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***SNYDER V. PHELPS* AND THE UNFORTUNATE DEATH OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A SPEECH-BASED TORT**

W. WAT HOPKINS*

From New York Times Co. v. Sullivan through Hustler Magazine v. Falwell, the Supreme Court of the United States established a reasonable balance between the rights of private persons to be free from unwarranted verbal attacks by groups or persons whose primary goal was self-aggrandizement. The framework for that protection was the tort of intentional infliction of emotional distress, which required plaintiffs to overcome an onerous standard of proof in order to prevail. In March 2011, however, the Court ruled in Snyder v. Phelps that the verbal attack of the Westboro Baptist Church against Albert Snyder during and after the funeral of Snyder's son, a Marine killed in Iraq, was protected because it involved matters of public concern. In making its ruling, the Court avoided tort law precedent related to public and private figures and diverted the issue from intentional infliction of emotional distress to matters of public debate, even though the Snyder case involved no public debate. In so doing, the Court all but eliminated intentional infliction of emotional distress as a speech-based tort.

Keywords: First Amendment, Intentional infliction of emotional distress, Supreme Court, *Snyder v. Phelps*

In the opening sentence of his Opinion for the Court in *Snyder v. Phelps*,¹ Chief Justice John Roberts demonstrates that he'd missed the point.² "A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service," the chief justice wrote.³

He was clearly highlighting what he thought to be a grievous inequity – millions of dollars for mere picketing. But he mischaracterized the jury's holding

¹ 131 S.Ct. 1207 (2011).

² Scholar Deana Pollard Sacks came to the same conclusion. See Deana Pollard Sacks, *Snyder v. Phelps: A Slice of the Facts and Half an Opinion*, 2011 CARDOZO L. REV. DE NOVO 64, 64 (writing that the opening sentence "is a half-truth at best, and a harbinger to the half-opinion rendered;" it was a statement that could not be proved true or false).

³ 131 S.Ct. at 1213.

and, by so doing, trivialized the key issue in the case:⁴ whether the church had caused severe emotional distress through an intentional and outrageous attack on a private person.⁵ A federal jury found that it had, awarding Albert Snyder, the father of the Marine at whose funeral the church members held a protest, \$2.9 million in compensatory and \$8 million in punitive damages.⁶

To characterize the case as being about picketing would be akin to casting *Hustler Magazine v. Falwell*,⁷ the only other speech-based intentional infliction case decided by the Supreme Court of the United States, as being about magazine publishing. Picketing may have been one vehicle church members used to harass Snyder, but the jury did not award damages because of the picket; the award was because of an on-site expressive attack and an accompanying video that was posted on the church's Web site — a video Chief Justice Roberts discounted in his Opinion for the Court.⁸ The chief justice, however, diverted the issue from that of intentional infliction of emotional distress. He referred to tort law in the third sentence of the opinion,⁹ but he did not mention the tort of intentional infliction of emotional distress until two pages later.¹⁰ And though he delineated the

⁴ The chief justice's was not the only mischaracterization of what the case was about. *See, e.g.*, Editorial, *Free Speech That's Ugly*, WASH. POST, Mar. 3, 2010, at A14 (reporting that speech cannot be punished because it is hateful or "expresses an aberrant point of view"); Adam Liptak, *Justices Uphold Hateful Protest as Free Speech*, N.Y. TIMES, Mar. 3, 2011, at A1 (writing that the case was about picketing); Press Release, Reporters Committee for Freedom of the Press, Reporters Committee Applauds Supreme Court Ruling That Even Repugnant Speech Must be Protected (Mar. 2, 2011), available at <http://www.rcfp.org> (reporting that the case was based on controversial speech about matters of public concern). *See also infra* notes 147-54 and accompanying text.

⁵ *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 n.3 (1988); RESTATEMENT (SECOND) OF TORTS § 46 (1977). *See also infra* note 11 and discussion accompanying *infra* notes 17-20, 155-77.

