those who publish stories or share information in order to advance the conspiracy. If there is no indication in a story that the statements or events are untrue, then the reporter is not acting in good faith and should not be able to rely on the privilege.

This does not mean that the reporter has to independently investigate the rumor, or to flatly reject its validity in the story, but they should somehow make it clear that they are not validating the source's claims but merely reporting them as newsworthy activity. There are several ways a reporter can do this, including providing background

information on the story or the parties involved. In 2018, SpaceX and Tesla CEO Elon Musk tweeted that diver Vern Unsworth was a “pedo guy” because Unsworth would not accept Musk’s help with rescuing 12 Thai boys from a flooded cave (Sharma, 2019).

There is not a lot a journalist can do to prove the accuracy of Musk’s tweet, nor should they have to. The fact that a person as powerful as Musk is accusing someone of being a pedophile is newsworthy, and writers can faithfully report this news by giving the background of the story and the character of Musk.

Courts make a consequential oversight when they only focus on the accuracy of the defamatory remarks and not the motives of those retelling them. Several courts have rejected the privilege by saying that it is unnecessary in light of the protections provided by the Supreme Court’s decision in *St. Amant* (1968), which held that public plaintiffs could not successfully sue for defamation absent evidence that “the defendant in fact entertained serious doubts as to the truth of his publication.” (p. 731). But this actual malice protection does not go far enough, because there are times when a reporter might have doubts about the truth of certain statements but still feel it serves the public interest to report them. *St. Amant*, by itself, provides no leeway for such writers. The question that should be asked is not whether the journalists had doubts about the legitimacy of the remarks, but whether they alerted the reader about their doubts. It is reasonable to punish the defendant if evidence is found that they knew the statements were false and published them without warning their readers. If, however, the defendant reports the defamatory comments while alerting the audience about the questionable reliability of the comments, courts should view this as evidence of good faith.

The *St. Amant* decision only covers a limited set of circumstances. It also creates a chilling effect on the dissemination of comments that, while false, are nevertheless newsworthy because the person making them is a public figure. Journalists, and the public in general, have no fighting chance against aspiring despots if they are not able to fully report on these rulers' actions. Good faith and motive are evident in stories where the writer does not treat the defamatory statements as fact, but accurately reports the fact that the statements were made. In these situations, *St. Amant* is not enough. Reporters need the added layer of protection that the neutral reportage privilege provides.

ii. Accuracy, context, and neutrality.

The courts most commonly define neutral reports as those that are “fair and accurate” (*Herron v. Tribune Publishing Co.*, 1987, p. 182). The United States District Court for the Northern District of California contended in *Barry v. Time, Inc.* (1984) that neutrality is when a “plaintiff does not and [cannot] assert that the articles present an unbalanced or one-sided picture of the public controversy ...” (p. 1127). The Supreme Court of Vermont in *Ryan v. Herald Association, Inc.* (1989) said neutrality is when the defamatory quotes are as accurate and precise as possible without any editorializing. The courts state what they think neutrality is, but not what journalists should do to ensure their report is neutral. A journalist needs to make clear that they are just reporting what the public figure said and are not validating the underlying claims. They need to illustrate the whole story and not leave out vital details that might alter how the audience views the statements. One way to do this is by giving more context regarding the relationship between the defamer and the defamed. Similar to David McCraw’s (1991) suggestion of including the existence of controversy between the two parties, the privilege should

protect the author if they provide each side of the story in their piece. This allows the reader to understand the bigger picture and possibly question the false remarks.

Journalists can use this tactic when covering cases about sexual assaults. In 2019, the *Salt Lake Tribune* reported that libel lawsuits were going up in Utah and the suspected cause was the #MeToo movement (Miller). Men were suing women for libel after they made accusations of sexual assault, and the women were suing the men for labeling them as liars. For writers to avoid lawsuits when reporting these stories, explaining the positions of each party would give the reader enough information to make their own decisions about what is true and false. Claiming neutral reportage can become tricky in these situations if both parties are private individuals, but the public concern of criminal behavior is more important for the community to know rather than keeping the identities of each party private. Shining light on these stories can offer support to the victim, expose the assailant, and possibly encourage other victims to come forward.

