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**Title**

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**Permalink**

<https://escholarship.org/uc/item/0d65t53k>

**Journal**

UCLA Entertainment Law Review, 17(1)

**ISSN**

1073-2896

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**Publication Date**

2010

**DOI**

10.5070/LR8171027133

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# When the Slander is the Story: The Neutral Reportage Privilege in Theory and Practice

Dan Laidman\*

## I. INTRODUCTION

It is an angry time in American politics. Members of Congress have disputed the President's citizenship and accused him of promoting "Nazi" policies,<sup>1</sup> an ex-President has called a Congressman racist,<sup>2</sup> and a member of the House of Representatives publicly questioned the sanity of a constituent who compared the President to Adolph Hitler.<sup>3</sup> Traditional media outlets have chronicled the comments and then countless websites have republished them, leading some to find a causal connection between the explosions in new media and political rhetoric.<sup>4</sup> On the local level, municipal politics continue to generate fierce disputes which often lead to allegations of slander involving public officials.<sup>5</sup> Only now, with the collapse of the

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\* J.D., UCLA School of Law, 2010. Many thanks to Professor Gia Lee at UCLA Law School and to Joseph Doherty, director of the school's Empirical Research Group.

<sup>1</sup> See Andie Collier, *G.O.P. 'Crank' Dominating Debate*, POLITICO, Sept. 10, 2009, <http://www.politico.com/news/stories/0909/27015.html>.

<sup>2</sup> See Jeff Zeleny & Jim Rutenberg, *White House is Sitting Out Race Debate*, N.Y. TIMES, Sept. 17, 2009, at A1.

<sup>3</sup> See *Woman's Nazi Gibe at Frank Draws Jab*, BOSTON GLOBE, Aug. 20, 2009, at A10. For a piece offering an analytical overview of the current political climate, see generally Sam Tanenhaus, *Making Sense of the New Political Anger*, N.Y. TIMES, Jan. 23, 2010, at WK1.

<sup>4</sup> See, e.g., Rekha Basu, Editorial, "Don't Cave in to Bullies, Obama," DES MOINES REG., Sept. 30, 2009, at 15 ("The Internet and 24-hour news cycles have created a public culture of politics that didn't exist before ... [where] [t]hings that might never have been said aloud now are repeated with impunity.")

<sup>5</sup> For a sampling of some recent local controversies, see, for example, *Local Judge Dismisses Part of Citizen's Suit Against Mayor*, ANNISTON STAR (Ga.), Dec. 9, 2009; Elizabeth Campbell, *City Manager: Mayor Abuses Power*, FT. WORTH STAR-TELEGRAM, Dec. 1, 2009, at B10; Mike Sprague, *La Habra Heights Mayor Sues Former Candidate for Slander*, WHITTIER DAILY NEWS (Cal.), Nov. 9, 2009; Martin DeAngelis, *Longport Won't Seek Repayment of Fees in Slander Case*, PRESS OF ATLANTIC CITY, Aug. 6, 2009, at C5; Mark Harrison, *Attorney Calls*

newspaper industry, these controversies are being covered by fewer professional reporters at traditional news outlets, and more upstart bloggers and activists.<sup>6</sup>

The evolution of the media landscape and the sharpening of political attacks are bound to put new pressure on the legal regime, especially laws concerning the republication of defamatory statements. Unfortunately, this area of law is a hodge-podge of conflicting rules that provides little guidance for speakers, publishers, litigants or courts.

One striking inconsistency is the fact that, thanks to Section 230 of the Communications Decency Act,<sup>7</sup> websites enjoy far greater protection against liability for republishing defamatory content than traditional media outlets. Courts have interpreted Section 230 to preclude liability for third-party content that Internet publishers passively re-post, whereas newspapers, magazines, radio and television stations would likely be vulnerable to damages for the same conduct.<sup>8</sup> While Section 230's immunity is extremely strong, at least one court has found that it can be breached if a website becomes too involved in shaping the third-party content.<sup>9</sup> The result is that web publishers are encouraged to pass along possibly defamatory content verbatim with a minimum of editorial intervention in order to remain immune, while all media outlets are potentially liable for publishing such statements in news reports that provide context and analysis. It is problematic because sometimes it is important for readers to know that possibly defamatory statements have been made, particularly in disputes involving public officials. In such cases, merely repeating the statement might reinforce the defamatory factual allegations, whereas explaining the newsworthiness to the reader would involve

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*for Councilman to Stop Slander*, TIMES-JOURNAL (Ft. Payne, Ala.), July 17, 2009; Kevin Litten, *Heated Exchanges: Former Deputy Fire Chief Threatens Lawsuit*, REPUBLICAN-AMERICAN (Waterbury, Conn.), June 11, 2009, at B2.

<sup>6</sup> See generally Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Oct. 19, 2009, available at [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php).

<sup>7</sup> 47 U.S.C. §230 (2000).

<sup>8</sup> See Matt C. Sanchez, Note, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301, 302 (2008) ("CDA 230 has elicited concern from courts and commentators who argue that immunizing online reproduction while punishing identical offline reproduction makes little sense."); Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 81-82 (2008).

<sup>9</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165-66 (9th Cir. 2008) (holding that a website could be sued under discrimination laws based on content that it solicited from users).

investigating the statement and explaining its context – the sort of intervention which would likely strip an Internet publisher of Section 230 immunity.

A legal doctrine exists to account for such situations, but its protections remain elusive for most publishers. The neutral reportage privilege developed in the 1970s to shield unbiased reports of newsworthy defamatory statements. For a while it seemed poised to expand and perhaps even to become embedded in First Amendment jurisprudence,<sup>10</sup> but the Supreme Court has never directly addressed neutral reportage.<sup>11</sup> Rather, it has been left to the individual states and federal districts, which have come to a variety of conclusions. Different versions of neutral reportage have been adopted, some courts have rejected the doctrine entirely, and the majority of jurisdictions have not considered it at all.<sup>12</sup> Given the uncertain legal landscape, one authority concluded that “[o]ne can only conjecture about whether the neutral reportage privilege retains much vitality.”<sup>13</sup>

Indeed, the most recent significant neutral reportage case dealt the doctrine a major setback. Confronted with a paradigmatic neutral reportage scenario, in which a newspaper reported on an elected council member making defamatory comments about fellow politicians, the Pennsylvania Supreme Court held in *Norton v. Glenn* that the paper could be held liable under traditional republication principles.<sup>14</sup> It did not matter that the article did not present the statements as true, but rather stressed how they reflected on the speaker (whom local voters ejected from office at election time, while retaining the defamed targets).<sup>15</sup> The ruling – and the U.S. Supreme Court’s

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<sup>10</sup> The Supreme Court suggested it might have been willing to adopt the neutral reportage privilege in a 1989 case had the petitioner not failed to raise the issue, a decision one justice called “unwise.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 660 n.1, 694-695 (1989) (Blackmun, J., concurring) (“Were this Court to adopt the neutral reportage theory, the facts of this case arguably might fit within it.”). Justice Brennan also favorably cited the cornerstone neutral reportage case in his dissent in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 36 (1990) (Brennan, J., dissenting).

<sup>11</sup> A petition from last year’s term asked the high court to “resolve the conflict in the lower courts on the neutral reportage doctrine.” Reply Brief for Petitioners at 13, *Clark v. Jenkins*, 130 S. Ct. 52 (2009) (No. 08-1122). See also Petition for a Writ of Certiorari at 31-35, *Clark v. Jenkins*, 130 S. Ct. 52 (2009) (No. 08-1122) (“That confusion has left speakers and audiences not only subject to a patchwork of constitutional rules across different jurisdictions, but also at risk.”). However, the Supreme Court denied certiorari in *Clark v. Jenkins*. 130 S. Ct. 52 (2009).

<sup>12</sup> See *infra*, Section I.

<sup>13</sup> T. BARTON CARTER, MARC A. FRANKLIN & JAY B. WRIGHT, *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 173 (7th ed. 1997).

<sup>14</sup> *Norton v. Glenn*, 860 A.2d 48, 57 (Pa. 2004).

<sup>15</sup> Jane Kirtley, *Merely the Messenger*, AM. JOURNALISM REV., April-May 2005, at 74,

decision not to review it – roiled newsrooms across the country because it undercut a fundamental, intuitive legal principle held by most every reporter and editor: you can't be held liable for telling the truth about a politician.<sup>16</sup>

Based on a review of the existing case law and academic literature, as well as a survey of dozens of journalists, this Comment argues that it is time to resurrect the neutral reportage privilege. Wider recognition of the doctrine is necessary to protect robust political discourse and the self-governance values embodied in the First Amendment, while accounting for the heightened concerns about reputational damage in the present era of nasty politics and anarchic new media. In addition to reviewing neutral reportage jurisprudence and commentary, I conducted a survey of those who are currently most likely to invoke the privilege – daily newspaper reporters covering government beats. This group may not be the most frequent invoker of neutral reportage in the years to come as newspaper staffs shrink and websites and bloggers undertake original reporting. However, I believe that documenting this group's experience now is important because the law will do a better job of responding to the burgeoning network of nontraditional news-gatherers if the legal doctrine reflects the ethical best practices that have emerged from decades of professional experience.

The survey results suggest that neutral reportage scenarios might be much more common than critics have suggested, creating the potential for more unjust and constitutionally suspect outcomes like that in *Norton*. Moreover, the results, as well as the accompanying interviews about how the journalists have responded to the situations, are also instructive in considering how neutral reportage fits into the larger picture of American libel jurisprudence. While some skeptical courts and commentators believe the privilege to be at odds with current defamation law, the findings suggest that the privilege can be complementary because it involves the same delicate balancing of free

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available at <http://www.ajr.org/Article.asp?id=3870>.