⁶ *Snyder v. Phelps*, 533 F. Supp. 2d 567, 574 (D. Md. 2008). The jury also found for Snyder on claims of intrusion and conspiracy. *Id.* The district court reduced the punitive damages to \$2.1 million. *Id.* at 571.

⁷ 485 U.S. 46 (1988).

⁸ Chief Justice Roberts reported that the video — called an "epic" by the church — was not considered because it was not mentioned in Snyder's petition for certiorari and Snyder did not respond to an assertion to that effect by the Phelpses, and because "Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic." 131 S.Ct. at 1214 n.1. The video received more attention in Snyder's brief than the chief justice acknowledged, however. *See infra* note 216 and accompanying discussion. In addition, it was discussed at some length in oral arguments. Transcript of Oral Arguments at 3-5, 10-11, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751). Clearly, then, the Court's decision not to consider the video was one of choice rather than protocol. Indeed, the chief justice wrote, "[W]e decline to consider the epic in deciding this case." 131 S.Ct. at 1214 n.1. *See also infra* notes 216-20 and accompanying discussion.

⁹ 131 S.Ct. at 1213.

¹⁰ *Id.* at 1215.

elements required to make a *prima facie* case for the tort,¹¹ he only addressed the element of outrageousness, finding the outrage perpetrated by Westboro against Snyder insufficient in light of the public nature of the attack.¹² The United States Court of Appeals for the Fourth Circuit, whose decision the Court affirmed, had similarly given short shrift to the tort.¹³

This kind of skewing of the law characterized much of Chief Justice Roberts' opinion – an opinion that will make it difficult, if not impossible, for private persons to win damages when they are targeted, through no action of their own and without provocation, by groups or individuals whose primary goal is to gain publicity for specific agenda by causing severe emotional harm.¹⁴ Albert Snyder clearly proved to the jury his case against the Westboro Baptist Church, and the district court affirmed.¹⁵ The Court paid scant attention to the tort, however, diverted from its own precedent,¹⁶ and implemented a rule that does not benefit the cause of free speech, while doing genuine harm to the long-established balance between the necessity for debate on public issues and the rights of private, uninvolved people to be free from unwarranted verbal abuse. Under the rule established in *Snyder*, intentional infliction of emotional distress, as a speech-based tort, is all but dead.

***Hustler*, Intentional Infliction of Emotional Distress, and Private Persons**

The Supreme Court, prior to *Snyder v. Phelps*, demarcated guidelines for establishing liability in cases of intentional infliction of emotional distress. Liability attached if a defendant's conduct was intentional or reckless, was extreme and outrageous, and caused severe emotional distress.¹⁷ While the tort

¹¹ The tort is described this way: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46 (1977). *See also infra* notes 17-20, 155-65.

¹² Chief Justice Roberts admitted that Snyder proved severe emotional distress, 131 S.Ct. at 1217-18, but rejected outrageousness as an element of the tort without deciding whether that element had been proved at trial. *Id.* at 1219. He did not discuss the element of intent or recklessness.

¹³ *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009). On appeal from the district court, Phelps did not challenge the sufficiency of the evidence, so the Fourth Circuit did not consider whether Snyder had proved his case. *Id.* at 216-17.

¹⁴ Westboro Baptist Church has admitted that its primary goal in protesting at military funerals is to gain publicity. *See infra* notes 75-76 and accompanying discussion.

¹⁵ *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008).

¹⁶ *Hustler* altered the burden of proof in intentional infliction cases for public officials and public persons, but did not address the tort as applied to private persons. *See* discussion accompanying *infra* notes 197-209.