Another practice journalists can implement when reporting a person's defamatory remarks is concentrating on the background and reputation of the accusers. The writer can apprise their audience of the defamer's possible biases and if they are known for holding certain beliefs. If Senator Mitch McConnell were to make dubious accusations about Judge Merrick Garland, a journalist could supplement his comments with information about McConnell's political ideology and past actions. The author of an article can also gauge the credibility of someone if they have made libelous remarks in the past. In 2009, musician and actress Courtney Love was the first celebrity to be sued for tweets she posted (Frizell, 2014). Love was sued for defamation by fashion designer Dawn Simorangkir and later by Love's own former lawyer. The first suit was for

tweeting that Simorangkir was a drug dealer, thief, and prostitute (Grebey, 2015). Shortly after Love settled the suits with Simorangkir, her former lawyer Rhonda Holmes sued her for defamation as well after Love tweeted Holmes “was bought off” (Grebey, 2015, para. 2). When reporting the controversy between Love and Holmes, a writer can include the past incidences with Simorangkir to note her history with defamation and let the reader decide if Love should be seen as a reliable source. Not providing background of the controversy or the credibility of the accusers is not a requirement of the neutral reportage privilege, but it does offer more evidence for the intentions of the defendant and provides more information for the reader.

Similar to a suggestion by media law scholar Randall Bezanson (1985), writers can also prove their neutrality by including denials of the comments from the accused. This will give the defamed the opportunity to prevent further harm to their reputation and evidence of a full and accurate story that the defendant can turn to if the plaintiff ends up suing. The journalist can also back up their claim of neutrality by commenting on the absence of proof of the allegations. This method of reporting is critical when the defamer is trying to peddle a conspiracy about a well-known tragedy to advance a political agenda. After the mass shooting at Sandy Hook Elementary School in 2012, far-right conspiracy theorist Alex Jones repeatedly claimed that the massacre was a hoax (Williamson, 2019). For years, Jones publicized lies about the shooting, saying it was staged by crisis actors who wanted to diminish the Second Amendment. Jones’ conduct has become newsworthy over the past several years, mostly for its extremism, so it is of public interest for journalists to report his latest behavior, but these stories need to include that there is no proof of legitimacy to his accusations. It would be negligent to

write about Jones' beliefs without also noting their inaccuracy, or at least making reference to Jones' past history of fabrication. There are situations where comments are so transparently false, like stating that someone comes from another planet, that a reporter should not be required to alert their audience about their falsity. It is likely that under these circumstances, the plaintiff would not be able to establish a prima facie case because if nobody believes the undoubtedly false claims, then the plaintiff's reputation would not be damaged. If an accusation is going to harm a person's reputation and the reporter cannot verify it, then they should include something in their article to alert their audience.

Adhering to each of these suggestions is not necessary for a journalist to be protected by the neutral reportage privilege, yet it needs to be clear that the writer has taken steps to let their audience know the public figure's statements have not been verified. Because every defamation case is unique and contextual, a bright line test is not feasible. The closest the courts can get to a test like this is to ask if the defendant made it apparent to their audience that the assertions they are publishing should not necessarily be read as truth. If it is evident that they were reporting the comments because they were newsworthy and not because they were trying to spread a false narrative, it is not justifiable to make the journalist liable for defamation. Even if the writer has doubts about the allegations, that should not matter as long as the statements are not presented as fact.

B. Newsworthiness

Courts have made newsworthiness or matters of public concern a substantial part of their rationale when deciding neutral reportage privilege cases. The drawback with this

is that there is no consensus about what those terms mean. Even though it is perceived that a newsworthiness standard “involves essentially the same inquiry as a public concern test,” (Papandrea, 2007, p. 580) there is not a customary assessment that every court follows. The task of defining what a matter of public concern is has eluded the Supreme Court for decades. Despite attempting to create a framework for this problem (*Philadelphia Newspapers v. Hepps*, 1986; *Dun & Bradstreet v. Greenmoss*, 1985; *Snyder v. Phelps*, 2011), the Court has not been able to come up with a test that can apply to distinctive cases across various contexts. In *Dun & Bradstreet v. Greenmoss* (1985), the Court said it depends on “whether the [expression]’s ‘content, form, and context’ indicate that it concerns a public matter” (p. 762). The Court decided in *Philadelphia Newspapers v. Hepps* (1986) that public interest was a necessary part of defamation suits and that speech involving “the legitimacy of the political process” (p. 778) should be classified as matters of public concern, but they do not provide any guidance after that. As De Vonna Joy (1987) suggests, the Court’s opinions imply that lower courts should approach the matter of public concern the same way Justice Potter Stewart dealt with obscenity: they should know it when they see it (*Jacobellis v. Ohio*, 1964).