<sup>16</sup> For a sampling of the national journalistic reaction to *Norton v. Glenn* and the Supreme Court's denial of certiorari, see, for example, Editorial, *A Chilling Effect on the Press*, LAS VEGAS REV.-J., Apr. 1, 2005, at B14; Michael R. Fancher, Editorial, *Court's Action Stifles Vigorous Reporting*, SEATTLE TIMES, Apr. 17, 2005, at A2; Editorial, *A Chilling Decision*, REG.-GUARD (Eugene, Or.), Apr. 4, 2005, at A8; Editorial, *A Chill in the Air*, INTELLIGENCER J. (Lancaster, Pa.), Apr. 1, 2005, at A8; Charles Winkler, Editorial, *Up and Down With the Supreme Court*, EUREKA TIMES-STANDARD (Cal.), Apr. 12, 2005; Editorial, *Writing as We See It*, AUSTIN AM-STATSMAN, Apr. 11, 2005, at A8; Editorial, *"Liars," Libel, and Liability*, L.A. TIMES, Apr. 5, 2005, at B10; Editorial, *Print no Evil?*, PRESS-ENTERPRISE (Riverside, Cal.), Apr. 5, 2005, at B8; Editorial, *Freedom of the Press: Well, sort of...*, PITT. TRIB. REV., Apr. 1, 2005.

speech and the protection of reputation.

This Comment does not present a comprehensive examination of every form of the neutral reportage privilege, nor does it say precisely how far courts should extend the doctrine's protections. Rather, it responds to criticism that the doctrine should not exist in any form whatsoever by focusing on what I term the "core model" of the privilege: a shield against liability for the reporting of newsworthy statements involving public officials regardless of the statements' veracity when the reporting is substantially accurate and presented in such a way that it does not join in the defamatory attack.

The survey is focused on situations in which the core model might apply, and the Comment ultimately argues for widespread adoption of at least this form of the doctrine as a necessary corollary to existing libel jurisprudence. A consistently recognized core model would protect journalists in old and new media, as well as political activists and ordinary citizens who inform the public about the statements of public officials in a responsible way.

Part I of this Comment traces the historical development of the doctrine, showing how it emerged from a gap in common law defamation standards. Part II describes the survey, which drew responses from 50 reporters covering government beats at daily newspapers across the country. They described their experiences with situations in which neutral reportage doctrine might apply. The section includes some data about the frequency of neutral reportage scenarios and how the journalists responded, as well as explanatory comments from the participants drawn from follow-up interviews. Part III argues for widespread adoption of a basic model of the privilege based on the survey results, which suggest that neutral reportage scenarios are much more common than some have suggested, and that the privilege would not undo the balancing of interests embedded in the current law. The Comment concludes that, rather than being a radical departure from existing libel jurisprudence, the core model of the neutral reportage privilege is a constitutionally mandated companion that supports the same self-governance theory of the First Amendment by protecting vital reporting about public controversies and officials' fitness for office.

## II. THE DEVELOPMENT OF NEUTRAL REPORTAGE DOCTRINE

The heart of American libel doctrine is the "actual malice" standard

developed by the Supreme Court in *New York Times v. Sullivan*.<sup>17</sup> In *Sullivan* and its successor cases, the Court upturned the common law and found in the First Amendment a formidable barrier to chilling press freedom through defamation lawsuits. To bring a winning claim, a public figure plaintiff must show that a statement was made with actual malice, which means that the defendant “entertained serious doubts as to the truth of his publication.”<sup>18</sup> In practice, it means that negligent factual errors about politicians will not trigger liability; defendants must spread falsehoods intentionally or with a high level of recklessness. The idea was to prevent subjects of news coverage from seizing upon mere mistakes to win massive damage awards that would discourage future critical reporting. The actual malice standard was aimed at eradicating any state action that sought to insulate political leaders from dissent. *Sullivan*, wrote Anthony Lewis, was a “transforming” opinion that “made clearer than ever that ours is an open society, whose citizens may say what they wish about those who temporarily govern them.”<sup>19</sup>

But a legal rule that turns on knowledge of falsehood raises a fundamental question that remains unresolved nearly half a century after *Sullivan* was decided: what happens when knowingly reporting a false statement best serves the very policy behind the doctrine? Or, to re-phrase Lewis, under a strict actual malice regime, citizens may not always be informed of what those who temporarily govern them say, even when such statements illuminate matters of public concern or provide important information about the speakers’ fitness to hold positions of official responsibility.

A long-standing common law doctrine only partially addresses this quandary. The “fair report” privilege, recognized overwhelmingly by the states, shields a publisher from liability for reporting on defamatory matter “in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern . . . if the report is accurate and complete or a fair abridgement of the occurrence reported.”<sup>20</sup> The rationale behind the privilege is the public’s strong interest in being informed about how government operates. Courts have justified fair report doctrine by noting that citizens have a right of

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<sup>17</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>18</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>19</sup> ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 7-8 (1991)

<sup>20</sup> RESTATEMENT (SECOND) OF TORTS § 611 (1977). For an overview of state case law endorsing the fair report privilege, see 50 AM. JUR. 2d *Libel and Slander* § 298 (2008).

access to public records, public meetings and court proceedings.<sup>21</sup>

Pennsylvania recognizes the fair report privilege,<sup>22</sup> meaning that the newspaper in *Norton* was free to report the portion of the council member's rant that occurred during the meeting. However, when the paper published comments made outside of the council chambers, it faced liability.<sup>23</sup> But if the paper had only reported on the official's antics from the meeting and omitted his comments outside the chamber, readers would have gotten an incomplete picture of what happened by missing the most outrageous portions of the rant.<sup>24</sup> The fair report privilege, while vital to promoting the public's knowledge of government actions, is incomplete in that important information about public issues and officials' fitness for office is just as likely to come from statements made in interviews, press conferences, campaign events or myriad other settings as it is in a public meeting or official report.

Neutral reportage doctrine emerged to fill the gap in the late 1970s. Part A of this section traces the history of the privilege, starting with the common law republication doctrine, which imposed liability for repeating others' defamatory statements regardless of the context. The section describes the landmark Second Circuit case that created the privilege to shield publishers who report on newsworthy defamatory statements, and explores subsequent cases that adopted different versions of the doctrine. Part B looks at the cases that have rejected the privilege. It analyzes the various criticisms, which tend to find neutral reportage doctrine inconsistent with the Supreme Court's libel jurisprudence, or ripe for abuse by irresponsible publishers.

#### A. Historical Foundations of the Neutral Reportage Privilege

Early in American legal history, publishers did not face liability for reprinting defamatory statements as long as they "merely repeated the words of another, . . . gave the source of the statement and reasonably

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<sup>21</sup> See, e.g., *Darakjian v. Hanna*, 840 A.2d 959, 963 (N.J. Super. Ct. App. Div. 2004) ("The underlying rationale is that the publisher is merely conveying to the public statements that members of the public would have heard had they been present in the public proceeding."). See also David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203, 1223 (2004) (arguing the fair report privilege is based on "the underlying importance of the public's knowing about these kinds of public issues, not because of any confidence that the reported accusations are true or made by a responsible person").

<sup>22</sup> See *Pellegrino Food Products Co., Inc. v. The Valley Voice*, 875 A.2d 1161, 1164 (Pa. Super. Ct. 2005).

<sup>23</sup> *Norton*, 860 A.2d at 50.

<sup>24</sup> *Id.*



believed that the charge was true.”<sup>25</sup> However, the common law came to treat repetition of libel or slander as an offense equal to the initial statement in response to concerns that republication worked its own evils by adding credibility and increasing dissemination.<sup>26</sup> “Tale bearers are as bad as tale makers” became the animating cliché of the common law republication doctrine.<sup>27</sup> The modern version of the doctrine, as encapsulated in the Restatement (Second) of Torts, states that “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”<sup>28</sup> The republication doctrine is a blunt instrument that does not distinguish between repeating a libel to amplify it and repeating a libel to expose or question it. Comparing two mid-century cases from Illinois shows how courts strictly applied the law without considering the particular context of the republication and what that meant for the rationale behind the doctrine.

The 1941 case *Cobbs v. Chicago Defender, Inc.*<sup>29</sup> involved an article in the *Chicago Defender*, one of the most influential black newspapers in the country, about a controversy involving Rev. Clarence H. Cobbs, a prominent African-American pastor and radio personality who helped pioneer Christian broadcasting and popularize gospel music.<sup>30</sup> The article reported that rumors of misconduct by Cobbs had prompted a possible investigation by the state’s attorney’s office, as well as probes by the Chicago Crime Commission and a Neighborhood Protective Association. An Illinois appellate court allowed the libel suit to proceed, holding that “[p]ublication of libelous matter, although purporting to be spoken by a third person, does not protect the publisher, who is liable for what he publishes.”<sup>31</sup>

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<sup>25</sup> David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 264 n.392 (1976) (citing cases from 1803, 1834 and 1877).

<sup>26</sup> See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 7.1 (2008).

<sup>27</sup> See, e.g., *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1122-23 (N.D. Cal. 1984); *Houston Chronicle Publ’g Co. v. Wegner*, 182 S.W. 45, 48 (Tex. App. 1915); *Ray Worthy Campbell, Note, The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983).

<sup>28</sup> RESTATEMENT (SECOND) OF TORTS § 578 (1977).

<sup>29</sup> *Cobbs v. Chicago Defender, Inc.*, 31 N.E.2d 323 (Ill. App. Ct. 1941).

<sup>30</sup> *Id.* at 324. For background on Rev. Cobbs, see City of Chicago, *Chicago Landmarks: First Church of Deliverance*, <http://egov.cityofchicago.org/Landmarks/F/FirstChurch.html> (last visited Apr. 12, 2010). For a history of the *Chicago Defender*, see PBS Online, *The Black Press: Soldiers Without Swords*, [http://www.pbs.org/blackpress/news\\_bios/defender.html](http://www.pbs.org/blackpress/news_bios/defender.html) (last visited Feb. 12, 2010).

<sup>31</sup> *Cobbs*, 31 N.E.2d at 325.