¹⁷ *Hustler v. Falwell*, 485 U.S. 46, 50 n.3 (1988) (citing *Hustler Magazine v. Falwell*, 797 F.2d 1270, 1275 n.4 (4th Cir. 1986) (citing *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974))).

generally related to conduct,¹⁸ it also has been applied to speech-based offenses,¹⁹ as it was in *Hustler v. Falwell*.²⁰

In *Hustler*, the Court unanimously held that public officials and public figures must prove actual malice in order to win damages for intentional infliction of emotional distress.²¹ The Court overturned a \$200,000 verdict against the magazine for the publication of an attack aimed at the Rev. Jerry Falwell. *Hustler* had published a parody of the Campari Liquor advertising campaign in which it portrayed Falwell as having a drunken, incestuous encounter with his mother.²² At the close of the evidence, the United States Court for the Western District of Virginia granted a directed verdict for the magazine on the invasion of privacy action,²³ and a jury held in favor of *Hustler* on Falwell's libel action, finding that the parody could not reasonably be understood as describing actual facts.²⁴ The jury found in favor of Falwell, however, on intentional infliction of emotional distress,²⁵ and the Fourth Circuit affirmed.²⁶

The Supreme Court reversed the holding, finding that the parody was protected by the First Amendment. Key to the Court's finding was the political nature of the publication. Falwell and Flynt were embroiled in a political dispute; Falwell had targeted pornography as a societal evil, and Flynt, as one of its most vociferous purveyors, responded.²⁷ Chief Justice William Rehnquist compared the parody to the works of political cartoonists and satirists who became involved in political debates throughout history.²⁸ Though the parody "is at best a distant cousin. . . and a rather poor relation" to the works of Thomas Nast, whose cartoons helped bring down the Tweed Ring, and cartoonists who lampooned George Washington, Franklin Roosevelt and Teddy Roosevelt, it is, nonetheless, deserving of the same protection because of its political nature.²⁹ In such political disputes, the Court held, "outrageousness" was insufficient for liability,³⁰

¹⁸ See RESTATEMENT (SECOND) OF TORTS § 46 (1977).

¹⁹ See *id.* at illus. 1.

²⁰ 485 U.S. 46 (1988).

²¹ *Id.* at 56. Justice Anthony Kennedy took no part in the case, *id.* at 57; Justice Byron White concurred in the judgment, but wrote that the actual malice rule did not apply, *id.* at 57 (White, J., concurring in the judgment). For a discussion of actual malice as applied to public and private persons, see *infra* notes 43-63 and accompanying discussion.

²² *Id.* at 48.

²³ *Id.* at 49. Appropriation is the only one of the four traditional invasion of privacy torts recognized in Virginia. See W. WAT HOPKINS, MASS COMMUNICATION LAW IN VIRGINIA 100-14 (3d ed. 2001).

²⁴ 485 U.S. at 49.

²⁵ *Id.*

²⁶ *Hustler Magazine v. Falwell*, 797 F.2d 1270 (4th Cir. 1986).

²⁷ See Rodney A. Smolla, *Jerry Falwell v. Larry Flynt* 108 (1988).

²⁸ 485 U.S. at 54-55.

²⁹ *Id.*

³⁰ *Id.* at 55.

because sufficient breathing space is required to encourage robust political debate.³¹ Therefore, in order to provide that breathing space, the Court held that public figures and public officials could not recover for the tort of intentional infliction of emotional distress without proving actual malice – that the material was published with knowing falsity or reckless disregard for the truth.³²

The application of the actual malice test to the parody in *Hustler* is problematic because a test of truth or falsity is being applied to rhetorical hyperbole that was not intended to assert actual facts. Indeed, a literal application of the actual malice test would clearly demonstrate that *Hustler* magazine had published the parody with knowledge of falsity.³³ At the bottom of the page on which the parody appeared, *Hustler* printed the disclaimer, “ad parody – not to be taken seriously,” and the magazine’s table of contents listed the ad as “Fiction; Ad and Personality Parody.”³⁴ *Hustler* magazine knew, therefore, that any facts that might have been communicated by the parody were false. The purpose of the parody was to attack – not to assert facts. That point was made during oral arguments when the attorney for *Hustler* admitted that the actual malice rule did not apply because the parody did not purport to state facts.³⁵

