

THE PAPER CASE¹: THE NEUTRAL REPORTAGE PRIVILEGE
IN DEFAMATION CASES AND ITS IMPACT
ON THE FIRST AMENDMENT

SHELLY ROSENFELD*

“It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life.”²

—*Edwards v. National Audubon Society*

“In its rush for the headline that the hero was the bomber, the media cared nothing for my feelings as a human being. In their mad rush to fulfill their own personal agendas, the FBI and the media almost destroyed me and my mother.”³

—Richard Jewell

I. INTRODUCTION

Richard Jewell was never formally charged with a crime for the events that transpired at the Atlanta Olympic games, but the onslaught of press reports centering around Jewell as the prime suspect of the Centennial Olympic Park bombing forced Jewell to endure a harrowing “trial by media.”⁴ Richard Jewell was working as a security guard during the 1996 Summer Olympics in Atlanta, Georgia when he discovered a suspicious knapsack that contained a

* Shelly Rosenfeld is a licensed attorney and worked as a television anchor and reporter. She earned her LL.M. at UCLA Law School, J.D. at University of California, Hastings College of the Law, Masters of Science in Journalism at Northwestern University, and Bachelor of Arts, Political Science, Mass Communications at University of California, Berkeley. Shelly would like to thank Professor Neil Netanel for his insightful feedback and guidance and Professor David Nimmer for his wisdom and support for this Note.

1. See THE PAPER CHASE (Twentieth Century Fox Film Corporation 1973) (substituting “case” to refer to television series and film, *The Paper Chase*, based on first year law student’s experiences).

2. *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 122 (2d Cir. 1977).

3. *NewsHour with Jim Lehrer: Olympic Park: Another Victim* (PBS television broadcast Oct. 28, 1996) available at http://www.pbs.org/newshour/bb/sports/jewell_10-28.html.

4. See *Showbiz Tonight* (CNN television broadcast, Aug. 17, 2006, 19:00), available at <http://transcripts.cnn.com/TRANSCRIPTS/060817/sbt.01.html> (discussing Jewell example and prevalence of media hype).

pipe bomb and notified police.⁵ While more than 100 people were injured, Jewell was able to clear many people away from the scene, thus saving lives.⁶ Although at first news organizations lauded Jewell as a hero, they later cast him as a suspect of a federal investigation.⁷ The news coverage that followed painted him as a recluse and a deviant, which he claimed tainted him long after his name was cleared.⁸ Jewell said of his experience, “The heroes are soon forgotten. The villains last a lifetime. . . . I dare say more people know I was called a suspect than know I was the one who found the package and know I was cleared.”⁹ Eventually, police found the real bomber, who pled guilty to the charges.¹⁰ Jewell sued several news organizations for defamation.¹¹ While most of those cases were settled, Jewell still found the outcome unsettling:

For that two days [before allegations of his involvement in the bombing], my mother had a great deal of pride in me — that I had done something good and that she was my mother, and that was taken away from her She’ll never get that back, and there’s no way I can give that back to her.¹²

The Jewell case is just one example of news coverage that not only taints an individual’s good name, but also injures the public’s perception of journalism. In the rush of the twenty-four hour news

5. See, e.g., Kevin Sack, *The Richard Jewell Inquiry: A Man’s Life Turned Inside Out By Government and the Media*, N.Y. TIMES, Oct. 28, 1996, at A1, available at <http://www.nytimes.com/1996/10/28/us/a-man-s-life-turned-inside-out-by-government-and-the-media.html?src=pm> (discussing Jewell’s discovery of pipe bomb outside Olympic park and FBI’s subsequent investigation of Jewell as lead suspect).

6. See, e.g., Kevin Sack, *Richard Jewell, 44, Hero of Atlanta Attack, Dies*, N.Y. TIMES, Aug. 30, 2007, at C13, available at http://www.nytimes.com/2007/08/30/us/30jewell.html?_r=2 (stating 111 people injured and one person killed in explosion).

7. See Sack, *supra* note 5 (discussing police involvement in interrogating Jewell and holding him suspect in bombing).

8. See David Kohn, *60 Minutes II: Falsely Accused*, CBS NEWS (Feb. 11, 2009, 9:18 PM), <http://www.cbsnews.com/stories/2002/01/02/60II/main322892.shtml> (discussing FBI’s suspicion of Jewell and his ordeal with media throughout FBI investigation).

9. Harry R. Weber, *Jewell: Olympics allegations still painful*, USA TODAY (July 23, 2006, 10:14 PM), http://www.usatoday.com/news/nation/2006-07-23-jewell-re-members_x.htm (internal quotations omitted).

10. See *id.* (discussing identity of real bomber, Eric Rudolph, found five years after Atlanta bombing).

11. See *id.* (discussing Jewell’s suits against media companies and Jewell’s advocacy of media scrutiny since bombing); see also Sack, *supra* note 5 (discussing actions and hype of media frenzy surrounding Jewell).

12. ‘All I did was my job’ Decade Later, *Pain of Being Called Bombing Suspect Fresh to Richard Jewell*, MSNBC (July 27, 2006, 8:45 AM), http://www.msnbc.msn.com/id/14029576/ns/us_news-life/.

cycle, especially in the immediacy of online broadcast news and print, journalists have tremendous pressure to get the story first. While journalists are busy with the facts, the media's investigation of the facts becomes very transparent. A consequence of the pressure for news immediacy is the lowering of journalistic standards, and inevitably, the perpetuation of innocent mistakes. In Jewell's case, news outlets reinforced the notion that Jewell fit the character of an alleged bomber and continued to propagate that notion in waves of successive newscasts. In the court of public opinion, is a "trial by media" just one of the consequences we'll have to accept from time to time to ensure a free press? To determine whether the media can avoid a repeat of Jewell's situation while still enjoying freedom of the press and ensuring public access to information about an ongoing controversy, it is necessary to examine the relevant tort law.

Defamation consists of either libel, which consists of written defamation, or slander, relating to spoken defamation.¹³ To recover in either of these areas, the plaintiff must prove that the statement was defamatory (meaning that the statement tended to injure plaintiff's reputation), the statement was of and concerning the plaintiff, the material was published to a third party, and that damages are presumed in libel or slander per se.¹⁴ Slander per se only applies to the following specific circumstances: when individual makes a defamatory statement that relates to a plaintiff's ability to do his job, alleges that a plaintiff committed a serious crime of moral dimensions, impugns a woman's chastity, or claims that a plaintiff suffers from a loathsome disease.¹⁵ If not slander per se, the plaintiff is required to prove that the statement inflicted economic harm.¹⁶ The public figure-private figure distinction is significant, and yields two different standards of proof for defamation. To that end, a public figure must prove that the statement was false and demonstrate actual malice on the part of the defendant, which

13. See RESTATEMENT (SECOND) OF TORTS § 568 (1977) (distinguishing libel as "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words" whereas slander is defined as "the publication of defamatory matter by spoken words, transitory gestures, and any form of communication other than [libel]").

14. See *Libel and Slander*, FREE LEGAL ENCYCLOPEDIA: LEGISLATIVE VETO TO LLOYD'S, <http://law.jrank.org/pages/8243/Libel-Slander.html#ixzz1Gaheyndt> (last visited Oct. 18, 2011) (defining factors relevant to defamation suit).

15. See 50 AM. JUR. 2D *Libel and Slander* § 141 (2011) (discussing elements of slander per se).

16. See 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 39 (2011) (describing elements proving defamation, slander per se, or damages).

is defined as “knowledge of falsity or reckless disregard” of the truth.¹⁷ This standard, articulated in *New York Times Co. v. Sullivan*,¹⁸ is based on the understanding that public officials have greater access to the media to clear their names than private figures, and that news stories about public officials are essential to an informed public.¹⁹ In order to promote these goals, the press needs robust protections for journalists who report information that would tend to injure a public official’s reputation, even if that information later turned out false. To further meet these goals, courts should uniformly adopt the neutral reportage privilege.

The neutral reportage privilege applies when “a republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher’s subjective awareness of the truth or falsity of the accusation.”²⁰ The details of the investigation and Richard Jewell’s status as a suspect were themselves newsworthy. The fact that the accusations later turned out to be unfounded doesn’t in retrospect mean that the newspaper should not have reported those accusations. If journalists were punished for republishing statements because of their potential falsity, this would significantly hamper their ability to report on controversial people and issues. This Note proposes that every jurisdiction adopt the neutral reportage privilege.