Chief Justice John Roberts tried to construct a test for what qualifies as a matter of public concern in the 2011 case *Snyder v. Phelps*. Justice Roberts test dealt with two categories: community concern and news interest. He reasoned that “speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’ The arguably ‘inappropriate or controversial character of a statement is irrelevant to the

question whether it deals with a matter of public concern” (p. 1216). Justice Roberts tries to solve the puzzle of defining a public concern in a few succinct sentences but leaves many questions unanswered. Questions like what is the difference between “concern to the community” and “of legitimate news interest?” When referencing the phrase “any matter of political, social, or other concern,” what type of speech does “other” include. And, when using the word “value,” he is saying that there are forms of speech that are not of value to the public but does not explain what they are or even offer examples to offer some clues. Nevertheless, some lower courts still use this test as a guideline when deciding cases that pertain to public concerns. Using a test that is not clear or detailed leads to confusion and differential treatment of cases.

Developing an adequate public concern test is important for neutral reportage situations because it is a question that needs to be asked when determining if the court should apply the privilege. Many courts rely on the *Gertz* precedent, looking at whether the plaintiff is a public or private person, and using that as a proxy for newsworthiness. The public or private status of an individual should not be the sole determinant of newsworthiness, however. There are two examples from this study in which the court allowed the privilege even though a private citizen was involved. In *April v. Reflector-Herald, Inc.* (1988), Mary April was fired from the sheriff’s office and she sued her former employer for age discrimination. The sheriff settled with April, but when he was asked by a reporter why she was fired, he said it was because she was stealing. In *House of Wheat v. Wright* (1985), the county coroner, an elected public official, made serious accusations against the plaintiffs who ran a funeral home and went to government agencies to revoke their license and have a criminal investigation opened against them.

Both of the defamatory remarks made in these cases were about private citizens, but they were of public interest as well. It is newsworthy if a public figure is defaming another individual, even if they are a private person. The knowledge of these events is more important than safeguarding a private figure's reputation. These figures have considerable influence and power over a community, and it is a necessity for the public to be aware of it.

The courts should look at whether the circumstances of the case are newsworthy before rejecting the neutral reportage privilege due to the private status of the plaintiff. For this to happen, some baseline criteria of what represents a public concern need to be set. Clay Calvert (2012) says, "perhaps, when it comes to the question of whether speech constitutes a matter of public concern, the line between public and private is deliberately left ambiguous in order to provide courts with flexibility and legal leeway to make difficult judgements based on the unique facts of each case" (p. 69). Calvert goes on to say that while this may be true, the courts need to at least follow similar guidelines, so they are not "liable to breed inconsistency" in cases regarding public concern. Coming up with benchmarks for what is newsworthy for public and private individuals will start to answer what Justice Roberts meant by "other concern[s] to the community" (2011, p. 1216). It is reasonable that the lives of public figures are more newsworthy than the lives of private individuals; however, the status of someone should not ultimately determine if their actions are newsworthy or not.

For public officials and figures, their day-to-day lives are newsworthy. The public is interested in the lives and engagements of government officials because they were put in office by the majority and are making decisions about everyone's livelihood. Reports

about how they act, whether it is on the Senate floor or talking to constituents on the street, enhance the public's knowledge and their ability to make the right political choices. With public figures, their actions can influence and inform the rest of society. The statements and ventures made by someone like Jeff Bezos could affect the stock market, thousands of jobs at Amazon, or the stability and reporting of the *Washington Post*, one of America's leading newspapers. Because of the authority and sway these individuals have, everything about their lives, besides what is included in privacy torts and the lives of their friends and families, should be fair game. This is not the case for private citizens. A significant amount of a private citizen's life is not of public concern unless they become involved in something similar to the two case examples above. This means that for a defendant to invoke the neutral reportage privilege, they need to demonstrate that the making of the accusations was of public interest and that the public or private status of the accuser and the accused are relevant considerations but not the sole determinants of newsworthiness.