A number of authorities have bemoaned the Court’s expansion of the actual malice standard to cases that focus on rhetorical hyperbole or other linguistic flourishes. First Amendment scholar Rodney Smolla wrote, for example, that the actual malice test might be appropriate for libel law, but intentional infliction of emotional distress is a different sort of beast – one for which truth or falsity is irrelevant.³⁶ Applying actual malice to intentional infliction, he wrote, was like “forcing a square peg into a round hole.”³⁷ The actual malice test requires a statement of fact rather than a statement of opinion. That is, there can be neither knowledge of falsity nor reckless disregard for the

³¹ *Id.* at 52.

³² *Id.* at 56.

³³ Justice White did not join the Opinion of the Court, he wrote, because the actual malice rule had little to do with the case: “[T]he ad contained no assertion of fact.” *Id.* at 57 (White, J., concurring in the judgment). In addition, the trial jury in the case found that no reasonable person would believe the parody to relate actual facts. *Id.* at 92.

³⁴ 485 U.S. at 48.

³⁵ Transcript of Oral Arguments, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (No. 86-1278), reprinted in 181 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 751, 758 (Philip B. Kurland & Gerhard Casper eds. 1989) (1987 Term Supp.). See also John M. Kang, *Hustler v. Falwell: Worst Case in the History of the World, Maybe the Universe*, 12 NEV. L.J. 582, 588-89 (2010), available at <http://ssrn.com/abstract=2055230> (emphasizing the non-truthful aspect of the parody).

³⁶ Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 430 (1988) (“The emotional distress tort. . . has nothing to do with truth or falsity.”).

³⁷ SMOLLA, *supra* note 27, at 171.

truth without the establishment of a statement that is, indeed, false, as the Court noted when it established in 1986 that libel plaintiffs involved in matters of public concern must prove falsity.³⁸ Actual malice, therefore, would appear to be inappropriate for the statements expressed in the *Hustler* parody, which were not subject to a test of truth or falsity.³⁹ As Smolla wrote:

One cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decision-making process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication or with its capacity to inflict reputational damage.⁴⁰

Hustler was a continuation of the Supreme Court's application of a public/private-person test rather than a subject-matter test in tort actions. The Court did not specifically refer to private persons in *Hustler*, but it clearly extended the actual malice rule only to public officials and public figures,⁴¹ and it did not extend any added protection to speech simply because that speech involved matters of public concern. The Court had an opportunity to apply a content-based test to intentional infliction of emotional distress, that is, to determine whether the content of the offensive publication focused on matters of public concern, thereby deserving protection. The Court had rejected such a test in libel law,⁴² however, and clearly did not want to resurrect it for the intentional infliction tort. It opted instead for the public/private test, which it first enunciated in *New York Times Co. v. Sullivan*.⁴³

In *Sullivan*, the Court established the rule that in order to win their cases, public official libel plaintiffs must prove actual malice, that is, that a defamatory publication was made with knowledge of falsity or with reckless disregard for its truth.⁴⁴ Three years later, in *Curtis Publishing Co. v. Butts*,⁴⁵ the Court extended

³⁸ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

³⁹ See Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV DE NOVO 101, 103, available at <http://ssrn.com/abstract=1588236> (writing that there is no justification for applying the actual malice standard to emotional distress claims outside the public arena). *But see* Brief of the American Center for Law and Justice as Amicus Curiae in Support of Neither Party at 8, *Snyder v. Phelps*, No. 09-751 (alleging that *Hustler* magazine had published "an extremely distressing lie.")

⁴⁰ SMOLLA, *supra* note 27, at 170. *See also* Smolla, *supra* note 36, at 427 (writing that the actual malice rule cannot simply be superimposed on intentional infliction).

⁴¹ 485 U.S. 46, 56 (1988).

⁴² *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974), *overruling* *Rosenbloom v. Metromedia, Inc.*, 388 U.S. 130 (1971). *See also* discussion accompanying *infra* notes 46-51.