In Richard Jewell’s libel case against an Atlanta newspaper, *Atlanta Journal-Constitution v. Jewell*,²¹ the Georgia Court of Appeals affirmed the trial court’s determination that Jewell was a voluntary, limited-purpose public figure.²² Jewell was unknown before the Olympic Park bombing, and soon became a target of the media’s watchful gaze. Jewell argued that he was not a public figure, and thus should not be subject to an actual malice standard.²³ The

17. See *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring malice for defamation claim). But see *Doe v. Daily News, L.P.*, 632 N.Y.S. 2d 750, 755 (1995) (doubting *Sullivan* holding on Constitutional grounds).

18. See *Sullivan*, 376 U.S. at 254, 279-80 (1964) (discussing standard).

19. See *id.* at 304-05 (Goldberg, J., concurring) (“The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements.”).

20. See *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1123 (N.D. Cal. 1984) (defining neutral reportage privilege).

21. See *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 175 (Ga. Ct. App. 2001) (describing case).

22. See *id.* at 187 (describing Jewell as public figure).

23. See *id.* at 181 (describing test of determining public figure).

court, however, declined to agree.²⁴ The court held that Jewell's actions—such as agreeing to interviews rather than shying away from the spotlight—rendered him a limited-purpose public figure.²⁵

Jewell granted ten interviews and one photo shoot in the three days between the bombing and the reopening of the park, mostly to prominent members of the national press. While no magical number of media appearances is required to render a citizen a public figure, Jewell's participation in the public discussion of the bombing exceeds what has been deemed sufficient to render other citizens public figures.²⁶

This Note does not discuss whether Jewell's categorization as a limited-purpose public figure was fitting. Instead, it discusses whether the doctrine of neutral reportage privilege is applicable once the standard of actual malice takes effect, even when the journalist may have had serious doubts about the validity of the information. Can journalists invoke the neutral reporting privilege to protect their reporting of allegedly defamatory statements provided that they report the story neutrally? The actual malice standard for reporting on a public figure concerns the statements made by the newspaper or broadcast and hinges on the journalist's subjective awareness of the truth or falsity of the statement.

For example, if a newspaper featured a photograph of Jewell with the heading, "Bomber Caught," and either knew or recklessly disregarded truthful information that would absolve Jewell prior to publishing the headline, such conduct would fall under the actual malice standard. The neutral reportage privilege set out in *Edwards v. National Audubon Society, Inc.*,²⁷ however, refers to the newspaper's quotation or description of a defamatory statement made by a third party.²⁸ If a newspaper, for example, quoted a public official who stated that Jewell was most likely the bomber, *Edwards* would apply.²⁹ Although a narrower privilege than the protections afforded in *Sullivan*, *Edwards* interprets *Sullivan* to lay the legal foun-

24. *See id.* at 183 (referring to Jewell as public figure).

25. *See id.* at 185 (stating that agreeing to interviews made Jewell voluntary limited-purpose public figure).

26. *Id.* at 184.

27. 556 F.2d 113 (2d Cir. 1977).

28. *See id.* at 120-21 (2d Cir. 1977) (describing neutral reportage privilege).

29. *See id.* at 119-22 (referring to neutral reportage privilege concept applied *Edwards*).

dation on which the privilege rests.³⁰ The neutral reportage privilege applies in certain situations where a reporter publishes a third party statement that falls under the actual malice standard for defamation, but the privilege absolves the reporter of liability for such a statement.³¹ At common law, one who republishes a defamatory statement is held liable, in addition to the person who first made the statement, as if that person were the one who made the defamatory statement in the first place.³² But in *Edwards*, the court decided that the First Amendment necessitates a neutral reportage privilege: “[When a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity.”³³

As this Note will propose, the neutral reportage privilege is essential to the freedom of the press that the First Amendment requires. The Supreme Court has never ruled that there is a neutral reportage privilege.³⁴ Despite this, it is a doctrine that the Court should affirmatively address at its earliest opportunity. According to *Edwards*, the Supreme Court made strides to set out the neutral reportage privilege in *Time, Inc. v. Pape*.³⁵ As stated in a footnote in *Barry v. Time, Inc.*,³⁶ however, *Pape* was “not generally regarded as adopting a constitutional privilege of neutral reportage.”³⁷ In *Pape*, police officers sued *Time Magazine* for defamation, claiming that a journalist treated the Commission Report’s accusations of police brutality as fact.³⁸ The Court held that the *Time Magazine* reporter, although omitting the word “alleged” when referring to police officer conduct, nonetheless objectively reported the accusations featured in the Commission Report.³⁹ In contrast, the plaintiff

30. See *id.* at 121 (citing *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964)).

31. See *id.* at 120 (describing neutral reportage privilege).

32. See *Khawar v. Globe Int’l, Inc.*, 79 Cal. Rptr. 2d 178, 186 (Cal. 1998) (referring to common law liability when defamatory statement is republished).

33. See *Edwards*, 556 F.2d at 120 (describing First Amendment protection).

34. See generally Dan Laidman, *When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 76 (2010) (stating that Supreme Court has never directly addressed neutral reportage privilege).

35. 401 U.S. 279 (1971). See *Edwards*, 556 F.2d at 121 (2d Cir. 1977) (citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (referring to establishment of neutral reportage privilege doctrine).

36. 584 F. Supp. 1110 (N.D. Cal. 1984).

37. See *id.* at 1123 n.15 (describing scope of neutral reportage privilege generally not within constitutional privilege).

38. See *Pape*, 401 U.S. at 281-82 (indicating that article in *Time Magazine* did not accurately resemble events that had occurred).

39. See *id.* at 292 (holding that *Time Magazine* did not recklessly disregard truth and at most demonstrated error in judgment).

scientists in *Edwards* did not claim that the journalist mischaracterized the Society's accusations, but instead claimed that the journalist was at fault for repeating unfounded accusations.⁴⁰ The policy arguments in *Sullivan* applied to a newspaper's "direct" reporting.⁴¹ These same policy arguments apply to the neutral reportage privilege, which is specific to a journalist's quoting of third parties' newsworthy statements.

Currently, this issue hangs in the balance. Were the Supreme Court to grant certiorari to a libel case where the statements at issue were newsworthy statements made by a third party and the press had reprinted the statements neutrally and with no knowledge of the statements' falsity, the Court should find the existence of such a privilege to protect freedom of the press. Sometimes the reporting of a defamatory statement is newsworthy.⁴² Provided that the reporter objectively reports this information, the reporter should not be held responsible for the content. Rather, only the speaker of the alleged defamatory statement should be held liable for the statement. This paper will examine how defamation cases such as *New York Times v. Sullivan*, *Curtis Publishing Co. v. Butts*,⁴³ *Time, Inc. v. Pape*, *Edwards v. National Audubon Society*, *Norton v. Glenn*,⁴⁴ *Khawar v. Globe International Inc.*,⁴⁵ and *Barry v. Time, Inc.* balance the dual interests of protecting victims from defamation and preserving the First Amendment right of free speech. By examining these cases, this Note will analyze the principles behind the neutral reportage privilege and its relevance for the First Amendment rights of journalists. Journalists test the waters of press protections on a daily basis through their work, especially in times of reporting on controversial issues or on breaking news. Finally, these cases also provide a framework for First Amendment issues in the digital age, where a defamation suit can arise from reporting content as "published" on the internet. The same articles or broadcasts de-

40. See *Edwards*, 556 F.2d at 120 (discussing whether news reporting agency can be liable for making serious charges against public figure without revealing sources).

41. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281-82 (1964) (outlining policy argument behind direct reporting defense).

42. See *Edwards*, 556 F.2d at 122-23 (holding that statements reported were not defamatory).

43. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (examining liability of publisher for libel in light of standards of investigation and reporting).

44. See *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004) (discussing neutral reportage privilege in defamation cases).

45. See *Khawar v. Globe Int'l, Inc.*, 79 Cal. Rptr. 2d 178 (Cal. 1998) (discussing limitation of neutral reportage privilege).

scribed in the case law could have easily been featured online if those events had occurred in the present day.