*Cobbs* was cited two decades later by another Illinois appellate court in *Lorillard v. Field Enterprises, Inc.*,<sup>32</sup> in which tobacco company heir and jazz festival founder Louis L. Lorillard sued the *Chicago Sun-Times* over a 1962 article about his divorce. Society columnist Cleveland Amory chronicled Lorillard's efforts to obtain a "quickie" separation from his wife, who charged him with being a bigamist and leaving her and their children to live in squalor.<sup>33</sup> Lorillard's ex-wife appeared to be the sole source for an article lacking any response from him. In a nod to changing social mores, the court dismissed Lorillard's libel claims based on the characterization "quickie divorce," but it allowed the case to proceed regarding the charges of being a "bigamist" who shirked his spousal support duties.<sup>34</sup> The court held that the *Sun-Times* could be liable even though it was reporting on the slanderous charges made by Lorillard's wife, declaring that "[i]t is not a defense to an action of libel to show that it is merely a repetition of what some other person may have said."<sup>35</sup>

A mechanical application of the republication doctrine decided both cases but it ignored the interests at stake. In *Lorillard*, the newspaper apparently provided a one-sided forum for Mrs. Lorillard to air her grievances without efforts at verification or any indication that the facts could be in doubt.<sup>36</sup> In contrast, the *Chicago Defender* piece about Rev. Cobbs exhibited skepticism about the charges. The piece was headlined "Rev. Cobb [sic] Denies Scandal; Defends Self Against Rumors in Broadcast," and it reflected efforts to include the pastor's response and to verify the allegations through public records.<sup>37</sup> The piece raised questions about the conduct of public officials for their involvement in spreading the rumors about Cobbs, and in reporting on the pastor's own broadcasts on the topic it provided relevant information about an issue of public controversy.<sup>38</sup>

In *Lorillard*, repetition of the defamation did not re-shuffle the balancing of interests triggered by the initial slander. The news in the column was the substance of the allegations made by Lorillard's ex-

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<sup>32</sup> *Lorillard v. Field Enters., Inc.*, 213 N.E.2d 1 (Ill. App. Ct. 1965).

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 4-6.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Lorillard*, 213 N.E.2d at 5 (noting that the "entire article is disparaging" to Lorillard).

<sup>37</sup> *Cobbs*, 31 N.E.2d at 324.

<sup>38</sup> *Id.* A version of the article at issue – perhaps from a different edition of the newspaper – in the historical *Chicago Defender* database puts the scandalous allegations in skeptical context from the very beginning, including two paragraphs about Cobbs' own response from his publicly broadcast radio show atop the story. *State's Attorney Probes Scandal on Rev. Cobb*, *CHICAGO DEFENDER*, Nov. 25, 1939, at A1.

wife, and the purpose of the column was to amplify the charges. There was no meta-purpose of reporting on the fact that the charges had been made, and no questioning of the source. Insofar as there was a public interest in reporting the charges themselves, the press' interest seems adequately protected by the actual malice standard.<sup>39</sup> However, the repetition of the purported defamation in *Cobbs* significantly re-aligned the interests. The fact that the damaging allegations were being spread by influential people in Chicago was itself newsworthy. Moreover, Cobbs' own broadcasts about the rumors had made them a topic of public controversy. The *Chicago Defender*'s article reflected this by putting the charges in perspective, making efforts at verification and prominently presenting Cobbs' viewpoint. However, under an actual malice regime the newspaper could still be held liable because its reporters likely had serious doubts as to the truthfulness of the charges. The republication doctrine was inadequate for a case such as *Cobbs*, where the making of the defamatory statements was the news worth reporting.

A court finally confronted this dilemma in 1977. *Edwards v. National Audubon Society, Inc.* arose from a 1972 *New York Times* story about the vociferous public debate over the pesticide DDT and its effects on wildlife.<sup>40</sup> The article reported that a publication sponsored by the Audubon Society in conjunction with the U.S. Fish and Wildlife Service had accused unnamed scientists affiliated with the pesticide industry of lying about bird population levels. The editor of the Audubon publication identified several specific scientists in a subsequent interview with the newspaper, although there was apparently some miscommunication within the society as to the scientists' actual culpability.<sup>41</sup> The article included responses from some of the named scientists vehemently denying the charges, and the *Times* later published a letter from an Audubon official tempering the organization's tone and merely accusing the scientists of "misinterpreting" Audubon data regarding the DDT controversy.<sup>42</sup> The newspaper's lawyer would later say that the reporter ultimately could not tell whether the charges were accurate. "All he could say was, 'I

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<sup>39</sup> *Lorillard* was decided a year after *Sullivan*, and while the Sun-Times argued for an actual malice standard, the court rejected it because the Supreme Court had not yet extended *Sullivan* beyond public officials to reporting on public figures. *Lorillard*, 213 N.E.2d at 7.

<sup>40</sup> *Edwards v. Nat'l Audubon Soc., Inc.*, 556 F.2d 113 (2d Cir. 1977).

<sup>41</sup> *Id.* at 117.

<sup>42</sup> *Id.* at 118-19.

have no idea, but I think that it was newsworthy.”<sup>43</sup>

Several of the named scientists sued both the Audubon Society and the *Times*, and a district judge denied the *Times*' motion for summary judgment on the grounds that a jury might find the *Times* acted with actual malice. Indeed a jury did just that, returning verdicts against the *Times* and an Audubon official.<sup>44</sup> A unanimous Second Circuit panel reversed, with Judge Irving Kaufman explaining that the *Sullivan* standard did not sufficiently protect the First Amendment interests at stake in the case.<sup>45</sup> The *Edwards* court recognized the same re-shuffling of interests that was present in *Cobbs*: repeating the defamation served a different set of interests from the initial libel because of the prominence of the parties involved and the public nature of the controversy. “What is newsworthy about such accusations is that they were made,” Judge Kaufman wrote. “We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.”<sup>46</sup>

The opinion ended with some consideration of the interests that had lost out, namely the reputation of the scientist plaintiffs. Kaufman called the Audubon Society's allegations “thoughtless” and acknowledged that they had caused the targets “pain and distress,” but he concluded 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.”<sup>47</sup>

The Supreme Court declined to review the decision in *Edwards*.<sup>48</sup>

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<sup>43</sup> Michael Huber, *Edwards v. Audubon Society Twenty-Five Years Later: Whatever Happened to Neutral Reportage?*, 20 COMM. LAW. 15 (2002). The *Times*' lawyer, Floyd Abrams, added that “If a journalist has to be in a position to believe in the charge, Watergate wouldn't have been reported.” *Id.*

<sup>44</sup> *Edwards*, 556 F.2d at 119.

<sup>45</sup> The composition of the Second Circuit panel is noteworthy for the prominence of the judges. Judge Kaufman became one of the most prominent American judges of the 20<sup>th</sup> century not to serve on the Supreme Court by virtue of his sentencing Julius and Ethel Rosenberg to die. See Marilyn Berger, *Judge Irving Kaufman, of Rosenberg Spy Trial and Free-Press Rulings, Dies at 81*, N.Y. TIMES, Feb. 3, 1992 at D10. Former Supreme Court Justice Tom Clark also joined in the *Edwards* opinion, which was issued three weeks before his death. Clark had become a roving appellate judge after resigning from the Supreme Court when his son, Ramsey, became Attorney General. See Martin Well, *Former Supreme Court Justice Clark Dies at 77*, WASH. POST, June 14, 1977, at C6. Rounding out the panel was William J. Jameson, a district judge from Montana sitting by designation, who was himself a former president of the American Bar Association. See *Around the ABA*, 76 A.B.A. J. 108 (1990).

<sup>46</sup> *Edwards*, 556 F.2d at 120.

<sup>47</sup> *Id.* at 122.

<sup>48</sup> 556 F.2d 113, *cert den.* 434 U.S. 1002.

In the ensuing years, absent guidance on whether the Constitution demands a neutral reportage privilege, state and federal courts have developed a patchwork of differing approaches. A 2006 survey of cases counted 17 jurisdictions adopting the privilege and 13 rejecting it.<sup>49</sup> However, a precise count of jurisdictions is difficult because courts a) have been circumspect about whether they actually are adopting neutral reportage,<sup>50</sup> b) tend to confuse the neutral reportage privilege with the fair report privilege,<sup>51</sup> c) have endorsed or rejected the neutral reportage privilege but only in dicta,<sup>52</sup> and d) are sometimes split within states.<sup>53</sup> Apparently, though, where neutral reportage has been recognized it has been a relatively successful defense, with one survey of cases between 1986 and 1994 finding neutral reportage-based summary judgment motions prevailing 62.5 percent of the time.<sup>54</sup>

Among the jurisdictions that have recognized the privilege, courts have repeatedly re-affirmed the basic holding of *Edwards* while refining the details. The Second Circuit itself made clear several years later that the privilege would not shield a news account that was so one-sided or inaccurate that it could be interpreted as joining in the defamatory attack.<sup>55</sup> The Eighth Circuit has adopted the privilege, holding that it can apply even to an opinion piece as long as “the reports were accurate reflections of what was said and done.”<sup>56</sup> The

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<sup>49</sup> Jennifer J. Ho, Annotation, *Construction and Application of the Neutral Reportage Privilege*, 13 A.L.R.6TH 111 (2006).

<sup>50</sup> See, e.g., *Ward v. News Group Int'l*, 733 F.Supp. 83, 84 (C.D. Cal. 1990) (holding both that the district has neither “approved or disapproved the use of the neutral reportage privilege” and that the defendants in the case “are protected by the neutral reportage privilege in this action”).

<sup>51</sup> See, e.g., *Norton v. Glenn*, 860 A.2d 48, 61 (Pa. 2004) (Castille, J., concurring) (“[I]n recognizing a neutral report privilege, the trial court conflates that doctrine with the separate and distinct fair report doctrine.”).

<sup>52</sup> See, e.g., *Burns v. Times Argus Ass’n*, 430 A.2d 773, 778 (Vt. 1981) (accepting *Edwards* in dicta); *Medico v. Time, Inc.*, 643 F.2d 134, 145 (3d Cir. 1981) (explaining that an earlier opinion that appeared to reject neutral reportage did so merely in dicta and that the privilege still might apply in the Third Circuit).

<sup>53</sup> Illinois appellate courts have split regarding recognition of a neutral reportage privilege. Compare *Krauss v. Champaign News Gazette*, 375 N.E.2d 1362 (Ill. App. Ct. 1978) and *Gist v. Macon County Sheriff’s Dept.*, 671 N.E.2d 1154 (Ill. App. Ct. 1996) (accepting the doctrine) with *Newell v. Field Enters.*, 415 N.E.2d 434 (Ill. App. Ct. 1980) and *Tunney v. Am. Broad. Co.*, 441 N.E.2d 86 (Ill. App. Ct. 1982) (rejecting the privilege).

<sup>54</sup> Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1774 n.74 (1998).

<sup>55</sup> *Cianci v. New Times Publ’g Co.*, 639 F.2d 54 (2d Cir. 1980) (holding that the privilege did not apply where an article detailing rape accusations against an elected official omitted his claims of innocence).

<sup>56</sup> *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1434 (8th Cir. 1989).