⁴³ 376 U.S. 254 (1964).

⁴⁴ *Id.* at 279-80.

⁴⁵ 388 U.S. 130 (1967).

the rule to public figures, though it did not fully delineate public figure status. In the 1971 case of *Rosenbloom v. Metromedia, Inc.*,⁴⁶ the actual malice rule was expanded again.⁴⁷ Writing for a plurality, Justice William Brennan, who had written the Opinion of the Court in *Sullivan*, held that private persons involved in matters of public concern must also prove actual malice in libel cases that grow from those issues.⁴⁸ It was the nature – or content – of the speech, therefore, that should control the plaintiff's burden of proof rather than the status of the plaintiff. Justice Brennan continued that approach in his dissent to *Gertz v. Robert Welch, Inc.*,⁴⁹ in which the Court overruled the *Rosenbloom* plurality. The *Gertz* Court reaffirmed that public debate is important and, therefore, some falsehood must be protected “in order to protect speech that matters.”⁵⁰ It rejected the *Rosenbloom* rule, however, holding that the First Amendment does not require private people to prove actual malice, even when involved in matters of public concern. Each state, the Court held, so long as it does not impose liability without fault, should determine the private-person fault standard for libel plaintiffs.⁵¹

In reaching its holding, the Court addressed the issue of public and private persons in two ways. First, filling a gap left open by *Curtis Publishing Co.*, the Court delineated three types of public figures for purposes of libel actions: public figures for all purposes, that is, persons who have widespread fame or notoriety; public figures for limited purposes, that is, persons who inject themselves into ongoing public controversies in an effort to affect the outcomes of those controversies; and involuntary public figures, an “extremely rare” category of persons who become public figures through no actions of their own.⁵²

More importantly for purposes of intentional infliction of emotional distress, however, the Court also affirmed that the First Amendment does not require private persons to confront the same standard of proof that it requires of public persons – at least in defamation actions. Public figures and public

⁴⁶ 403 U.S. 29 (1971).

⁴⁷ The actual malice rule also was expanded in *Garrison v. Louisiana*, 379 U.S. 64 (1964), in which the Court held that the rule applied to public officials involved in cases of criminal libel.

⁴⁸ 403 U.S. at 43-44.

⁴⁹ 418 U.S. 323 (1974). Justice Brennan adhered to his *Rosenbloom* opinion, maintaining that the best protection for robust debate required that actual malice be applied when private persons were involved “in matters of public or general interest.” *Id.* at 61 (Brennan, J., dissenting). See also *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 799-80 (Brennan, J., concurring).

⁵⁰ *Id.* at 341.

⁵¹ *Id.* at 347-48. The Court, however, left intact a rule established in 1967 requiring private persons to prove actual malice when bringing actions for false light invasion of privacy. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The Court, seeing the tort as an end run around libel law, required the heightened standard, even though the publication by *Life* magazine involved entertainment rather than political expression, *id.* at 387-88, and even though the case involved privacy rather than defamation, *id.* at 390-91.

⁵² 418 U.S. at 345.

officials, the Court held, have greater access to channels of effective communication, making it easier for them to take advantage of “[T]he first remedy” available to persons attacked by false defamations⁵³ – rebutting speech with speech.⁵⁴ Therefore, private persons are more vulnerable to injury, and the state interest in protecting them is correspondingly greater.⁵⁵ In addition, public figures, like public officials, voluntarily expose themselves to a greater risk of criticism by entering the public sphere; they invite public scrutiny and run the greater risk that accompanies such scrutiny.⁵⁶ A private person, on the other hand, “[H]as relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury.”⁵⁷ Therefore, the “public or general interest” test was inadequate in serving the interests at stake.⁵⁸