II. A PUBLIC FIGURE OF SPEECH

Our discussion of the neutral reporting privilege must begin with an understanding of the constitutional underpinnings of the Supreme Court's rulings in this area. As these cases will demonstrate, the goals of the Court's application of the actual malice standard to defamation applied to public officials in *New York Times Co. v. Sullivan*, and public figures in *Curtis Publishing Co. v. Butts*, is actually best preserved by the neutral reportage privilege. The reason for this is that the neutral reportage privilege involves justifications similar to those of the actual malice standard. In other words, the same reason of avoiding the chilling of speech under the First Amendment that justifies a higher burden of proof for a public official or public figure who sues for defamation, justifies the need for a neutral reportage privilege. *Edwards v. National Audubon Society* is perhaps the most famous pronouncement of the neutral reportage privilege, defining its scope to extend to statements either relating to or made by public officials and public figures. As I will explain, *Edwards* works to enhance the protections that *Sullivan* established. While the neutral reportage privilege would only apply when the defamation plaintiff is a public official or public figure, the difference is that even if the reporter re-publishes a defamatory statement about that person, the state of mind of the reporter, i.e. reckless disregard of the truth or falsity of the statement, is irrelevant, as long as that the reporter did not aim to "deliberately distort[] these statements to launch a personal attack of his own on a public figure"46

In *Sullivan*, the *New York Times* printed a full-page advertisement describing "a wave of terror" against African Americans engaged in non-violent demonstrations in Alabama.⁴⁷ While the advertisement did not identify L.B. Sullivan by name, Sullivan sued the *Times*, claiming that the newspaper libeled him.⁴⁸ Sullivan claimed that numerous statements, including, "police armed with

46. See *Edwards*, 556 F. 2d at 120 (holding that neutral treatment of claims and accusations is necessary to receive neutral reportage privilege).

47. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256-57 (1964) (discussing exact contents of publication in question to include description of current civil rights demonstrations and request for funds to support student movement, right to vote, and Dr. Martin Luther King, Jr.'s legal defense).

48. See *id.* at 258 (discussing how publication's description of event and reference to police would lead readers to believe it referred to plaintiff).

shotguns and tear-gas” and “[the students’] dining hall was padlocked in an attempt to starve them into submission” referred to him because he was responsible for supervising police actions.⁴⁹

The Court acknowledged the inaccuracies in the statements, but noted “that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁵⁰ Thus, the *New York Times* was not found liable. A rule of law that would punish an inaccurate statement made against a public official for actions relating to his office has the undesirable effect of punishing criticism of the government, and thus, the Court said, the public interest outweighs the interest of the public official.⁵¹ As decided by *Sullivan*, if a public official faced a false statement of fact that met the actual malice standard of knowledge of falsity of reckless disregard for the truth, then the public official could sue under libel to seek compensation for injury to his reputation⁵² The definition of “reckless disregard” for the truth is itself murky, as the Court acknowledges in *Sullivan*.⁵³ In that case, the Court cites Justice Jackson’s statement in *United States v. Ballard*: “I do not see how we can separate an issue as to what is believed from considerations as to what is believable.”⁵⁴ The actual malice state of mind analysis could force a court to consider whether the reporter believed the statement to be true, in addition to whether the false information was believable. The neutral reportage privilege benefits the media by rendering the reporter’s state of mind as to the third party statement irrelevant, whereas actual malice does not.

If the case involved a news story instead of the advertisement at issue in *Sullivan*, the neutral reportage privilege could apply. If a journalist covered the events involved in the lawsuit, repeating the content of the advertisement or perhaps obtaining statements made by those who sponsored the ad, and these statements injured Sullivan’s reputation, should the reporter be liable for printing them? What if the reporter repeats the statements in a neutral way and attempts to solicit Sullivan’s response to those allegations, even

49. *Id.* at 257.

50. *See id.* at 258-59 (“It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.”). *Id.* at 271-72.

51. *See id.* at 281 (holding interest of public and government to discuss and criticize public features outweighs individual’s interest in reputation).

52. *See id.* at 279-80 (requiring showing of actual malice in order for public figure to receive compensation for libel).

53. *See id.* at 279 (discussing proof difficulties this standard will pose).

54. *United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

if the reporter had serious doubts as to their truth? Without the neutral reporting privilege, the journalist, and potentially the news organization employing that reporter, could face a lawsuit. Because the information had made its way into a widely circulated publication such as the *New York Times*, it was in the public's interest to report on the ad's disputed content.

Just a few years after *Sullivan*, the Court broadened its definition of actual malice to include public figures in addition to public officials. In *Curtis*, the Supreme Court resolved two issues at the same time by examining an individual plaintiff who had become a public figure by nature of his position and another who had attained the status through his actions.⁵⁵ Moreover, the cases illustrate the scope of actual malice by examining a wide array of situations. The first involved university athletic director and former University of Georgia football coach Wally Butts, who sued the *Saturday Evening Post* for publishing that he and another coach "fixed" the results of a football game.⁵⁶ The Court also addressed a second case in which retired military general Edwin Walker sued the *Associated Press* for publishing an article describing Walker's involvement in a riot opposing an African American student's acceptance to the University of Mississippi.⁵⁷ Both Butts and Walker were not public officials, so *Sullivan* did not apply.⁵⁸ But the court deemed these plaintiffs public figures for the following reasons:

Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion

55. See *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 135, 140 (1967) (describing two plaintiffs, athletic director of large university and private citizen, who gained publicity through political statements against physical federal intervention).

56. See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 4 (2003) (explaining that article alleged that Butts conspired with head coach of University of Alabama football team, Paul "Bear" Bryant, to rig 1962 game).

57. See *id.* (explaining that news item concerned Walker's role in civil unrest that broke out after James Meredith was admitted in 1962 as first African American to attend University of Mississippi).

58. See *Curtis*, 388 U.S. at 146 (recognizing argument "that the publicity in these instances was not directed at employees of government and that these cases cannot be analogized to seditious libel prosecutions").

the falsehood and fallacies' of the defamatory statements.⁵⁹

The rationale underlying this decision is that not only public officials, but public figures who take action to become part of an important public issue, have access to a medium that could enable them to expose the false accusations that allegedly injured their reputation. The Court determined that Butts was a "well-known and respected figure in coaching" and Walker was a man of "political prominence" because his "strong statements against [federal troops' involvement in school segregation] had received wide publicity."⁶⁰ Thus, the Supreme Court determined for the purpose of serving the public interest, the government does not distinguish between "criticism of private citizens who seek to lead in the determination of . . . policy . . . [and] criticism of government officials."⁶¹

The *Curtis* case yields an important rationale for the neutral reportage privilege. The neutral reportage privilege only applies when a court would find actual malice in the first place, since if there is no actual malice, there is no defamation.⁶² "Even absent the special protection afforded to neutral reportage . . . the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the *Times*."⁶³ Thus, it is clear that the neutral reportage privilege only has an effect on cases that would otherwise demonstrate actual malice. Once there is a finding of actual malice, the journalist could assert the neutral reportage privilege as a shield from liability. In practice, if the newspaper has actual knowledge that the statement was false, the neutral reportage privilege, as adopted by *Edwards*, would apply because of the court's pronouncement that the journalist's state of mind as to the truthfulness of the quote's substance is irrelevant. As the court discussed in *Edwards*, "[s]uccinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the

59. See *id.* at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

60. *Id.* at 140.

61. *Id.* at 147-48 (quoting *Pauling v. Globe-Democrat Publ'g Co.*, 362 F.2d 188, 196 (8th Cir. 1966)).

62. See Justin H. Wertman, *The Newsworthiness Requirement of the Privilege of Neutral Reportage is a Matter of Public Concern*, 65 *FORDHAM L. REV.* 789, 789 (1996) ("[T]he privilege is an exception to the common law rule that one who repeats defamatory statements of another is liable for defamation.")

63. *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (quoting *Time, Inc. v. Pape*, 401 U.S. 279 (1971)).

accurate and disinterested reporting of those charges, regardless of the reporter's private views concerning their validity."⁶⁴ In its actual malice analysis, *Edwards* held that the newspaper did not need to accept denials at face value.⁶⁵ In addition, Floyd Abrams concluded that *Edwards* affirmed the notion "that a critical function of the press, at best, is to report charges and countercharges made by candidates for public office and that the press should not be obliged to decide between them in order to be safe from potential libel liability."⁶⁶ This is certainly a distinct benefit that the neutral reportage privilege supplies: the privilege allows the reporter to disseminate the uninhibited dialogue of public officials and public figures.

The distinction between actual malice and the neutral reportage privilege is further explained in the words of Ray Worthy Campbell:

This privilege shields from liability those who republish certain known libels of public figures, wherever those charges were made. The neutral reportage privilege thus creates an exception to the general rule that states may redress knowing or reckless defamation published outside the limited setting covered by the common-law fair report privilege.⁶⁷

The Associated Press ("AP") in *Walker* received the information from a reporter on the scene and had no reason to believe the reporter was not reliable.⁶⁸ Thus, the neutral reportage privilege need not apply to the *Walker* case because the Court did not find actual malice on the part of the defendant, AP.⁶⁹

In addition, the reporter's "dispatches . . . with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized

64. *Id.*

65. *See id.* at 121 (stating reporters need not rely on denials alone).

66. *See* Floyd Abrams, *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., The Past and the Future*, 65 ST. JOHN'S L. REV. 731, 736 (1991) (stating *Edwards* used different method).