Northern District of California embraced *Edwards* while finding the prong that the charge had to come from a trustworthy individual or organization to be too narrow. Instead, the court extended the privilege “to *all* republications of serious charges made by one participant in an existing public controversy against another participant in that controversy, regardless of the ‘trustworthiness’ of the original defamer.”<sup>57</sup> The Central District of California has applied the privilege but shied away from the “participant in an existing public controversy” language in favor of the public figure/private figure categories favored in the Supreme Court’s libel jurisprudence.<sup>58</sup>

The most recent high-profile neutral reportage case involved a paradigmatic “core model” scenario: a newspaper reporting on a politician’s remarks about his colleagues. *Norton v. Glenn* started with a story in the *Daily Local* in Chester County, Pennsylvania about the vitriolic sparring that had overtaken the Parkersburg Borough Council. As described briefly in the introduction, Councilman William T. Glenn, Sr. went on a bizarre rant about Council President James B. Norton III and Mayor Alan M. Wolfe during a public meeting and then in comments outside the council chamber to *Daily Local* reporter Tom Kennedy. The fair report privilege covered the *Daily Local*’s reporting of the portion of Glenn’s rant that took place inside the chambers, but only the neutral reportage privilege could apply to his remarks outside of the meeting.<sup>59</sup>

In his post-meeting diatribe, Glenn accused Norton and Wolfe, among other things, of being “queers and child molesters,” and he alleged that the council president had tried to grab his penis. The article quoted Norton as calling Glenn’s comments “bizarre” and suggesting that he “get the help he needs.”<sup>60</sup> Editors at the *Daily Local* felt the comments were newsworthy because Glenn was an elected official and the public should know of his behavior, and the statements illuminated the dysfunctional state of local government.<sup>61</sup> Although editors would later admit that the story could have been written differently, the voters of Parkersburg apparently got the message because they voted Glenn out of office while retaining Norton and

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<sup>57</sup> *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1126 (N.D. Cal. 1984).

<sup>58</sup> *Ward v. News Group Int’l, Ltd.* 733 F.Supp. 83, 84 (C.D. Cal. 1990).

<sup>59</sup> *Norton v. Glenn*, 860 A.2d 48, 53 n.6 (Pa. 2004).

<sup>60</sup> *Id.* at 50.

<sup>61</sup> Kathleen Brady Shea, *Defamation Suit from 1995 Settled: A Newspaper Was Sued over Quoted Epithets*, PHILA. INQUIRER, July 14, 2006, at B1 (quoting the *Daily Local*’s top editor as saying the “fact that the statement [was] made” and what it said about Glenn and the tenor of local government was the news, rather than the substantive allegations in the statements).

Wolfe.<sup>62</sup>

Nonetheless, Norton, Wolfe and another official sued both Glenn and the *Daily Local* for defamation. At trial, a jury held Glenn liable but not the newspaper, applying a form of the neutral reportage privilege on the judge's instructions.<sup>63</sup> The trial judge defined the privilege as covering publication of "serious charges of a public official involved in an ongoing controversy and concerning other public officials irrespective of the publisher's belief as to the falsity of the charges, provided that the report does not espouse or concur in the charges and in good faith believe that the report accurately conveys the charges made."<sup>64</sup> An appeals court affirmed the judgment against Glenn but reversed the finding as to the *Daily Local* because it disagreed about the applicability of the privilege. The Pennsylvania Supreme Court took up the case to decide whether the privilege was mandated by either state law or the First Amendment.<sup>65</sup> Noting that the U.S. Supreme Court had not clarified the issue of neutral reportage, Pennsylvania's then-Chief Justice Ralph Cappy took on the task of predicting what the high court might do based on its past decisions.<sup>66</sup> After examining *Sullivan* and its follow-up cases, Justice Cappy concluded that given the Supreme Court's "consistent application of the actual malice standard" and "its cautions that free expression law should be balanced against, and not be allowed to obliterate, state law protections to reputation," it would likely reject the privilege of neutral reportage.<sup>67</sup>

## B. Analysis of Cases Rejecting the Neutral Reportage Privilege

Most of the courts that expressly rejected the neutral reportage privilege did so based on their understanding of the requirements of the Supreme Court's defamation jurisprudence. In particular, some judges were bothered by the privilege's focus on the newsworthiness of the statements being reported, as opposed to whether the target of the

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<sup>62</sup> *Id.*; Kirtley, *supra* note 15.

<sup>63</sup> *Norton*, 860 A.2d at 51.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 51-52.

<sup>66</sup> Interestingly, the only other justice to file an opinion in *Norton*, Ronald Castille, wrote a lengthy and strongly-worded defense of the neutral reportage privilege in which he called the *Daily Local*'s story "newsworthy" and "a matter of importance to voters." Nonetheless, he concurred in the judgment because recognition of the neutral reportage privilege "should originate with the High Court." *Id.* at 60 (Castille, J., concurring).

<sup>67</sup> *Id.* at 57.

speech was a public or private figure. Courts and commentators have asserted that the privilege contradicts the Supreme Court's holding in *Gertz v. Robert Welch, Inc.*<sup>68</sup> that the heightened protection of the actual malice standard applies only if the defamed party is a public figure. In so ruling, the Court moved away from its earlier decision in *Rosenbloom v. Metromedia, Inc.*<sup>69</sup> that focused on whether the defamatory statements involved matters of public interest, without regard to the prominence of the parties.

Critics of the neutral reportage privilege have contended that its focus on the newsworthiness of the defamatory statement puts it at odds with this focus on the identity of the speaker. "The Supreme Court has not adopted *Edwards* . . . and in our view it is not possible to reconcile it with that court's prior decision in *Gertz*," declared a New York appellate court. "The unequivocal holding of *Gertz* is that a publisher's immunity is based upon the status of the plaintiff, not the subject matter of the publication."<sup>70</sup> Echoing *Gertz*, one commentator critical of the privilege contended that "subject matter analysis fails to accommodate adequately the state's interest in protecting a private person's reputation. Moreover, the use of a subject matter test would require judges to decide which publications were matters of public or general interest."<sup>71</sup>

The force of such arguments has been weakened over time as the Supreme Court has brought newsworthiness inquiries back into its defamation jurisprudence. The Court squarely re-introduced such a test 11 years after *Gertz* in *Dun & Bradstreet, Inc. v. Greenmoss Builders*.<sup>72</sup> The case involved a defamation lawsuit over a credit reporting agency's false notice, sent to five subscribers, that a construction contractor had gone bankrupt.<sup>73</sup> The Court held that the speech did "not involve matters of public concern" because the subject

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<sup>68</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>69</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

<sup>70</sup> *Hogan v. Herald Co.*, 84 A.D.2d 470, 478 (N.Y. App. Div. 1982). New York's state and federal courts remain split on the neutral reportage issue, with the Second Circuit, in addition to its own *Edwards* standard, finding an implied neutral reportage privilege in New York state law. *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11 (2d Cir. 2000). For other examples of courts citing incompatibility with *Gertz* as a reason to reject the privilege, see *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 n.5 (3d Cir. 1978); *Newell v. Field Enters.*, 415 N.E.2d 434 (Ill. App. Ct. 1980); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 885-86 (Ky. 1981).

<sup>71</sup> Dennis J. Dobbels, Comment, *Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Re-Publish Defamation Should be Rejected*, 33 HASTINGS L.J. 1203, 1220-21 (1982).

<sup>72</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985).

<sup>73</sup> *Id.* at 751.



concerned the business affairs of one fairly small firm, and the distribution of the speech was so strictly limited.<sup>74</sup> The Court held that the *Sullivan* actual malice standard will not apply in cases involving private figures and such non-newsworthy speech.<sup>75</sup> Meanwhile, the Court continues to weigh whether speech is a matter of public concern in its current doctrinal formulations in related First Amendment areas such as public employee speech<sup>76</sup> and the unwanted publication of truthful information.<sup>77</sup>

*Dun & Bradstreet* and the related cases show that the Supreme Court is still willing to apply First Amendment doctrines that consider whether the speech at issue is on a matter of public concern. This should ease the apprehension of the courts which rejected neutral reportage solely on the basis of fear over doctrinal inconsistency. Even before *Dun & Bradstreet*, however, there were still legitimate arguments that neutral reportage's newsworthiness test did not contradict the categorical approach of *Gertz*. Under *Rosenbloom*, the question was whether the defamatory statement involved matters of public importance, and under *Gertz* the question became how closely the subject of the statement is linked to matters of public importance. Asking the latter question still involves a judicial determination of what matters to the public.

Judge Marilyn Hall Patel of the Northern District of California recognized this when she found the neutral reportage privilege to be consonant with *Gertz*, writing in *Barry v. Time, Inc.* that "the court must already engage in the evaluation of whether the plaintiff is a public figure and what constitutes a public controversy. In order to apply the neutral reportage doctrine the court in addition need only assess whether the defamer is a party to the controversy and whether the report is accurate and neutral."<sup>78</sup> This analysis is the correct one, and I would add that it is not unprecedented for the Supreme Court to shift from ad hoc inquiries into categorical rules without abandoning the balancing of interests that necessarily occurs in both modes of

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<sup>74</sup> *Id.* at 762-63.

<sup>75</sup> *Id.*

<sup>76</sup> *See Connick v. Myers*, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

<sup>77</sup> *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

<sup>78</sup> *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1125 (N.D. Cal. 1984).

analysis. The shift from *Rosenbloom* to *Gertz* is analogous to the trajectory of the Court's Public Forum jurisprudence. The Court went from ad hoc determinations of what the public interest in free speech was in a given location to a set of rules based on categories of public space. Rather than eliminate the balancing of interests, the Court simply shifted the inquiry to a different stage of the process, namely to the selection of the category into which the particular public forum fits.<sup>79</sup> A similar shift occurs when courts try to determine whether a defamation plaintiff is a public or private figure. The courts inevitably end up making an inquiry into newsworthiness, just under a different guise.

Few critical courts have ventured beyond this doctrinal hang-up to offer policy-based resistance to the neutral reportage privilege. A hint of a more theoretical distaste came in 1982 when the Court of Appeals of Michigan declined to apply *Edwards* "as the press is adequately protected by the burden of proof required in *Sullivan*."<sup>80</sup> Twenty years later, the Pennsylvania Supreme Court took off from where that declaration left off and offered a somewhat more developed, though still fairly sparse, argument for why the neutral reportage privilege is unnecessary and harmful. In *Norton v. Glenn*, the Pennsylvania high court reached two primary conclusions in the process of rejecting the neutral reportage privilege: (1) that the privilege was unnecessary because the actual malice standard already provides enough First Amendment protection, and (2) that the neutral reportage privilege would undermine the careful balancing of interests underlying the actual malice framework.