C. Whom the Privilege Protects

Many of the courts that have rejected the neutral reportage privilege have done so because they said *Sullivan* and its progeny provided sufficient protection for journalists. In *Janklow v. Viking Press* (1985), for example, William Janklow, then-governor of South Dakota and the former attorney general, sued Peter Matthiessen and the Viking Penguin publishing company for releasing a story that contained "false and unprivileged statements" (p. 876) about Janklow. In the South Dakota Supreme Court's decision, they observed that *Sullivan* already provides "generous protection" (p. 881) to media defendants and declined to adopt the privilege for that reason. While *Sullivan* is of the

utmost importance for journalists, it only provides protection when the plaintiff cannot prove actual malice. The purpose of the neutral reportage privilege is to protect journalists when they disseminate newsworthy comments that they know, or strongly suspect, are defamatory. Expanding the shield of *Sullivan* by recognizing the neutral reportage privilege would offer more freedom to the press, yet there is a need to delineate who this safeguard should cover.

As technology advances and the ways to consume media changes, the definition of journalist is consistently evolving. The “traditional” journalists are usually defined as ones who received a formal education in the field and are backed by elite newspapers (Gant, 2007). The non-traditional journalists, who do not have proper training or credentials, are not always recognized as media defendants under the law (Gant, 2007). This matters when trying to claim a privilege like the reporter’s privilege, which protects journalists from being compelled by courts to disclose information about their confidential sources or information (Koningisor, 2018). These protections – recognized by some courts as components of the First Amendment and protected in other jurisdictions via state statutes (“shield laws”) or common law rules – often exclude bloggers and citizen journalists who do not publish in mainstream outlets. During the Dakota Access Pipeline protests of 2016 and 2017, activists Shiyé Bidzíl and Myron Dewey started the Facebook page ‘Digital Smoke Signals’ to document the protests by using their drones (Al Jazeera, 2016). Bidzíl and Dewey’s page was the primary source for breaking news on the conflict and captured the actions of the police including footage of them using tear gas, water cannons in freezing weather, and rubber bullets on protestors. Even though their reporting was accurate and of public interest, they were not

traditional journalists and, therefore, would not be covered by the same privileges in many states.

The field of journalism will not be able to evolve if privileges for journalists do not apply to people like Bidzíl and Dewey. This is not to say that everyone should be categorized as a journalist, but parameters need to be set that include more types of publishers who contribute to public knowledge and interest. Ugland and Henderson (2007) believe the basic categories of journalist and non-journalist are impractical, and a tiered approach with multiple definitions is called for. They reasoned, “it is perilous to orient the debate around a simple journalist/nonjournalist dichotomy where there are potentially as many definitions of journalist as there are consumers of journalism” (p. 256). While it is necessary for some areas of the law to define what makes someone a journalist, the neutral reportage privilege seeks to protect the dissemination of newsworthy information regardless of the identity of the person sharing. Past experience or professionalism may be useful to determine the status of a journalist in other situations, but these conceptions are not helpful under neutral reportage circumstances because the privilege is more broadly applied. Everyone should be able to claim neutral reportage as long as they adhere to the proper criteria. Traditional journalists will benefit from the protection of the neutral reportage privilege as well, yet they are not the sole beneficiaries. The courts need to base the protection on the defendant’s desire to faithfully and truthfully inform regardless of their status as a journalist.

The way information is shared will continue to evolve with every change in communication technology. The laws that protect free speech and a free press must adapt as well and must protect individuals who disseminate newsworthy information, even

when using newer media and platforms. These laws need to focus on whether the press is fair and accurate rather than on a reporter's education or place of employment. The public wants and needs people who have their welfare in mind when reporting the news; where they do it, in a newspaper or on a social media platform, should not be a factor for applying the neutral reportage privilege.

D. Social Media Headlines and Posts

During the early days of social media, the platforms were not taken seriously as the place to post breaking news or hard-hitting journalism. These ideas have changed over the last several years, mainly since Donald Trump started using Twitter as president. He was not the first president to use social media, as former President Barack Obama was dubbed the "social media president" (Baldwin-Philippi, 2014), but Trump uses Twitter to make official proclamations, to insult his adversaries, and to distribute his thoughts on policies and tragedies. There is a preconceived notion that content posted on Twitter and other forms of social media are not as likely to be subjects of defamation lawsuits because they are seen as flippant or hyperbole (Silver, 2017). Attorney William Charron (2012) argued the medium "provides a context to more readily perceive and excuse seemingly defamatory statements as emotional, unguarded, and imprecise 'opinions'" (p. 60) and proposes that Twitter should be fully exempted under existing defamation law. Although many tweets are meant to be exaggerated, every user should not be immune from liability. Is the public not supposed to take the President at his word if Twitter is the form of communication he chooses? Is he supposed to be let off the hook if he spreads false information just because he disseminated the news on a social media platform instead of through a White House aide or at a press conference?