67. Ray Worthy Campbell, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 854 (1983).

68. *See* *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 141 (indicating that reporter in *Walker* was present during events and there was no indication of personal prejudice or incompetency by reporter) (citations omitted).

69. *See id.* at 142 (finding no showing of actual malice based on "rapid and confused occurrence of events," and surrounding facts and circumstances).

statements on the underlying controversy.”⁷⁰ The Court found that a reporter for *The Saturday Evening Post* had actual malice, and therefore the reporter could assert the neutral reportage privilege.⁷¹ If a reporter does not have actual malice, there is no need for the privilege because the reporter will not be liable for defamation. The entire purpose of the neutral reportage privilege is that, even if the reporter believed the statements were likely untrue and published them anyway because they came from a public figure and were about a public figure, the privilege would allow the reporter to avoid liability under the actual malice standard as long as the reporter neutrally reported the article.

Such a privilege applies even if the reporter believes the statement to be factually untrue. In order for the privilege to apply, the reported statement must come from a public figure and pertain to a public figure. When it comes to news, it is considered newsworthy to report *that* a public figure made a statement even though the *content* of that statement may be untrue. For purposes of illustration, suppose that Sarah Palin made a statement that Barack Obama is not a U.S. citizen. Such a statement is newsworthy in and of itself because of the parties involved, regardless of the truth or falsity of its content. By reporting that Sarah Palin made such a statement, the newspaper is reporting what actually happened, that Sarah Palin made a statement, not that the statement Sarah Palin made was an objective truth or falsehood. Even if that same newspaper has serious doubts as to the validity of Sarah Palin’s claim, the newspaper would not be liable for defamation under the neutral reportage privilege provided that it reports the story in a neutral manner.

While the neutral reportage privilege is a necessary protection for the press, the privilege does not give the journalist *carte blanche* to be irresponsible. For example, the reporter who wrote about Butts cited as his main source a person named George Burnett, who claimed that he had overheard the conversation between the two coaches and taken notes.⁷² One prong of the neutral reportage privilege requires that the statement must come from “a responsible, prominent organization” or individual.”⁷³ This is just

70. *Id.* at 158-59.

71. *See id.* at 166 (explaining that jury awarded plaintiff \$3,000,000 in punitive damages after receiving ‘actual malice’ instructions).

72. *See id.* at 136 (describing article’s statement that Burnett overheard telephone conversation between two coaches due to electronic error).

73. *See Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (referring to requirement as part of “fundamental principle” at stake in case).

another way of stating that the statement must come from a trustworthy public figure. Burnett was on probation because he had a history of writing faulty checks, a past that suggested he was far from a trustworthy person. In addition, the reporter did not seek independent corroboration of Burnett's statements.⁷⁴ "John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed . . . [and] no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information."⁷⁵ Finally, the press did not compare video footage of the game with the source's notes to determine whether the information the source supposedly overheard was general talk about football that would have held little value to an opposing coach.⁷⁶ Thus, the Court found that the reporter's actions amounted to actual malice.⁷⁷ Because the journalist merely repeated the accusations of a third party, Burnett, one might think that the neutral reportage privilege might apply to shield the reporter from liability. Despite this inclination, *Edwards* requires that the statement not only derive from any third party, but it must be a "newsworthy accusation[] made by a responsible and well-noted organization" or person.⁷⁸ In this case, the source does not fit that category. In addition to lack of trustworthiness indicated by his criminal background (mentioned above), Burnett was not a public official, did not represent a reputable, public organization, and his past actions demonstrated that he was not a responsible person. Standing alone, his statements were not newsworthy, and therefore not protected by the neutral reportage privilege.

III. DON'T KILL THE MESSENGER: MAKING THE CASE FOR THE NEUTRAL REPORTING PRIVILEGE

"The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press

74. See *Curtis*, 388 U.S. at 157-58 (stating Burnett's history).

75. *Id.* at 157.

76. See *id.* at 136, 158 (stating Coach Butts's defense that phone conversation contained general football talk that would have been of little value to the opposing team and noting "[t]he Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless.")

77. See *id.* at 157-58 (concluding that evidence was sufficient to support jury finding of actual malice based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting normally adhered to by responsible publishers").

78. See *Edwards*, 556 F. 2d at 122 (referring to appellees as "paid liars").

be afforded the freedom to report such charges without assuming responsibility for them.”⁷⁹ Some courts have addressed whether a reporter should suppress a newsworthy, but potentially defamatory, statement about a public figure when the reporter has serious doubts about the statement’s truth. The neutral reportage privilege addresses this issue. In *Edwards v. National Audubon Society*, a group of scientists sued the *New York Times* for libel in printing the National Audubon Society’s statements that attacked researchers who supported continued use of the pesticide DDT.⁸⁰ The *New York Times* accurately reported the statements, and the paper considered the organization’s statements to be “newsworthy” because they came from a reputable environmental organization.⁸¹

In 1977, at the time of the case, the debate about DDT had become heated. On one side of the debate, environmental organizations such as the Audubon Society argued that the pesticide would endanger the lives of birds. In contrast, supporters of the chemical’s continued use asserted that “millions of humans [would] die of insect-carried diseases and starvation caused by the destruction of crops by insect pests” if not for the use of DDT.⁸² Anti-DDT groups averred that the DDT supporters were backed by the pesticide industry, while the supporters of DDT claimed that opposition to its use was “genocidal.”⁸³

A specific area of disagreement between the two sides involved an issue within the Audubon Society’s report, entitled the “Bird Count.”⁸⁴ The Bird Count showed that despite the use of DDT, the number of birds documented had actually increased. DDT proponents interpreted the Bird Count to mean that the insecticide did not harm the bird population. The Audubon Society countered that the growing number of birds listed was the “result of not more birds, but more birders” and the increased number of bird sightings resulted from “more birders who are also better birders.”⁸⁵ Thus, argued Robert S. Arbib, Jr. in the Bird Count report preface, “[a]nytime you hear a ‘scientist’ say the opposite [of the Audubon

79. *Id.* at 120.

80. *See generally, id.* at 118-19 (detailing factual background and Society’s initiation of litigation).

81. *See id.* at 117 (stating the reporter “immediately realized that the Audubon Society’s charges were a newsworthy development in the already acrimonious DDT debate”).

82. *Id.* at 115-16 (stating opposing argument).

83. *See id.* at 115-16 (explaining scope of DDT debate).

84. *See id.* at 116 (defining “bird count”).

85. *See id.* 117-19 (stating Audubon Society’s argument).

Society's position], you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."⁸⁶

Arbib's statement effectively calling the pro-DDT scientists "paid liars" was not founded upon any concrete evidence.⁸⁷ In fact, when a reporter questioned him about these scientists, Arbib was unable to name anyone in particular. Finally, a colleague at the Audubon Society named some individuals, whom the reporter mentioned in the article. Even in naming these scientists, the Society could not point to a single person it truly believed was a paid liar, but instead stated that scientists "have been consistent misinterpreters of the information in *American Birds*."⁸⁸ In earlier proceedings, the district judge determined that the scientist plaintiffs were public figures, and thus the actual malice standard applied.

The reporter contacted the named scientists and asked for their responses to the allegations.⁸⁹ Although unable to reach every scientist to get their response, the journalist made an effort to get both sides of the story, and printed the scientist's responses.⁹⁰ The court held that because the statement came from a reputable organization, the Audubon Society, about a controversial issue, the use of DDT, the comments were a "newsworthy" development to an ongoing story. While the district court held the *New York Times* liable for libel based on actual malice, the Second Circuit reversed.

Despite acknowledging that the statements were hurtful, in holding the *New York Times* not liable, the Second Circuit offered perhaps the most significant judicial pronouncement on the neutral reportage privilege. The court stated that even if a reporter has doubts as to the truthfulness of a statement by a responsible organization, the reporter, or the reporter's news organization, should

86. *See id.* at 118 (quoting *New York Times* article at issue).

87. *See id.* at 117 (Despite the potentially explosive character of the allegation that scientists supporting DDT were paid liars, Arbib does not appear to have had any factual basis for the charge.).

88. *See id.* at 117 (quoting Mr. Arbib).

89. *See id.* (including "appellees Dr. J. Gordon Edwards, Professor of Entomology at San Jose State College in California, Dr. Thomas M. Jukes, Professor of Medical Physics and Lecturer in Nutrition at the University of California, Berkeley, and Dr. Robert H. White-Stevens, Professor of Biology at The Rutgers University in New Jersey as well as Nobel Laureate Norman Borlaug and Dr. Donald Spencer, a lecturer of the National Agricultural Chemical Association").