Regarding the first argument, the *Norton* court wrote that the U.S. Supreme Court has, "pursuant to the actual malice standard, provided considerable protection to defendants in defamation actions filed by public officials and public figures."<sup>81</sup> The protections are "considerable," the court explained, because the actual malice standard "goes so far" as to bar liability against those who negligently publish libelous statements about public figures or public officials.<sup>82</sup> This restating of the *Sullivan* doctrine disregards the situation at issue in *Norton*, in which there was no negligence or recklessness, but rather the intentional reporting of a public official's newsworthy defamatory statement. If such scenarios raise the same First Amendment issues

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<sup>79</sup> See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (2d ed. 1988).

<sup>80</sup> *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 518 (Mich. Ct. App. 1982).

<sup>81</sup> *Norton v. Glenn*, 860 A.2d 48, 56 (Pa. 2004).

<sup>82</sup> *Id.*

that motivated the *Sullivan* court to craft a new doctrine, then actual malice, with its focus on intent, provides insufficient protection. The conclusion that actual malice's "considerable protection" is enough to satisfy the First Amendment, therefore, appears to rest on the assumption that such core neutral reportage scenarios either do not raise serious First Amendment concerns, or they are so rare that it is a constitutionally acceptable loophole.

The *Norton* court also concludes that recognizing the neutral reportage privilege would undermine the *Sullivan* framework. The opinion traces the Supreme Court's libel jurisprudence and concludes that actual malice involves "a balance" between the First Amendment's "guarantee of freedom of expression and the states' right to offer protection to a citizen's reputation via a defamation action."<sup>83</sup> Neutral reportage doctrine, the court wrote, would "sharply tilt the balance against the protection of reputation," thus "jettison[ing]" the *Sullivan* standard and replacing it with a rule that resembles blanket immunity for the press.<sup>84</sup> The court did not explain precisely how this tip in the *Sullivan* balancing would occur, but it seems that the court was making an empirical assumption that recognition of the neutral reportage privilege will lead to an increase in undue reputational damage that does not serve important public interests.

### III. SURVEY OF JOURNALISTS ABOUT THEIR NEUTRAL REPORTAGE EXPERIENCES

To probe the above-mentioned assumptions, I supplemented a study of case law and commentary with a survey of journalists regarding how neutral reportage situations play out in practice. Part A of this section describes how I conducted the survey, and Part B presents the results along with commentary from interviews with some of the participants.

#### A. Methodology

I surveyed a group of journalists who cover municipal and state government about their experiences with scenarios in which the neutral reportage privilege might apply. I do not present the results as decisive evidence, but rather as information to supplement the other sources by

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

adding insight about how the doctrine plays out in actual situations. I focused on daily newspaper reporters with political beats because they are constantly exposed to government officials and are tasked with informing the public about what those officials say, making them more likely than others to encounter neutral reportage scenarios. Daily newspapers still cover local and state government more closely and more frequently than any other media outlets, and their reports are still the primary sources for much broadcast and online news. Moreover, these reporters operate under established professional standards which can help shape legal rules. I chose government beats because they align most closely with this Comment's limited inquiry into the core model of the privilege.<sup>85</sup>

While the results are not meant to be taken as scientific data, the survey was guided by general principles of empirical research. The survey population – 50 respondents out of a total pool of 125 – was relatively small, but it was a carefully selected group meant to reflect the larger universe of American daily newspapers. I selected 125 different dailies using an online database maintained by the John S. and James L. Knight Foundation as part of a 2005 survey of newsroom diversity.<sup>86</sup> The Knight survey included data on 1,410 newspapers, which was nearly all of the 1,452 dailies in the United States that year, as counted by the Newspaper Association of America.<sup>87</sup> I selected between one and four newspapers in each of the 50 states depending on the state's population and number of newspapers, aiming for a random sample within the Knight database's alphabetized geographic categories. Once I had selected the newspapers I visited their websites and used staff directories or recent news articles to choose a reporter from each paper who covers municipal or state government. I contacted them first by e-mail and then followed up by telephone.

The 125 newspapers in the original sample had an average weekday circulation size of 73,815, and a median circulation of 37,500.

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<sup>85</sup> Certainly neutral reportage doctrine has been applied in non-political contexts, but the aim of this Comment is to consider if a core model is a constitutionally required floor. The Supreme Court has established actual malice as a constitutional boundary in lawsuits by public officials and public figures, but left it to the states to define the contours of liability in cases involving private figures. Similarly, the Court might find a core model of the neutral reportage privilege required by the First Amendment, and leave to the states whether to expand its protection to cases not involving public officials.

<sup>86</sup> BILL DEDMAN & STEPHEN K. DOIG, REPORT FOR THE KNIGHT FOUNDATION SHOWS TRENDS AT 1,410 US NEWSPAPERS (2005), <http://powerreporting.com/knight/>.

<sup>87</sup> NEWSPAPER ASSOCIATION OF AMERICA, TOTAL PAID CIRCULATION (2008), <http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx>. By 2008 the number of daily newspapers had shrunk to 1,408. *Id.*

As of 2005, the average American newspaper circulation size was about 36,789 for weekdays and 60,471 for Sunday editions.<sup>88</sup> I received 50 responses: 12 by e-mail, 12 through a survey website, and 26 through telephone interviews. The respondents work at newspapers in 34 different states in every region of the country. Their newspapers have a median circulation of 35,000 and an average of 88,183. The largest newspaper represented has a circulation of about 550,000, the lowest about 4,000. The reporters have been covering government for a median of 6 years and an average of 9.6. The longest-tenured reporter had been on the beat for 40 years, the newest for two months.

## B. Results

The survey recipients were all asked the same questions about whether they have encountered public officials making statements that may have been defamatory but also newsworthy. If they answered yes then they were asked about the frequency of such situations, and how they responded. In response to the first question, 72 percent of recipients (36 out of 50) reported encountering situations in which a public figure made a statement that may have been both defamatory and newsworthy. The group that had not encountered such statements had an average of 7.67 years and a median of 4 years of experience on government beats, compared to the mean of 9.6 and a median of 6 for the participants as a whole. Of the group that had encountered neutral reportage scenarios, 19 percent (7 out of 36) said they encountered such situations often, 25 percent (9 out of 36) said sometimes, and 56 percent (20 out of 36) said rarely.

The questions were purposely open-ended, and most recipients volunteered additional information about the relevant situations they had encountered.<sup>89</sup> Many said they had encountered elected officials and candidates for office making defamatory remarks about political opponents during election campaigns. “That happens about every election,” and “On the campaign trail they say stuff all the time,” were representative comments. Often these are borderline cases of defamation where the truth is obscure. “Especially in the heart of

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<sup>88</sup> PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, AVERAGE CIRCULATION OF U.S. DAILY NEWSPAPERS (2007), <http://www.journalism.org/node/1073>. The median was not available. Circulation figures have continued to decrease across the country since these statistics were released, but they remain useful for showing that the survey pool was representative of the industry as a whole.

<sup>89</sup> The survey recipients participated on the condition of anonymity for themselves and their publication.

campaign season they'll say things about someone's record that may have a shred of truth but may be out of context or misleading," said one survey participant.

Other examples provided clearer cases of defamation: a sheriff accusing a county commissioner of being mentally ill; someone close to a candidate using a blog to accuse the candidate's opponent of being a drunk driver; a public works official accusing a restaurant of serving roadkill; a politician suggesting a rival was gay; an official making a veiled charge that a political opponent embodied a racial stereotype; political officials accusing a rival of sexual harassment; and numerous iterations of public officials accusing one another of corruption, cronyism and incompetence with enough specificity to suggest a legally actionable statement of fact rather than opinion, which is almost always protected under the First Amendment.

Of those who had encountered possible neutral reportage scenarios, 44 percent had always reported on the comments (16 out of 36), 25 percent (9 out of 36) had never reported on the comments, and 31 percent (11 out of 36) had reported on some statements and declined to report on others.

While it is difficult to determine precisely where the privilege applies for the reasons explained in the previous section, I divided the survey recipients based on how the doctrine has been applied in their areas.<sup>90</sup> Of the original sample, 29.6 percent (37 out of 125) of the journalists were located in states in which the neutral reportage privilege has generally been applied in a manner favorable to the press, while 70.4 percent (88 out of 125) were located in states which had either rejected the privilege or where the case law was too sparse or conflicting to come to any conclusions. Of the respondents who answered "yes" to the first question, and therefore had encountered situations in which the privilege might apply, about 36 percent (13 out of 36) were located in jurisdictions which have given neutral reportage favorable treatment and about 64 percent (23 out of 36) were not.

For those working in jurisdictions in which the doctrine has either been accepted or received strongly favorable judicial treatment, about 38 percent (5 out of 13) had always reported the statements, 31 percent (4 out of 13) had never reported them, and about 31 percent (4 out of 13) had both published and not published the statements. For those in

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<sup>90</sup> For this effort I relied heavily on the Media Law Resource Center's survey of libel law in every U.S. state and federal circuit, which includes a section on neutral reportage for each jurisdiction. MEDIA LAW RESOURCE CENTER, MEDIA LIBEL LAW 50-STATE SURVEY (2007-2008). If the decisions within a jurisdiction were not at least strongly favorable to neutral reportage, or there was conflicting authority, then it went in the "reject/unclear" category.

jurisdictions that have either rejected the privilege or those in which the state of the law is too conflicted or sparse to draw any conclusions, about 48 percent (11 out of 23) have always reported the statements, 17 percent (4 out of 23) have never reported the statements, and about 35 percent (8 out of 23) have both reported and not reported the statements.

Most of the participants who elaborated on their reasons for publishing or not publishing said they balance the harm that repeating the statement would cause to the target's reputation against the public interest in knowing that the charge had been made. "We certainly are not in the habit of making our newspaper the mouthpiece for every criticism that gets aired in public," one reporter said. Many of the survey recipients said the balance tips in favor of printing a defamatory statement if it tells the public something important about the speaker. "It depends on how severe it is," one participant said. "Sometimes it's almost more newsworthy when they cross that line more than when they don't (because) it's very common for politicians to bash each other."