Trump is not the only one using social media applications to communicate with the public. Journalists are turning to these platforms to share their latest story, to update their followers about ongoing investigations, and to comment on current events. People now use websites like Twitter for their daily news. For these reasons, social media users should be held accountable as if they were informing the public through television or a newspaper. They should have the same protections as those communicating through traditional media, but also take some ethical steps when disseminating information to the masses, especially when they plan to claim the neutral reportage privilege.

i. Headlines.

A consequence of sharing articles on social media is that users are only able to see the headline of the story unless they click the link to read the whole piece. With many people only reading the headline and not clicking through, falsehoods can spread if the headline is out of context or misleading. An example of this is a *Politico* article about the 2018 Florida senatorial election. On November 11, 2018, the *Politico* Twitter account tweeted an article with the headline “Scott: Nelson is ‘trying to commit fraud to win’ Florida’s Senate race” (Griffiths, 2018). Then-Florida Governor Rick Scott accused then-Florida Senator Bill Nelson of election fraud even though there was no proof of this. Despite the article mentioning that Scott made these claims without evidence, this does not matter if the majority of people are taking the headline at face value and not reading the full story. Journalists can write a story neutrally and in effect downplay the defamatory statements, but this does not help if the headline is solely the defamatory remark with no warning of its falsity. With clickbait and simple sharing functions, headlines involving libelous comments need an indicator that informs the reader the

accusations are doubtful. This is particularly important when the headlines appear on a newsfeed meant for scrolling and short attention spans. Examples of indicators could be to note the relationship between the accuser and the accused or refer to the credibility of the accuser.

ii. Social media posts.

With rampant disinformation appearing on social media daily, it is not feasible to expect the platforms themselves to control all of it. Some of the onus to limit the falsehoods that are shared should be placed on the people posting. One of the ways this can be done is by the platforms offering a method for users to mark their posts to alert their followers of content that contains defamatory statements. This type of warning would act as a noticeable red flag for readers when they are scrolling through their feeds. The readers would understand that what they are looking at should not be taken as complete truth. Similar to the social media headlines, it would not be a legal requirement, but it would offer the person posting a defense when they are arguing their intent for republishing libelous remarks. By marking their content, it would show that the defendant's motive was to inform the public of a newsworthy event while also making sure their viewers know of its falsity. Another option that would help temper the virality of misleading news would be for an outside organization to fact-check the tweets and other posts of prominent social media participants who are verified and have a considerable influence. This would include public officials, celebrities, and political pundits with a large following. Similar to websites like Snopes, it would verify information and be a warning to the public of who they can and cannot trust. An organization like this could also corroborate popular tweets and Facebook posts that are

circulating on the web any given week and combat dangerous disinformation that perpetuates a divisive society.

These suggestions of what the courts, journalists, and social media websites should do regarding inaccurate news and the neutral reportage privilege are not foolproof, but they are a start. They will give protection to the ones who deserve it while also placing barriers in front of those who seek to mislead the public. If applied correctly and effectively, the neutral reportage privilege will expand the right to free speech and press while still giving legitimately aggrieved plaintiffs a pathway for restitution.

VII. Conclusion

In *Krauss v. Champaign News Gazette, Inc.* (1978), the Illinois Fourth District Appellate Court asserted that "a robust and unintimidated press is a necessary ingredient of self-government. Since the ultimate sovereign in this country is an informed citizenry, we must have information available of and about public issues and public figures upon which to make judgments as to public officials and public programs" (p. 746-747). The neutral reportage privilege defends the press and promotes an informed citizenry, but based on the case analysis, the courts are inconsistent with their views about the privilege and leave journalists unsure of the law and if they will be protected when repeating defamatory yet newsworthy statements.

If the United States wants to ensure the free flow of information, the neutral reportage privilege needs to be made a universal principle of libel law. While continuing to ensure that reputations of the innocent are not harmed and that disinformation is not promoted, the privilege is still able to give security to journalists who are reporting a complete and fair story to showcase the truth and expose a person's character. The integrity of the most influential and powerful figures is of public interest, and there need to be consequences for these individuals when they spread false rumors. The suggestions proposed in this thesis seek to strike the right balance regarding what should and should not be shielded by the privilege. If it is clear the writer published an accurate story with good motives, the newsworthiness of the information should outweigh the subject's reputation. It is vital that the U.S. has a strong and free press, and the neutral reportage privilege will only help that goal.

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APPENDIX

Cases Analyzed for the Study

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