90. *See id.* at 117-18 ("He succeeded in reaching three: Dr. White-Stevens, Dr. Jukes, and Dr. Spencer. All of these scientists categorically denied the charges, and Dr. Spencer even referred to them as 'almost libelous.' Dr. White-Stevens and Dr. Jukes, in addition, sent Devlin voluminous supporting materials setting forth their side of the DDT debate.").

not be held liable for publishing the statement.⁹¹ The court reasoned that the statement was in and of itself “newsworthy” because of its source, regardless of whether the statement was truthful or not. This is exactly the limit of the privilege: that the reporting is really just about what the “responsible” organization or person said.⁹²

The neutral reportage privilege distinguishes between the accuracy of the quote and the quote itself being intrinsically accurate. According to the court in *Edwards*, “if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.”⁹³ Additionally, the *Edwards* court also noted that “a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage.”⁹⁴ In other words, if a reporter or publisher is biased against the one claiming defamation, the neutral reportage privilege does not apply.

In *Edwards*, the court held that the neutral reportage privilege applied to the reporter because the reporter did not support the National Audubon Society’s statements against the scientists in his article.⁹⁵ Although the court noted the fact that the reporter did include responses from some of the scientists, the reporter was not required to include the scientists’ response for the privilege to be valid. According to the actual malice standard in *Sullivan*, a reporter is liable for libel if the plaintiff can prove that the reporter published a statement with knowledge that the statement “was false or acted in reckless disregard of its truth”⁹⁶ Thus, if the re-

91. *See id.* at 120 (“[W]hen a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity.”).

92. *See id.* (“[A] publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations.”).

93. *See id.* at 120 (noting reason why neutral reportage privilege is important).

94. *See id.* (stating people not protected by neutral reportage privilege and why those individuals cannot enjoy protection of neutral reportage privilege).

95. *See id.* at 121 (stating, “evidence adduced at trial was manifestly insufficient to demonstrate ‘actual malice’ on the part of the Times”).

96. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964) (defining actual malice standard and noting that standard is necessary to protect reporters’ First and Fourteenth Amendment rights).

porter knew or strongly believed that the statement made by another was false but printed it anyway, the reporter could be subject to a libel judgment. In *Edwards*, it is likely that the reporter was skeptical about the validity of the Society's allegations due to the lack of evidence that the Society presented to substantiate its claims. In such a situation, a journalist or perhaps the news organization would likely make the call whether to print or broadcast the story. In my experience as a television reporter and anchor, among the practical factors that the editorial staff would consider are the newsworthiness factor that the *Edwards* court mentions.⁹⁷ In addition to the television station or newspaper's usual concerns of whether the matter was relevant, important, and interesting, the news organization ought to consider whether publicizing the story would subject it to any liability.

From a practical standpoint, the neutral reportage privilege provides an important safeguard to the news industry in terms of preventing potential financial liability. Even if the news organization has an errors and omissions insurance policy, continuous libel suits would drive up the policy's cost. Additionally, continuous litigation would also cause the news organization to be overcautious in its news reports, resulting in an overall decrease in the reporting of controversial allegations. A news organization simply cannot afford to remain in business if it is afflicted by continuous libel litigation.

Whether a reporter has acted with actual malice is evaluated according to the reporter's actions. The relevant question is this: did the reporter ignore evidence that would make the quotes seem less accurate? Certainly in cases such as *Edwards*, the more research the reporter does, the greater effort he expends in getting the response of the victims of the alleged defamation, and the greater doubt the reporter has about the original statements in question.

While there is a public interest in promoting the dissemination of truth, there is also a corollary interest in protecting a reporter's freedom of speech to encourage, and not stifle, reporting of newsworthy events. If the neutral reportage privilege does not operate as a shield for reporters, reporters would be discouraged from conducting research on both sides of a story. If the neutral reportage privilege was eliminated, reporters might have serious doubts about

97. The author worked as an anchor and reporter at KYMA-TV and as a Washington Correspondent for WDAY-TV and WDAZ-TV. *See also* *Edwards*, 556 F. 2d at 120 ("What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.").

the validity of original quotes, which could potentially reach the level of actual malice. The neutral reportage privilege, however, does not eliminate actual malice. Instead, actual malice exists alongside the neutral reportage privilege. Actual malice allows the fact finder to determine whether the reporter was negligent in researching the allegations, or possessed motive or intent to harm the subject of the allegations, while the neutral reportage privilege protects the reporter where the reporting itself is neutral and accurate. “[T]he First Amendment protects the accurate and disinterested reporting of these charges, regardless of the reporter’s private views regarding their validity.”⁹⁸ Even if a journalist knows for certain that the statement is false, the privilege still applies, as long as the journalist reports the story neutrally and the statement is from or about a public figure or official.

The next question that arises is whether the neutral reportage privilege would apply in the *Jewell* case. Although many of Jewell’s libel suits were settled out of court, a case against the Atlanta Journal-Constitution is still pending.⁹⁹ If the court affirms the other rulings that Jewell was a public figure, the actual malice standard will apply. If the court finds that the actual malice standard applies, then the newspaper could potentially assert the neutral reporting privilege if the jurisdiction chooses to adopt the defense. For example, in the Richard Jewell case, the Federal Bureau of Investigation (FBI) “leaked” to the press information that Jewell was considered a suspect in planting the bomb. If the article had quoted the FBI, the reporter from the Atlanta Journal-Constitution would not be liable for the statements that happened to be defamatory because the FBI is a reputable organization. In particular, one article that is the subject of the current litigation contains a description comparing Jewell to a convicted serial killer. Depending on the contents of the article and the source of the quote, the neutral reporting privilege may apply.

The focus under the neutral reportage privilege in *Edwards* as it applies to Jewell is whether the reporters made an effort to validate the story and whether the reporters attempted to obtain both sides of the story. One rationale for adopting the privilege was put forth in *Edwards*, namely, “[t]hat a democracy cannot long survive unless the people are provided the information needed to form

98. See *Edwards*, 556 F.2d at 120 (detailing contours of First Amendment).

99. See Allyson M. Palmer, *Jewell’s Libel Case Argued Again*, FULTON COUNTY DAILY REPORT, Feb.10, 2011, available at <http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?l=100325228911> (noting current litigation between Jewell and Atlanta Journal-Constitution).

judgments on issues that affect their ability to intelligently govern themselves.”¹⁰⁰ While one could argue that this could be accomplished even if reporters are required to indicate that their articles contained mere allegations or unsubstantiated allegations, the reporter’s state of mind could still be at issue. In fact, under the actual malice standard, if the journalists make clear that they are reporting defamatory unsubstantiated allegations, they are more open to attack by defamation plaintiffs who will argue that the journalists had serious doubts as to the truth of the information they were disseminating. At times, it is precisely the most explosive comments that will grab the audience’s attention. In those situations, the interest in an informed public would outweigh any potential costs to public figures who by definition have access to media outlets to clear their names by reason of their position in society. A reporter in such a quandary could argue that “[w]hat is newsworthy about such accusations is that they were made.”¹⁰¹ Even if the statement is false, it still serves the function of informing the public about a newsworthy event.

Furthermore, if all reporting were subject to potential defamation suits, there would be a chilling effect on speech in regard to news dissemination. Most newsgathering, like most knowledge, is second hand. Reporters rely on the testimony, research, and scholarship of others to report the news. If reporters felt they were required to vet every third party statement that they reported, they would likely curtail the information that they gather and disseminate to the public. According to the *Edwards* court, “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.”¹⁰² For this reason, the court in *Jewell* should adopt the neutral reporting privilege, despite the deleterious effect that the statements had on Jewell himself.

IV. LIABLE FOR LIBEL: THE ARGUMENTS AGAINST THE NEUTRAL REPORTAGE PRIVILEGE

In *Norton v. Glenn*, the plaintiffs filed a defamation suit against a newspaper, which claimed that the plaintiffs, a mayor and a borough council resident, were homosexuals and child molesters.¹⁰³

100. *Edwards*, 556 F.2d at 115.

101. *Id.* at 120.

102. *See id.* at 122 (advocating adoption of neutral reportage privilege and acknowledging importance of neutral reportage privilege).

103. *See Norton v. Glenn*, 860 A.2d 48, 50 (Pa. 2004) (stating brief procedural history of case).

In the article, the plaintiffs' co-worker, another public official, recounted interactions that he had with the plaintiffs both inside and outside of the council chamber.¹⁰⁴ In particular, the plaintiff's co-worker referred to the plaintiffs as "queers and child molesters" and also asserted that one of the plaintiffs grabbed his penis without his consent.¹⁰⁵ Intuitively, it would seem to the public's benefit for a newspaper to report these defamatory comments. After all, wouldn't the public be well-served to know the biases that Glenn, a public official, had? The question that the court faced was whether Pennsylvania should adopt the neutral reportage privilege.