The journalist who encountered the charges that the official embodied a negative racial stereotype opted to report on them (along with responses from the target of the attack and context suggesting the allegations were false) because "even if it's groundless, as long as it's properly vetted it tells you something about [the speaker] and it's something he's been telling people out in the community. We were amplifying it to some degree, but he had enough of a voice that it was getting out there anyway."

The reporter who heard the sheriff accuse a municipal councilor of being mentally ill chose not to report the statement because "it was such an off-the-wall statement and so difficult to substantiate." However, the journalist added that "it's one of those stories that haunts me" because he thinks the public has an interest in knowing that the sheriff made such a statement, and that the feud between local government officials had escalated to such a degree. One participant made a distinction between officials' statements that primarily deliver information and those that primarily reveal the speaker's character. In the case of the former, the reporter said, the newspaper might be more cautious because a reader would be more likely to accept the information as true. "That happens fairly often when you cover county commissioners or legislators that say something that's demonstrably untrue: you're in the position of putting it in the newspaper and either refuting it with your own words or someone else's or not [printing] it at

all,” the journalist said.

By contrast, “sometimes it’s newsworthy if they’re going around saying something on the campaign trail using it to score political points and it’s not true. Then I think it’s probably deserving of coverage” because the reader is more likely to be skeptical of the statement while learning something important about the speaker. The journalists were especially hesitant to report statements when they thought the defamatory substance might outweigh the newsworthy context or any message about the speaker. The reporter who encountered the candidate spreading rumors about his opponent’s sexual orientation opted not to report the statement because “it really had nothing to do with the election.”

Other reporters struggled less with the decisions, albeit with different outcomes. “I blow off statements that are obviously stupid,” one participant said, while another pointed to “incredible stupidity and ignorance” of officials’ defamatory statements as “major factor[s]” to publish them. One reporter’s intuitive bright line test aligns with that of the many courts which have been more accepting of neutral reportage as related to public figures than private ones. “A lot of times I have some public officials that just spout off at the mouth and there’s not much to it,” the journalist said. “The difference to me is if they’re talking about another public official they work with or if it’s a resident.”

Some reporters expressed a belief that there are run-of-the-mill defamatory remarks that are not worthy of publication because they have become so common in politics and government. “The comments have always been petty and not worth wasting time on the usual he-said-she-said/charge-denial-counter-charge,” one reporter said. Others, however, have a presumption in favor of reporting such statements because they illustrate the character of local government. “Usually if they’re gonna say it I’ll print it,” a survey participant said of elected officials. Another reporter said his “general approach has been to print anything anyone will tell me with their name attached, and allow whomever they are blistering to respond in the same article if they so choose.”

### III. ARGUMENT FOR UNIFORM ADOPTION OF THE CORE MODEL OF THE PRIVILEGE

The information gathered in the survey, taken together with existing precedent and scholarship, suggests that some of the assumptions underlying criticism of the neutral reportage privilege are



faulty. The results indicate that neutral reportage scenarios are more common, and therefore the need for additional legal protection more pressing, than critics have assumed. Moreover, the findings suggest that rather than obliterate the balancing of interests between the free flow of information about government and the protection of reputation, journalists to whom the privilege may apply continue to engage in this balancing even when shielded by the doctrine.

The *Norton* court concluded that the actual malice standard already provides “considerable” protection for First Amendment interests. The court characterized the *Sullivan* standard as far reaching, shielding even negligent libel, but it did not try to explain how the actual malice framework would actually apply to a situation like the one before it in which the defendant knowingly published the defamatory statement of a public official because the utterance itself was newsworthy.<sup>91</sup> The court’s failure to address whether actual malice is a good fit for such a situation, and its characterization of actual malice’s protections as being sufficient to satisfy the First Amendment, suggest that the court is making certain assumptions about neutral reportage scenarios. The court may be assuming that there is not a valid public interest in knowing that such a defamatory statement had been made, or that the public interest does not outweigh the damage to the target’s reputation. Or, the court could be making the empirical assumption that such scenarios are rare enough that they comprise an acceptably small loophole in the *Sullivan* standard and that First Amendment values are not significantly hurt by not recognizing a neutral reportage privilege.

The survey results cast some doubt on this last assumption. A strong majority of the journalists encountered situations in which public figures make defamatory statements that readers should know about. Not only had 72 percent of recipients (36 out of 50) encountered such situations, but the remaining 28 percent who had not had less experience than their peers (a median of 4 years on the beat compared to 6 years for the group as a whole), suggesting that it may be a matter of time until they face such a scenario themselves.

Of the reporters who had encountered neutral reportage scenarios, a majority of 56 percent (20 out of 36) said they had encountered such situations only rarely. One could argue that this means neutral reportage situations are not in fact common. However, with more than 1,400 daily newspapers in the United States and 72 percent of surveyed government reporters encountering neutral reportage situations, even

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<sup>91</sup> See *supra* notes 78-81.

one situation each would be significant in the aggregate. And nearly half of the surveyed reporters (44 percent or 16 out of 36) have encountered multiple situations.

Another assumption critical to the logic of *Norton* is the idea that the neutral reportage privilege would undo the balancing of interests inherent in the actual malice standard. Calling the neutral reportage privilege “sweeping” in its scope, Justice Cappy wrote in *Norton v. Glenn* that acceptance of it “would sharply tilt the balance against the protection of reputation, and in favor of protecting the media.”<sup>92</sup> The court does not explicitly state how the balance would shift, but presumably it believes that adoption of the privilege would lead to more defamation without a corresponding increase in important public interests being served. This assumes that those shielded by the privilege would disregard the balancing of interests embodied in the doctrine and cause a great deal of additional undue reputational damage. These key assumptions about journalistic behavior seem to underlie *Norton*’s contention that recognizing the neutral reportage privilege is a “radical notion” that would upend existing legal norms as significantly as *Sullivan* itself.<sup>93</sup>

The survey results and corresponding interviews tell a different story. The findings suggest that even when the reporters encounter defamatory statements that pass the initial threshold test of possibly being newsworthy because they were made, they are likely to engage in a second level of balancing and refrain from publishing if the reputational harm outweighs the news value. Of the participants who had encountered such statements, 25 percent (9 out of 36) had never reported them, 31 percent (11 out of 36) had both published and declined to publish such remarks, and 44 percent (16 out of 36) had printed such statements on each occasion they arose. These numbers show a majority of journalists who have encountered such statements have exercised their discretion not to report them. They engaged in a balancing process that found the news value insufficient, and many of those who had always reported the statements suggested that they engaged in similar deliberative processes but each time the public interest predominated over concerns about reputational harm.

It is also worth noting that while the “always reported” category has a plurality of 44 percent among this group of participants, within that group a disproportionate 69 percent (11 of 16) of them had only encountered defamatory but newsworthy statements on rare occasions,

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<sup>92</sup> *Norton*, 860 A.2d at 56-57.

<sup>93</sup> *Id.* at 53.

compared with 56 percent for the group as a whole. This suggests that for many of them they are not adhering to an absolutist policy of reporting on every defamatory statement with a hint of public interest, but rather they simply have not encountered that many.

Moreover, the results in this category were similar among the journalists in jurisdictions favorable to the privilege and those in jurisdictions without any protection. In the states and circuits where the neutral reportage privilege has either been formally accepted or treated in a strongly favorable manner by the courts, 38 percent (5 out of 13) of survey recipients had always reported, 31 percent (4 out of 13) never, and about 31 percent (4 out of 13) had both published and not. For those in jurisdictions without any protection, about 48 percent (11 out of 23) always reported, 17 percent (4 out of 23) never, and about 35 percent (8 out of 23) have both reported and not. There is no significant difference between the numbers in each category, and in fact the findings show that slightly more journalists in jurisdictions that apply neutral reportage doctrine in a manner favorable to the press have declined to report than in areas that have rejected or not applied the privilege.

These results suggest that the mere presence of the neutral reportage privilege does not encourage irresponsible journalistic behavior. Rather, the government reporters are by and large continuing to balance the reading public's interest in knowing that a defamatory statement has been made against the damage that repetition of the charge will do to the target's reputation. Rather than "sharply tilt[ing] the balance"<sup>94</sup> established in *Sullivan*, this complements it.

Justice William Brennan, the author of the *Sullivan* opinion, wrote shortly after the opinion was issued about the importance of Alexander Meiklejohn's self-governance theory of the First Amendment as a key rationale behind the actual malice standard.<sup>95</sup> The Justice explained how the court was influenced by Meiklejohn's theory that the founders made a "basic decision . . . to govern themselves rather than to be governed by others" and the "first amendment, in his view, is the repository of these self-governing powers."<sup>96</sup> Meiklejohn explained that "[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon un-wisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones,

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<sup>94</sup> *Id.* at 57.

<sup>95</sup> William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>96</sup> *Id.* at 11.

unfair as well as fair, dangerous as well as safe, un-American as well as American.”<sup>97</sup>

*Sullivan* translated that view into its iconic formulation of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>98</sup> Against this backdrop, one law review article critical of *Norton* concluded that permitting the media to report Glenn’s comments “actually supports the policy underlying *Sullivan*: facilitating robust public discourse.”<sup>99</sup>

The piece drew criticism from an opponent of neutral reportage doctrine for failing to consider that the media appellant in *Norton* conceded that Glenn was unreliable and “the reporter was on notice that there were substantial grounds for seriously doubting the veracity of the source.”<sup>100</sup> However, while Glenn was clearly not a responsible source, he was an elected official in a position of power and influence in his community. Reporting his statements alerted the reading public to the extent of his irresponsibility, giving them information to use when deciding how to vote – vital tools for self-governance, in the framework of Meiklejohn and *Sullivan*.

As has already been mentioned, the voters of Parkersburg did make a self-governance decision in the next election by voting Glenn out of office and retaining the targets of his vitriol, Mayor Alan Wolfe and Council President James Norton.<sup>101</sup> To be sure, Wolfe and Norton nonetheless suffered harm because of the repetition of Glenn’s slander. The allegations were on Wolfe’s mind “all the time” a decade after the article ran, and he feared being alone with children because of the taint of being associated with molestation.<sup>102</sup>

Such reputational damage is not to be taken lightly, but it also had remedies short of holding the Daily Local liable. Wolfe and Norton

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<sup>97</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960).