The Court re-emphasized that holding two years after *Gertz* in *Time, Inc. v. Firestone*,⁵⁹ rejecting arguments that Mary Alice Firestone was a public figure because she was involved in a cause célèbre. “Were we to accept this reasoning,” the Court held, “we would reinstate the doctrine advanced [in *Rosenbloom*],” which was repudiated in *Gertz* because the rule would unacceptably abridge a legitimate state interest.⁶⁰ Subject-matter classifications, the Court held, often result in an improper balance. “It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test.”⁶¹ And nine years later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁶² the Court repeated the proposition: “In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*.”⁶³

In *Hustler*, the Court emphasized the importance of protecting speech on matters of public concern, but it is clear that a primary reason the parody constituted speech of public concern was Falwell’s status as a public figure who was an active participant in a public debate.⁶⁴ The confluence of a public figure embroiled in a public debate – not simply the existence of a matter of public

⁵³ *Id.* at 344.

⁵⁴ See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (“[T]he basis of the First Amendment is the hypothesis that speech can rebut speech.”).

⁵⁵ 418 U.S. at 344.

⁵⁶ *Id.* at 344-45.

⁵⁷ *Id.* at 345.

⁵⁸ *Id.* at 346.

⁵⁹ 424 U.S. 448 (1976).

⁶⁰ *Id.* at 454.

⁶¹ *Id.* at 456.

⁶² 472 U.S. 749 (1985).

⁶³ *Id.* at 756. The Court also repeated the proposition that private persons have not voluntarily exposed themselves to increased risk and lack effective opportunities for rebuttal, so states still possess a strong interest in protecting them. *Id.*

⁶⁴ See Posting of Howard Wasserman to <http://www.prawfsblogs.com> (Mar. 2, 2011, 8:31 a.m.).

concern— required the heightened standard. No one – other than members of Westboro Baptist Church⁶⁵ – alleged that the Snyders were public figures or that they were involved in a public debate. By abandoning its approach of looking at the public-private distinction⁶⁶ and establishing what one authority called a very broad “inquiring-minds-want-to-know” kind of standard,⁶⁷ the Supreme Court ignored a large body of precedent and effected a significant shift from a person-based standard to a subject-matter-based standard.⁶⁸

Snyder v. Phelps

The lawsuit was filed by Albert Snyder against Fred W. Phelps Sr., the Westboro Baptist Church, and some of the church’s members, specifically Phelps’s daughters, Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis.⁶⁹ In 1991, church members began picketing funerals in order to assert the message that God hates homosexuality and is punishing America – particularly the military – for its tolerance of gays.⁷⁰

They claim to have protested at more than 400 military funerals,⁷¹ and at thousands of other venues, in opposition to “the fag lifestyle of soul-damning, nation-destroying filth.”⁷² Initially, the picketing took place at funerals of persons who may have been gay or who had beliefs with which the church members objected.⁷³ Church members began picketing at military funerals in

⁶⁵ See discussion accompanying *infra* notes 93-94.

⁶⁶ See Sacks, *supra* note 2, at 65.

⁶⁷ Posting of Neil Richards to <http://www.concurringopinions.com> (Mar. 2, 2011, 6:06 p.m.).

⁶⁸ See Wasserman, *supra* note 64.

⁶⁹ See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008). Phelps founded the church in 1955 and has been its only pastor. Fifty of the church’s sixty or seventy members are Phelps’ children, grandchildren or in-laws. *See id.*

⁷⁰ See *Phelps-Roper v. Strickland*, 539 F.3d 356, 359 (6th Cir. 2008) (“Because God is omnipotent to cause or prevent tragedy, [church members] believe that when tragedy strikes it is indicative of God’s wrath,” quoting the complaint).

⁷¹ *Snyder*, 131 S.Ct. 1207, 1213 (2011). The number of Westboro protests changes dramatically by the week. *See infra* note 72.