The *Norton* Court held that it recognized the fair report privilege, but not the neutral reportage privilege.¹⁰⁶ The fair report privilege is narrower than the neutral reportage privilege because it protects a reporter from liability for publishing a defamatory statement if the reporter relied upon a public official or a public document as the source.¹⁰⁷ "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."¹⁰⁸ Precisely at instances like these where the information directly bears upon a public official's ability to govern, the importance of informing the public of the officials' conduct would outweigh concerns about publishing defamatory content.

Of course the reporter would realize that Glenn's statements were not true, and thus printing them could meet the threshold of actual malice. The purpose of the neutral reportage privilege is to protect a reporter who did not concur in these statements, but rather neutrally reported them. If the reporter knows that a statement is false and the reporter's story suggests that the statements are true, the reporter is not protected by the neutral reportage privilege. The reporter must be careful in this situation. If the reporter's story implies that the reporter endorses the defamatory statements or the story attacks the subject of the defamatory statements, the neutral reportage privilege would not apply. In that case, the reporter could be found liable for defamation. The jour-

104. *See id.* (explaining how co-worker obtained information).

105. *See id.* (detailing specific allegations made by co-worker regarding plaintiffs).

106. *See id.* (noting types of privilege and court holding).

107. *See Fair Report Privilege*, CITIZEN MEDIA LAW PROJECT (last updated July 22, 2008), <http://www.citmedialaw.org/legal-guide/fair-report-privilege> (defining fair report privilege and identifying sources protected by fair report privilege).

108. Laidman, *supra* note 34, at 80.

nalist cannot hide behind the shield of the neutral reportage privilege to attack or defame someone by repeating unfounded accusations made by a third party if those accusations appear to be endorsed by the reporter. Although not required, if the reporter were to seek and report “the other side of the story,” this would help establish that the statements were being reported neutrally and not endorsed, as was the case in *Edwards*.¹⁰⁹

While the fair report privilege is important in promoting journalistic accounts of government proceedings, it leaves a significant amount of valuable information unprotected. If the paper had only reported on the official’s antics from the meeting and omitted his comments outside of the chamber, readers would have gotten an incomplete picture of what happened by missing the most outrageous portions of the rant. “[I]mportant 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.”¹¹⁰ Rather than limiting sources, a more effective privilege is to protect a reporter who neutrally reports a statement from a public figure about another public figure.

An alleged defamatory statement can lead to the public learning more about the speaker. As in *Norton v. Glenn*, if a politician makes a bigoted or racist statement about another politician, and the reporter has a strong belief that the statement is not true, it would serve the public to know that the politician made such a statement about his or her opponent.¹¹¹ Otherwise, potential voters might elect a public official without the educated awareness that the politician had made such a statement. Surely the reporter would have doubts as to the veracity of that politician’s statement. If the journalist would not be able to claim the neutral reportage privilege, there could be a chilling effect. The journalist would be less likely to report on the statement, although relevant and important, for fear of incurring liability. News organizations with deep pockets would also be less likely to encourage reporters to report such comments. While one could make the argument that it is not a great burden for a news organization to make clear that it is

109. See *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, at 120 (2d Cir. 1977) (explaining importance that reporter get both sides of story to establish that reporter was neutral in reporting and determining that if reporter does not get both sides of story, there is better chance that reporter will appear biased).

110. Laidman, *supra* note 34, at 80.

111. See *e.g. Norton*, 860 A.2d at 48 (referring to case in which councilman alleged that council president and mayor were homosexual).

merely reporting on the public figure's allegation, by using a word such as "alleged," "claimed," and "argued," as the Supreme Court held in *Time v. Pape*, requiring use of such language would impose a stricter standard of liability than *Sullivan* warrants.

Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like 'alleged,' despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.¹¹²

One could also argue that news organizations should be required to publish a response from the person alleging defamation. However, in *Miami Herald Publishing Co. v. Tornillo*,¹¹³ the Supreme Court ruled that a Florida statute requiring a newspaper to print a right of reply for political candidates *was* unconstitutional as a content-based restriction.¹¹⁴ The Court referred to the statute as a "penalty" that would exact a financial burden on newspapers "in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print."¹¹⁵ An additional concern would be the chilling effect on publishers: "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy."¹¹⁶ With regard to the argument that a news organization should be required to indicate that the defamed person declined to comment or could not be reached, while a responsible

112. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

113. 418 U.S. 241, 256 (1974).

114. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 374-75 (1969) (upholding Fairness Doctrine, including requiring one subject to personal attack during broadcast to be afforded opportunity to respond on-air, the Federal Communications Commission has abolished fairness doctrine.); *see also* 74 AM. JUR. 2D *Telecommunications* § 134 (recognizing that Fairness Doctrine chills speech and noting abolishment of Fairness Doctrine by F.C.C.).

115. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. at 256.

116. *Id.* at 257.

journalist should attempt to reach the other side of the story, as the Supreme Court stated in *Miami Herald*, “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”¹¹⁷

A. Limits on the Neutral Reportage Privilege

Another case where a court declined to adopt the neutral reportage theory was *Khawar v. Globe International, Inc.*¹¹⁸ The *Khawar* Court held that the neutral reportage privilege did not apply to a newspaper’s report regarding a private figure. Twenty years after Senator Robert Kennedy’s assassination in 1968, a book titled “The Senator Must Die: The Murder of Robert Kennedy” named Ali Ahmand, and not Sirhan Sirhan, as Senator Robert Kennedy’s assassin.¹¹⁹ The book described Ahmand as a Pakistani man who wore a “gold-colored sweater and carried what appeared to be a camera but was actually the gun with which Ahmand killed Kennedy”.¹²⁰ The book’s photographs featured an arrow pointing to “Ahmand” near Kennedy that night, but the real person to which the arrows were actually pointing was photographer Khalid Khawar who had a picture taken with Robert Kennedy very shortly before Kennedy was killed.¹²¹ At the time the book was published, Sirhan Sirhan had already been convicted for assassinating Kennedy.¹²² The tabloid, *Globe*, published an article describing the book, and featured the same photographs that the book had, pointing out Khawar as the Senator’s killer.¹²³ After the tabloid’s article was published, Khawar and his family received death threats.¹²⁴ Khawar later sued *Globe* for the article that detailed the book’s incorrect claim and the photographs that asserted a false statement that Khawar was the one responsible for Kennedy’s death.¹²⁵ Police, however, never considered Khawar a suspect.¹²⁶

117. *Id.* at 256.

118. 79 Cal. Rptr. 2d 178

119. *See Khawar v. Globe Int’l, Inc.*, 79 Cal. Rptr. 2d 178, 259 (1998) (addressing book’s controversial thesis).

120. *Id.*

121. *See id.* at 260-61 (explaining error in book’s assertion).

122. *See id.* at 259 (noting conviction for Kennedy assassination).

123. *See id.* at 259-60 (explaining tabloid’s involvement).

124. *See id.* at 261 (noting negative consequences from book).

125. *See id.* at 260 (describing how lawsuit arose).

126. *See id.* (asserting that police had not focused on Khawar).

The first issue tackled by the court was whether Khawar was a public figure.¹²⁷ At the time the article and book were published, he was a farmer in Bakersfield, California.¹²⁸ Khawar never sought out media attention any time between the assassination of Kennedy and the publication of the book and article.¹²⁹ Although a Bakersfield TV station interviewed Khawar about the article, the court held that he did not seek out substantial media attention sufficient to make him a voluntary public figure.¹³⁰ “If such access were sufficient to support a public figure characterization, any member of the media—any newspaper, magazine, television or radio network or local station—could confer public figure status simply by publishing sensational defamatory statements against any private individual.”¹³¹ As a result, the Supreme Court of California affirmed a lower court judgment upholding Khawar’s status as a private figure.¹³²

While *The Globe* asserted that it should be immunized from liability for the statements it published as a result of the neutral reportage privilege, the court held that in California there was no neutral reportage privilege for private figures.¹³³ Moreover, the court made a special effort not to decide whether the neutral reportage privilege should apply in California, staying true to the *Edwards* Court that had argued to extend the privilege to public figures.¹³⁴ Just as the actual malice standard does not apply to a claim for defamation against a private figure, so too, the court argued, the privilege does not apply when reporting on a private fig-

127. *See id.* at 259 (addressing first portion of court’s rationale).

128. *See id.* at 260 (commenting on Khawar’s lack of status as public figure).

129. *See id.* (mentioning factors that find against Khawar being public figure).

130. *See id.* (discussing that some media access available to any private individual subject to controversy is not sufficient to establish public figure status).