<sup>98</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>99</sup> *Recent Case, Pennsylvania Supreme Court Declines to Adopt Neutral Reportage Privilege – Norton v. Glenn*, 860 *A.2d* 48 (Pa. 2004), 118 *HARV. L. REV.* 2029 (2005) (“Rather than viewing *Sullivan* as a bright-line rule prohibiting in all circumstances the publication of comments known to be false, the *Norton* court should have examined the character of Glenn’s comments in light of the spirit of *Sullivan* to determine which way Supreme Court jurisprudence militates.”).

<sup>100</sup> David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock’s Attempts to Circumvent New York Times v. Sullivan*, 9 *VAND. J. ENT. & TECH. L.* 551, 628, 631 n. 574 (2007).

<sup>101</sup> See Kirtley, *supra* note 15.

<sup>102</sup> See Shea, *supra* note 61.

won defamation judgments against Glenn that included \$17,500 each in compensatory and punitive damages.<sup>103</sup> While the media defendant provided an opportunity for greater financial compensation,<sup>104</sup> the plaintiffs already obtained a defamation judgment against the original source of the slander, which had the declarative effect of clearing their names.<sup>105</sup> Moreover, while Glenn's culpability was fairly straightforward,<sup>106</sup> the Daily Local's was more complex as witnesses testified that coverage of the diatribe contributed to election results favorable to the plaintiffs and the reporting could have made them sympathetic to readers.<sup>107</sup>

Unfortunate as the reputational harm suffered by Norton and Wolfe was, it does not appear to be greater than that allowed under the balancing of interests at work in *Sullivan*. The Supreme Court certainly did take the protection of reputation into account in its doctrinal formula. The absolutist positions of Justices Hugo Black and William O. Douglas remained relegated to the concurrences, and the actual malice standard provided for continued defamation liability where intent to spread falsity or recklessness could be shown.<sup>108</sup> Nonetheless, the bar was placed quite high because "[i]njury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error."<sup>109</sup> *Sullivan* cited precedent in which the Court refused to subject those who criticize judges to criminal contempt charges out of concern for the "dignity and

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<sup>103</sup> *Norton v. Glenn*, 860 A.2d at 51.

<sup>104</sup> The case ultimately settled in the midst of a 2006 re-trial for an undisclosed amount of money. See Shea, *supra* note 61.

<sup>105</sup> Focusing on this goal of clearing the defamed party's good name, some have advocated for parties in libel suits to agree to forego causes of action seeking monetary damages from the press based on showing actual malice, and instead to opt for trials focused on the truth of the statement that would result only in a declarative judgment. See, e.g. Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988). The defamed party's opportunity to clear their name through a suit against the original speaker shows another advantage of neutral reportage doctrine over a strict actual malice regime.

<sup>106</sup> Glenn's lawyer contended, unsuccessfully, that the councilman's slurs were akin to "playground" insults, not libel. See Adam Liptak, *Libel Suit Challenges the Right to Report a Politician's Slurs*, N.Y. TIMES, Mar. 31, 2003, at A8. Glenn did not appeal the trial court verdicts against him. *Norton*, 860 A.2d at 51.

<sup>107</sup> See Liptak, *supra* note 103.

<sup>108</sup> See *Sullivan*, 376 U.S. 254, 295 (Black, J., concurring) (finding in the First Amendment "an absolute immunity for criticism of the way public officials do their public duty," whether true or not). See also Brennan, *supra* note 95 at 5-6 (explaining how the absolutist view did not prevail).

<sup>109</sup> *Sullivan*, 376 U.S. 254 at 272.

reputation” of judicial officers because “judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’” and “surely the same must be true of other government officials, such as elected city commissioners.”<sup>110</sup>

While different courts have adopted different forms of the neutral reportage privilege, all have included some doctrinal limits that act as built-in protections for reputation parallel to that of the *Sullivan* standard. The core model advocated by this Comment would include the typical holding that the privilege does not apply when the publication at issue comes closer to joining in the defamation than neutrally reporting on it.<sup>111</sup>

Whereas “malice” in the actual malice standard is a term of art that refers to a knowing or highly reckless mental state, the comparable reputation-protecting device built into the neutral reportage privilege more closely resembles the common meaning of the word “malice” – the doctrine does not shield the press when the purpose is to defame, not to inform. This logical and linguistic harmony is an advantage of neutral reportage doctrine over the *Sullivan* “actual malice” standard, which has drawn criticism for the “unusual and confusing use of words.”<sup>112</sup>

The preponderance of survey participants who reported declining to publish newsworthy but defamatory statements shows that the same balancing of interests at work in *Sullivan* continues in neutral reportage contexts – even in jurisdictions in which the privilege is available to the press. The majority of the surveyed government reporters who have encountered such situations are taking into account the reputational harm of publicizing the slanderous remarks and comparing it to the public interest.

In core model contexts such as these, in which the speakers were government officials or candidates for public office, the clearest public interest is that of readers making well-informed choices about whom to vote for, among other ways of participating in government. That is the

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<sup>110</sup> *Id.* at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376).

<sup>111</sup> *See, e.g., Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 69 (2d Cir. 1980) (refusing to apply neutral reportage because the article at issue “did not simply report the charges but espoused or concurred in them”); *Condit v. Dunne*, 317 F. Supp. 2d 344, 371 (S.D.N.Y. 2004) (declining to apply neutral reportage because the defendant “concurred in the allegations he reported”).

<sup>112</sup> *See* MARK SABLEMAN, *MORE SPEECH, NOT LESS: COMMUNICATIONS LAW IN THE INFORMATION AGE* 97-98 (1997). The author of the *Sullivan* opinion himself, Justice William Brennan, acknowledged some of the confusion surrounding the term “actual malice” in a subsequent opinion. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (clarifying that the phrase refers to a knowing or reckless intent, not ill will).

heart of the self-governance model of the First Amendment that informs the actual malice standard, thus suggesting that in practice neutral reportage scenarios reinforce rather than obliterate the principles of current libel jurisprudence.

A possible criticism of the survey is that it focuses on a narrow group of journalists who tend to be the most responsible, and thus the most likely to maintain the *Sullivan* balance based on their own professional standards. While there is no formal accreditation system for journalists, daily newspapers are thoroughly imbued with the tenets of the Society of Professional Journalists Code of Ethics, which includes admonitions that reporters should “show compassion for those who may be affected adversely by news coverage” and that “only an overriding public need can justify intrusion into anyone’s privacy.”<sup>113</sup> Unlike daily newspaper reporters, other journalists might not adhere as strictly to these ethical standards, and those writing for tabloid publications may disregard them entirely.<sup>114</sup> Similarly, the rapid expansion of online journalism and blogs presents new challenges to the careful *Sullivan* balancing by threatening increased undue reputational damage.<sup>115</sup>

Further research into the behavior of bloggers and online journalists and pundits would be worthwhile. However, for the purposes of this Comment, I believe the survey is instructive for the very reason that the respondents are likely to be among the more ethical journalists. The doctrinal limits of the core model – the remarks being repeated must be newsworthy and the reporting must be neutral so as not to join in the attack – echo the ethical standards of the Society of Professional Journalists code. One prominent commentator, Wake Forest University School of Law Dean Blake Morant, has suggested that professional codes of journalistic conduct such as these can serve a greater role in the legal system.<sup>116</sup> While acknowledging

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<sup>113</sup> Society of Professional Journalists, Code of Ethics, <http://www.spj.org/ethicscode.asp> (hereinafter SPJ Code).

<sup>114</sup> See, e.g., *Khawar v. Globe Int’l Inc.*, 19 Cal.4th 254, 259-60 (1998) (declining to apply neutral reportage privilege where a tabloid gave an “abbreviated, uncritical summary” of a book falsely implicating a man in the assassination of Robert F. Kennedy).

<sup>115</sup> See, e.g., Anne Marie Squeo, *Rove’s Camp Takes Center of Web Storm: Bloggers Underscore How Net’s Reporting Dynamics Provide Grist for the Rumor Mill*, WALL STREET J., May 16, 2006, available at <http://online.wsj.com/article/SB114774060320053665.html> (quoting new media scholar and blogger Jay Rosen as saying the “system for keeping unverifiable reports out of the news is totally broken down when you look at the online world” but defending the “let’s see if this holds up” philosophy that predominates on the Internet).

<sup>116</sup> Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595, 635-36 (2005).

that such codes are not universally followed, particularly among media outlets that are especially susceptible “to the omnipresent pressure for ratings and profit,” Dean Morant wrote that “mechanisms such as ethical codes and other forms of self-restraint remain effective industry-wide norms and cognitive guide-posts that promote responsible journalism,” and that “codes of ethics could be probative indicators of industry customs.”<sup>117</sup> While rare, it is not unheard of for courts to look to journalistic best practices in the same way that they use customs in other industries as proxies for reasonableness and negligence when determining tort liability.<sup>118</sup>

To be sure, even those who promote and practice good journalistic ethics would bristle at the notion of courts enforcing such codes. The First Amendment restricts government “intrusion into the function of editors.”<sup>119</sup> The Society of Professional Journalists itself recently amended its code of ethics to make clear that the code “is intended not as a set of ‘rules’ but as a resource for ethical decision-making. It is not – nor can it be under the First Amendment – legally enforceable.”<sup>120</sup> In the context of privacy torts, Professor Amy Gajda has proposed an approach in which “liability would be assigned only if no reasonable professional journalist would have reached the same conclusion,” thus limiting “liability to genuinely outrageous cases while leaving journalists free to make their own judgments within the realm of reasonable professional disagreement.”<sup>121</sup>

While any government evaluation of journalistic ethics is troubling – even when the government agent is a judge – such an approach limits the First Amendment concerns. It may well be a necessary trade-off in order for publishers to gain the protection of the neutral reportage privilege. The doctrine has drawn the most criticism when it has been presented as an “absolute” privilege.<sup>122</sup> The most likely scenario for

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<sup>117</sup> *Id.* at 599, 620.

<sup>118</sup> *Id.* at 620-23. For a further example of a court looking to journalistic practice norms, see *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 634 (2001) (citing evidence that the practice at issue was “not consonant with journalistic standards and practices”). For a general example outside of the journalism context, see *Trimarco v. Klein*, 436 N.E.2d 502 (1982) (using custom to establish reasonable duty of care in tort law).