131. *Id.*

132. *See Gallagher v. Connell*, 20 Cal. Rptr. 3d 673, 683 (Cal. 2004) (quoting *Khawar*, 79 Cal. Rptr. 2d at 183) (“[T]he characterization as an involuntary public figure must be reserved for an individual ‘who, despite never having *voluntarily* engaged the public’s attention . . . nonetheless has acquired such prominence in relation to the controversy as to permit media access.’”) (alteration in original).

133. *See Khawar*, 79 Cal. Rptr. 2d at 180 (“[T]his state does not recognize a neutral reportage privilege for republication of a libel concerning a private figure.”).

134. *See id.* (refusing to decide whether state recognizes neutral reportage privilege for libel concerning public officials or public figures); *see also Edwards v. Nat’l Audubon Soc’y*, 556 F.2d 113, 170 (2d Cir. 1977) (“[W]hen a *responsible, prominent organization* . . . makes serious charges against a *public figure*, the First Amendment protects the *accurate and disinterested reporting* of those charges, regardless of the reporter’s private views regarding their validity.”) (emphasis added).

ure.¹³⁵ “If the scope of the privilege were to include defamations of private figures, a neutral reportage route out of liability would emasculate the *Gertz* . . . distinction between private and public figure plaintiffs.”¹³⁶ Rather, the court was convinced that when it comes to a private figure, the re-publisher of the defamatory statements is just as liable as the one who originally made them.¹³⁷

A defamatory article or broadcast of a private individual “can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations.”¹³⁸ To remain consistent with *Sullivan*’s burden of proof for actual malice, the *Khawar* Court held that the cost to the private individual, resulting from an “absolute” neutral reportage privilege, outweighs the benefit of a prominent organization or person making a charge against a private figure.¹³⁹ The court decided that because it would have certainly been reasonable to expect *The Globe* to interview witnesses who could have corroborated or weakened the book’s allegations about Khawar, there was actual malice and negligence on the part of the defendant.¹⁴⁰ In *Khawar*, the court’s analysis of the neutral reportage privilege’s importance was sparse. Because the *Harte-Hanks Communications v. Connaughton*¹⁴¹

135. See *Khawar*, 79 Cal. Rptr. 2d at 183 (discussing standards for classification of public figure status in relation to actual malice standard).

136. *Id.* at 189. (referring to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974)).

137. See *id.* at 186 (“At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim.”); see also *Frommoethelydo v. Fire Ins. Exch.*, 42 Cal. 3d 208, 217 (1986) (establishing one who republishes another’s defamatory statement may also be held liable for same libel or slander).

138. See *Khawar*, 79 Cal. Rptr. 2d at 189 (noting issues with defamation and private individuals).

139. See *id.* (“[R]ecognition of an *absolute privilege* for the republication of those charges would be inconsistent with the United States Supreme Court’s insistence on the need for balancing the First Amendment interest in promoting the broad dissemination of information relevant to public controversies against the reputation interests of private figures.”) (emphasis in original); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (discussing balance between First Amendment with rights of private and public individuals).

140. See *Khawar*, 79 Cal. Rptr. 2d at 192 (establishing actual malice occurs where there is enough evidence to prove defendant had high degree of awareness of probable falsity of published information); see *id.* (“Because there were . . . reasons to doubt the accuracy of the . . . claim, and because that claim was an inherently defamatory accusation . . . the jury could properly conclude that *Globe* acted with actual malice in republishing that claim if it found . . . that *Globe* failed to use readily available means to verify the accuracy of the claim”) (citation omitted).

141. 491 U.S. 657 (1989).

defendant never asserted the privilege as a defense, the Supreme Court has never squarely addressed the issue.¹⁴² In *Khawar*, by contrast, the defendant raised the neutral reportage privilege and the court had an opportunity to assert a more definitive analysis of the underpinnings of the privilege where the story involved a matter of public concern.¹⁴³

Even though this Note does not assert that the neutral reportage privilege must apply to private figures, based on *Edwards*, the court in *Khawar* missed an opportunity to probe deeper into the intellectual and public policy underpinnings of the neutral reportage privilege. In *Edwards*, the Second Circuit was concerned with whether the reporter had accurately reported the story.¹⁴⁴ Allowing the journalist to report the alleged defamatory statement may enable the public to learn more about the controversial issue. As in *Edwards*, there may have been skeptics about DDT, and forcing the scientists to address allegations of self-interest would give the public an opportunity to have their concerns addressed.¹⁴⁵

When a major organization or a public figure or official makes a statement about another public figure or official, it is the journalist's responsibility to accurately report it, since it is newsworthy. For example, as one court has observed, "[w]e believe that the New York Times cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society."¹⁴⁶ After all, the victim of an alleged defamatory statement can still sue the original speaker for defamation. This is not precluded by the neutral reportage privilege. What is precluded is that even if the reporter doubts the truth of the content of the quote, as long as he reports it in a neutral way, the journalist should not pay the price in the attempt to educate the public.

142. *See id.* at 660 n.1 (describing why Court will not review neutral reportage privilege as defense).

143. *See Khawar*, 79 Cal. Rptr. 2d at 186 (noting that Globe raised neutral reportage privilege as defense).

144. *See Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (focusing on fundamental principle that "when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity").

145. *See id.* at 115-17 (discussing high intensity of DDT controversy).

146. *Id.* at 122.

B. Expanding the Definition of the Neutral Reportage Privilege

Not only does judicial support exist for the neutral reportage privilege in a federal court in California, but also the court even broadened its definition. In *Barry v. Time, Inc.*, a California district court held that the defendant, *Time Magazine*, had a defense against libel as a result of the neutral reportage privilege.¹⁴⁷ Furthermore, the court held that the neutral reportage privilege applied to a source other than a “responsible” organization.¹⁴⁸ Quintin Dailey, a USF basketball team top player accused Pete Barry, the former USF head basketball coach, of making financial payments to Dailey that violated the NCAA rules.¹⁴⁹ *Sports Illustrated* published the article, which appeared to have been reported in a neutral and disinterested way.¹⁵⁰ The article also included Barry’s denial of the accusation.¹⁵¹ As judicial precedent considers college and pro athletes to be public figures, both Dailey and Barry fit this category, and the actual malice standard should apply.

Citing to *Edwards*, the court held in *Barry* that “[w]hat is newsworthy about such accusations is that they were made.”¹⁵² Thus, in order for the neutral reportage privilege to apply to these circumstances, the court held that instead of the requirement that the original source of the statements in question be a responsible organization such as the Audubon Society, it can also include a person.¹⁵³ Moreover, the court held that the individual who made the original statement need not have credibility, but must be “prominent.”¹⁵⁴ What this means in a practical way is that *Sports Illustrated* could not take cover under the neutral reportage privilege had the allegation of Barry’s improper actions in recruiting players been

147. See *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1125 (N.D. Cal. 1984) (holding *Time* had defense against libel).

148. See *id.* (holding neutral reportage privilege establishes viable defense).

149. See *id.* at 1112 (describing action for libel rising out of two separate publications in 1982 issue of *Sports Illustrated*).

150. See *id.* at 1113 (noting neutral tone in *Sports Illustrated* publications relating to plaintiff).

151. See *id.* at 1112 (noting that articles contained Barry’s denial that he had ever made illegal or questionable payments to any players while he was coach).

152. See *Barry*, 584 F. Supp. at 1123 (discussing intersection of neutral reportage and newsworthiness as articulated in *Edwards*).

153. See *id.* at 1126 (finding that the privilege extends to both individuals and organizations who both participate in an existing public controversy and the statement was made against another participant in that same controversy, regardless of the inherent trustworthiness of the alleged defamer).

154. See *id.* at 1126-27 (holding that prior standards requiring original defamer to be “trustworthy” required too much discretion on part of news organization, which could have chilling effect on dissemination of newsworthy public controversies).

made by “an anonymous USF student or a ‘man on the street’” even if the person happened to be honest.¹⁵⁵ Even though Dailey, the defamer in this case, had been convicted of assault and failed a lie detector test regarding that crime, the court still argued that publishing his allegations would be permitted under the neutral reportage privilege.¹⁵⁶ This is because Dailey was a prominent individual, as he was the star of the USF basketball team and a “central actor in the public controversy concerning alleged recruiting violations at USF”¹⁵⁷ Dailey’s allegations were relevant and newsworthy because of his close relationship to the events, not because of his trustworthiness.

The basis for the neutral reportage privilege as articulated by the court emphasized that free dialogue about matters of interest to the community is vital to the functioning of a democracy. “Recognition of the public’s ‘right to know’ that serious charges have been made against a public figure is an important application of the Supreme Court’s concern that ‘debate on public issues be uninhibited, robust, and wide-open.’”¹⁵⁸ The court held that the public would ultimately suffer in the absence of a neutral reportage privilege in situations where they need to be informed about a matter of public concern.¹⁵⁹ Ultimately:

If a republisher may be held liable for passing on newsworthy but defamatory information to the public, it is likely that he will decline to publish this information for fear that his doubts will later be characterized as ‘serious’ and therefore actionable. Even if he does not fear ultimate liability, the mere threat of costly and time-consuming inquiry into his state of mind may cast a chilling effect on publication.¹⁶⁰

155. *See id.* at 1126 n.19 (noting that Dailey’s status as prominent individual means court need not address hypothetical scenario of accusations from anonymous individual).

156. *See id.* (explaining requirements for sources under neutral reportage privilege).

157. *See id.* at 1127 (asserting public interest in knowing Dailey made allegations).

158. *Id.* at 1125 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

159. *See id.* (asserting that public will be deprived of opportunity to make informed judgments in respect to public controversies).

160. *Id.*

V. PROPOSAL

Suppose the president of the United States told an interviewer that the vice president was plotting to kill him; should a media defendant that reported the president's statement without endorsing its truth be personally liable? Note that if the defendant believed the president's statement was false, *New York Times v. Sullivan* would offer no protection.¹⁶¹

—Professor Marc A. Franklin

This quote illustrates the necessity of having a neutral reportage privilege. This Note proposes that the Supreme Court adopt the *Edwards* pronouncement of the neutral reportage privilege. *Edwards* advances the neutral reportage privilege when “a republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher’s subjective awareness of the truth or falsity of the accusation.”¹⁶² The state of mind of the news journalist is irrelevant; the privilege simply requires the press to report neutrally and accurately any defamatory statement made by a “responsible, prominent” third party (such as a public official or public figure) against a public official or figure.¹⁶³ Even if the reporter knew that the statement was false, the fact that the president in the above scenario made such a statement would be newsworthy in and of itself. However, under *Sullivan*, publishing the statement would meet the standard of actual malice because the reporter knew the statement was false.¹⁶⁴ In such a situation, the reporter could be found liable for defamation if the vice president’s reputation were to suffer as a result. Although the reporter’s liability is not absolute (*Sullivan* may offer protection if, for instance, the story itself clearly stated that the charges were false, thereby undermining the basis of actual malice), the neutral reportage privilege is a valuable protection for

161. MARC A. FRANKLIN, ET AL., MASS MEDIA LAW CASES AND MATERIALS 346 (Foundation Press, 7th ed. 2005).

162. See *Barry*, 584 F. Supp. at 1123 (explaining neutral reportage standard).

163. See *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F. 2d 113, 120 (2d Cir. 1977) (stating that when potentially defamatory statements are made by such sources, First Amendment protects accurate and disinterested reporting regardless of reporter’s private views).

164. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (discussing actual malice requirement).

journalists who are reporting on the newsworthy statements of “responsible, prominent” organizations or people.¹⁶⁵

The neutral reportage privilege actually encourages reporting on controversial issues that can be rife with vilifying language and personal attacks. Moreover, the neutral reportage privilege encourages a journalist to report the other side’s response to a third party’s defamatory statement and expose the falsity of that charge, because the journalist will not be liable for printing the defamatory quote. In doing so, the privilege furthers the purpose of the First Amendment: to encourage “the widest possible dissemination of information from diverse and antagonistic sources” because “a free press is a condition of a free society.”¹⁶⁶

The importance and prevalence of the media is as strong as ever. Current First Amendment doctrine, following from *Sullivan*, is quite protective of the press in many circumstances, but there is room for improvement. I propose that the adoption of the neutral reportage privilege, through its protections for members of the press, is a necessary step in maintaining the principles underlying the First Amendment. “Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate The First Amendment requires that we protect some falsehood in order to protect speech that matters.”¹⁶⁷ Although the Supreme Court denied evaluating Richard Jewell’s case, the Court is likely to have an opportunity to address this privilege in the future. A famous concurrence in *Harte-Hanks Communications*, mentioned the neutral reportage privilege by name but did not evaluate the issue since it was not presented to the Court for resolution.¹⁶⁸ In a concurring opinion, Justice Blackmun reasoned that the petitioner’s failure to invoke the neutral reportage privilege as a defense was a detrimental to his case: “This strategic decision appears to have been unwise in light of the facts of this case.”¹⁶⁹ Al-

165. See *Edwards*, 556 F.2d 113, 120 (“Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.”).

166. See *Miami Herald Publ’g. Co. v. Tornillo*, 418 U.S. 241, 252 (1974) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)) (examining meaning of freedom of press under First Amendment).

167. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974).

168. See *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 694 (1989) (describing how Justice Blackmun mentioned privilege in concurrence, but did not analyze case under privilege).

169. See *id.* (Blackmun, J., concurring) (suggesting that facts of case may have fit with neutral reportage defense if such defense had been raised).

though the Supreme Court had never addressed the neutral reporting privilege directly, Justice Blackmun admonished the party for not using it as a defense: “Were this Court to adopt the neutral reportage theory, the facts of this case arguably might fit within it.”¹⁷⁰ Based on Blackmun’s phrasing, it appears that he at least would have been in favor of adopting the privilege as articulated in *Edwards*, and applying it to protect a news organization if the facts of the case merited such an outcome.

In his article “With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage,” James E. Boasberg argues for not only adopting the neutral reportage privilege but also extending the privilege to apply to a statement by any source with regard to a public figure.¹⁷¹ As novel as this approach is in its thoroughness, the best approach would address the issue incrementally through successive Supreme Court rulings, rather than to attempt a massive sea change. Similar to the Supreme Court’s decision to extend the actual malice standard to encompass public figures in addition to public officials in *Curtis*, the best approach would apply the doctrine piecemeal.¹⁷² The neutral reportage privilege could later be extended to protect non-news organizations that publish or broadcast allegedly defamatory statements about public figures. Instead of following Boasberg’s more expansive proposal, it is best follow the reasoning in *Edwards* and limit the neutral reportage privilege to news organizations only.

A separate limitation of the *Edwards* neutral reportage privilege is that it only applies to defamatory statements made about public officials and figures, not private individuals.¹⁷³ Although the internet provides a resource for private individuals to clear their name after they have been defamed, public officials and figures still wield more influence and can command the attention they need to counterbalance such defamatory statements with their own responses. Moreover, public figures such as reality show celebrity Kim Kardashian invite public comment and criticism on themselves more often than a private individual who has not deliberately

170. See *id.* at 695 (Blackmun, J. concurring) (noting potential usefulness of neutral reportage theory for case at hand).

171. See James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 488 (1991) (arguing for neutral reportage privilege and extending privilege’s application to statement made by any source regarding public figure).

172. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (expanding actual malice standard to encompass public figures).

173. See *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (describing limiting effect of neutral reportage privilege).

sought the spotlight. Therefore, it is not unreasonable to protect news organizations that report on individual statements made about Kim Kardashian as opposed to unsolicited statements about a private figure.

VI. CONCLUSION

[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.¹⁷⁴

—Thomas Jefferson

While the *Jewell* case represents the worst-case scenario of media overreach, protections for the press are vital in order to allow news organizations to report information without a constant fear of liability, and protect the values instilled by the First Amendment.

Some journalists now claim there is a so-called ‘Jewell Effect’ in journalism, a fear that accurately publishing the name of a suspect who is neither arrested nor charged with a crime will lead to a slew of defamation lawsuits filed by that suspect should the person later be cleared of any wrongdoing.¹⁷⁵

In examining case law before and after the neutral reportage privilege was articulated in *Edwards v. National Audubon Society*, cases such as *New York Times v. Sullivan*, *Curtis v. Butts*, *Time v. Pape*, *Norton v. Glenn*, *Khawar v. Globe International Inc.*, and *Barry v. Time* are helpful to understand how constitutional free speech guarantees can remain strong while guaranteeing sufficient protection to individuals who become the subject of that free speech. The neutral reportage privilege is not merely helpful in this regard, but essential. When a journalist neutrally reports a newsworthy statement made by a public figure or official against another public figure or official, that journalist should not be held liable for the defamatory statement if he or she tried to get both sides of the story. When Journalism is referred to as the “Fourth Estate,” it is largely because it is a mechanism for checks and balances on the branches of government by keeping the public informed of potential government

174. Anne M. Macrander, *Bloggers As Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075, 1078 n.16 (2008).

175. Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell Is A Public Figure Is Wrong And Harms Journalism*, 22 LOY. L.A. ENT. L. REV. 293, 323 (2002).

abuses, public issues of great importance, and the conduct of public officials.¹⁷⁶

176. See Marin R. Scordato, *The Elusive Paradigm of the Press*, 72 B.U. L. REV. 673, 675-76 (1992) (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) (“[T]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”)).