<sup>119</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>120</sup> SPJ Code, *supra* note 112; Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1043 (2009).

<sup>121</sup> Gajda, *supra* note 119, at 1044.

<sup>122</sup> *See, e.g.*, *In re United Press Int’l*, 106 B.R. 323, 330 n.18 (D.D.C. 1989); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 894 (Ky. 1981); *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225 (3d. Cir. 1978); Peter B. Kutner, *What is Truth?: True Suspects and False Defamation*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 63 (2008).



adoption would be recognition of a qualified privilege involving determinations of newsworthiness and neutrality. Connecting those inquiries to professional standards would at least make the intrusion into the editorial role more predictable and rational. Applied to neutral reportage scenarios, it would protect journalists abiding by the standards who are currently vulnerable, while potentially allowing for liability against publishers who repeat defamatory statements in order to damage reputation rather than to inform the public, or whose reporting is so careless and so divergent from industry ethical norms that it throws the neutrality into question.

As mentioned in the Introduction, there is currently a debate over whether courts have gone too far in shielding Internet publishers from defamation liability under Section 230 of the Communications Decency Act. Courts have expressed qualms with the unusual breadth of the immunity even while extending it,<sup>123</sup> and commentators have called for revisions.<sup>124</sup> Whatever happens with Section 230, wider recognition of at least the core model of the neutral reportage privilege would benefit the law of republication of defamatory statements online. If the law were changed to strip Internet sites of their special protection, then the growing crop of online journalists and activists would be just as vulnerable as their print and broadcast counterparts. The core model of the neutral reportage privilege would provide needed protection for those Internet publishers who republish defamatory remarks in context and not as mere amplification.

And if the current broad interpretation of Section 230 prevails, then neutral reportage doctrine could correct a skewed incentive system. Online publishers may want to republish newsworthy defamatory statements in the proper context by posting them along with additional reporting probing the statements' veracity and explaining how and why they were made and what their utterance might say about the speaker. However, under the current regime, this behavior could strip them of their Section 230 immunity, encouraging them to allow third parties an unfettered forum to publish the defamatory remarks without any such vital context, thus harming the reputation of the target and not serving

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<sup>123</sup> See, e.g., *Barrett v. Rosenthal*, 40 Cal. 4th 33, 62-63 (2006) ("We share the concerns of those who have expressed reservations about the ... broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications.")

<sup>124</sup> See, e.g., Olivera Medenica, *The Immutable Tort of Cyber-Defamation*, 11 No. 7 J. INTERNET L. 3, 8 (2008); Robert D. Richards, *Sex, Lies and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 215-16 (2009).

the public interest in obtaining information about why the statement is newsworthy. With the protection of the neutral reportage privilege, online publishers would not have to make this calculation; they would have to ensure that the charges are newsworthy while accurately reporting them without joining in the defamatory attack. In other words, they would have an incentive to engage in ethical journalistic behavior.

Finally, one could argue based on the data that the lack of a privilege is not inhibiting the reporting of newsworthy defamatory statements, and so there is no need for additional legal protections. Indeed, in the jurisdictions in which the privilege has been rejected or the law is unclear, 48 percent (11 out of 23) have always reported such comments, 17 percent (4 out of 23) never, and about 35 percent (8 out of 23) have both reported and not. This argument echoes a long-standing criticism of expanded First Amendment barriers to defamation liability that considers such protections unnecessary given the prosperous state of the American media.<sup>125</sup> An updated criticism might be that while traditional print and broadcast outlets are suffering, it is not because of defamation liability, and meanwhile online media is flourishing.

However, Congress passed Section 230 precisely because of concerns about the chilling effects of such liability. In the words of one court that broadly interpreted the provision, “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”<sup>126</sup> Neutral reportage doctrine recognizes that this threat continues to exist for certain speakers in the online and offline worlds, and that it can deny readers important information. While the actual malice standard made it more difficult to chill press freedom through defamation liability, such litigation did not cease after *Sullivan*. Judge Robert Bork wrote in the mid-1980s of a “remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards [that] has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit.”<sup>127</sup> In his book *Suing the*

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<sup>125</sup> See, e.g., Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1010 (2000) (arguing that the fact “the press in the United States and other common law countries had flourished under the general rules in force prior to the advent of *New York Times*” shows such state tort law protections are adequate).

<sup>126</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>127</sup> *Ollman v. Evans*, 750 F.2d 970, 996 (Bork, J., concurring). See also LEWIS, *supra* note 19, at 200-18.

*Press*, Professor Rodney Smolla found that the rise in defamation claims was not a mere function of legal doctrine, but that it also stemmed from a complex interaction of political, social and psychological factors.<sup>128</sup> Despite recent innovations like the application of state anti-SLAPP<sup>129</sup> statutes in media cases that have made it more difficult to sue for defamation,<sup>130</sup> there is no reason to think that such a confluence of trends could not once again bring defamation claims back into fashion. *Norton*, meanwhile, shows that such actions can still succeed. If any readers are denied important information about the behavior and fitness of their elected officials because of concerns over the sort of liability imposed in *Norton*, then an important First Amendment value has been damaged. The survey participant's description of the altering of his piece on the blog attack against a rival candidate in response to defamation concerns shows another risk. The journalist in that situation said that the toned down article that ran in the newspaper did not sufficiently communicate what the speaker actually said and so readers were confused and misled – a classic chilling effect with harmful consequences.

The argument that the press is doing fine without the neutral reportage privilege may have some force in private figure contexts, but it is insufficient when dealing with public officials. Justice Byron White made the distinction in his *Gertz* dissent. “The press today is vigorous and robust,” White wrote. “To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth.”<sup>131</sup> The justice distinguished public official cases, though, because those implicated the “central meaning” of the First Amendment, which White understood to mean no seditious libel. “In a democratic society such as ours, the citizen

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<sup>128</sup> RODNEY A. SMOLLA, *SUING THE PRESS* 7 (1986) (“The new invigoration of the law of defamation and invasion of privacy is in part the result of changes in legal doctrine, but it is even more a reflection of changes in the attitudes and frustrations of contemporary Americans.”).

<sup>129</sup> Anti-SLAPP statutes (concerning so-called “Strategic Lawsuits Against Public Participation”) exist in about half the states and allow for lawsuits that implicate a defendant’s First Amendment rights of free speech or free petition to be dismissed at an early stage if they are unlikely to succeed on the merits. *See, e.g.*, Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235 (2007).

<sup>130</sup> *See* Robert D. Richards & Clay Calvert, *Suing the Media, Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy*, 67 ALB. L. REV. 1097, 1112 (2004).

<sup>131</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 390 (1974) (White, J., concurring).

has the privilege of criticizing his government and its officials.”<sup>132</sup> This has been the consensus First Amendment theory that has dominated Supreme Court jurisprudence.<sup>133</sup> Therefore, when confronted with a choice between under-protecting this interest with the current neutral reportage status quo and possibly over-protecting it with wider adoption of the privilege, the tradition of the self-governance/anti-seditious libel theory of First Amendment law argues in favor of over-protection.<sup>134</sup>

#### IV. CONCLUSION

Some of the most incisive critics of the Supreme Court’s defamation jurisprudence suggest that, in affording the press such great protection, the Court undervalues the public interest in truth.<sup>135</sup> A related critique is that the actual malice standard, with its floor of recklessness, encourages the press to push the boundaries of negligence through sloppy reporting.<sup>136</sup> When applied correctly, neutral reportage doctrine should largely avoid these concerns because, unlike the paradigmatic actual malice case, it does not involve a mistake but rather an intentional decision to report accurately on a falsehood of importance to the public. While the substantive defamation being repeated is false, the fact of its utterance is true and that predominates in a neutral reportage scenario.

One attorney noted that this still could produce great harm if it ends up enabling demagogues. “It would protect someone like Joe McCarthy because it allows people to make false allegations as long as they’re ‘newsworthy.’”<sup>137</sup> While that is certainly a legitimate concern, it also cuts in favor of the privilege, for it would also be impossible for the press to expose someone like Joe McCarthy without being able to

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<sup>132</sup> *Id.* at 387.

<sup>133</sup> *See supra* notes 95-98.

<sup>134</sup> *See also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1139 (2002) (suggesting that the “indispensable” *Sullivan* rule can be defended with appeals to principle rather than requiring empirical evidence of chilling effects).

<sup>135</sup> *See, e.g.*, LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 120 (1992) (“[F]alsity flowing from that robust debate may lead to an impoverished discourse where truth never quite has a chance to catch up”).

<sup>136</sup> *See, e.g.*, Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 927 (1984) (comparing libel of public figures with its constitutionally heightened culpability standard with other areas of tort law where negligence standards govern risk-creating but socially beneficial activities).

<sup>137</sup> Huber, *supra* note 43, at 16 (quoting media lawyer Alan H. Fein).

use his own words to illustrate the extent of his misdeeds.

Some doctrinal limitations on the neutral reportage privilege may very well be appropriate to keep it from abetting demagogues, unduly hurting the reputations of those outside positions of power, and spreading misinformation and slander without the proper context. However, courts such as the one that decided *Norton v. Glenn* err when they reject the core model of the neutral reportage privilege – a true account of statements an elected official made about other elected officials that bore directly on his fitness for office – that is consistent with long-established First Amendment principles.

The reasoning behind the decision and related criticism from other courts and commentators rests on certain empirical assumptions about the behavior of the press. Critics of neutral reportage maintain that the First Amendment interest in open debate is adequately served by the actual malice standard, and that recognizing neutral reportage doctrine would fundamentally alter the balancing inherent in existing libel jurisprudence. These assume that public officials rarely make newsworthy defamatory statements, and that when they do journalists would take advantage of the neutral reportage privilege to publish the statements without regard to the balancing of interests inherent in defamation doctrine.

The results of the survey cast doubt on those assumptions, suggesting that neutral reportage scenarios are common enough to create a substantial loophole in defamation law, and that reporters will continue to balance free speech with reputational harm even if granted additional legal protection. In light of this, along with the commitment to robust political discourse that has long guided American libel jurisprudence, the core model of the neutral reportage privilege should be adopted nationwide. Clarifying the law regarding the republication of slanderous statements in such a way would be especially welcome in a time when the rapid growth of new media has created much uncertainty.