⁷² Westboro Baptist Church Web page, <http://www.godhatesfags.com>. The number of protests grows rapidly with multiple pickets often staged within a single community, each lasting less than an hour. *See id.* As of mid-September 2012, the church claimed to have participated in nearly 50,000 pickets. *Id.* Church members have picketed organizations as diverse as the Southern Baptist Convention, the ACLU, and the Billy Graham Evangelistic Association, and persons as diverse as Coretta Scott King, Ronald Reagan, William Rehnquist, and Fred Rogers. *See* Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 332 (2008).

⁷³ The church first gained national notoriety in 1998, for example, when members protested at the funeral of Matthew Shepard, a man who had been tortured and murdered after he made it known

2005.⁷⁴ They readily admit that they choose military funerals because of the heightened publicity caused by the protests,⁷⁵ a motive acknowledged by the Court.⁷⁶ The church is listed by the Southern Poverty Law Center as one of six hate groups in Kansas,⁷⁷ and by the Anti-Defamation League as one of seventeen extremist groups in the United States.⁷⁸

Almost entirely because of the activities of the church, Congress and a number of states have adopted statutes restricting or prohibiting the picketing of funerals.⁷⁹ The church has challenged some of the statutes, with mixed results.⁸⁰

The lawsuit began when members of the Westboro church demonstrated at the funeral of Snyder's son, Marine Lance Corporal Matthew A. Snyder, at St. John's Catholic Church in Westminster, Maryland. Snyder had been killed in the line of duty in Iraq.⁸¹ Members of the church carried signs specifically chosen for

he was gay. See Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 159 (2008); *Westboro Baptist Church – World's Most Famous Calvinists* (1 of 8), <http://youtube.com/watch?v=hmIr9P-vkSQ> (last visited Sept. 11, 2012).

⁷⁴ See Wells, *supra* note 73, at 160.

⁷⁵ See *Snyder*, 533 F. Supp. 2d 567, 578 (D. Md. 2008). In its brief on the merits, the church reports that it pickets at funerals because they are highly publicized events with extensive media coverage. Brief for Respondent at 4, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751). Snyder also asserted that church members began picketing military funerals for a more personal reason. In their brief on the merits, Snyder's attorneys report that Phelps admitted that the picketing of military funerals began as a means of revenge because members of the church had been assaulted by Marines. Brief for Petitioner at 6, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751).

⁷⁶ 131 S.Ct. at 1217.

⁷⁷ Southern Poverty Law Center Web page, <http://www.splcener.org> (last visited Apr. 1, 2011). The six groups include one Ku Klux Klan group and three neo-Nazi groups.

⁷⁸ Anti-Defamation League Web page, <http://www.adl.org> (last visited Apr. 1, 2011).

⁷⁹ See Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 579, 614-19 (2007); Wells, *supra* note 73, at 153, 156. Since the Court's ruling, there has been additional activity related to regulations on picketing at funerals. A bill, titled the "Safe Haven for Heroes Act of 2011," has been introduced into Congress aimed at tightening the regulations governing the picketing of military funerals. H.B. 961, 112th Cong. (2011). In addition, Oklahoma has passed a bill prohibiting protests within two hours before and after a funeral and increasing from 500 feet to 1,000 feet the distance from a funeral a protest can occur. S.B. 406 (2011).

⁸⁰ See, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), *cert. denied* 129 S.Ct. 2865 (2009) (reversing a district court's denial of injunctive relief for the church on grounds of the likely success of the church's First Amendment claim); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (holding a funeral protest provision to be constitutional because it was content neutral and narrowly tailored, because the state had a significant interest in protecting funeral attendees, and because there were alternative channels for the church's communication).

⁸¹ See *Snyder*, 131 S.Ct. at 1213; *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569-70 (D. Md. 2008). The United States Court of Appeals for the Fourth Circuit repeated the facts outlined by the district court. *Snyder v. Phelps*, 580 F.3d 206, 211-12 (4th Cir. 2009).

the picket: “Semper Fi Fags,” “Pope in Hell,” and “Maryland Taliban.”⁸² Members also brought a sign displaying a stylized image of two males engaging in anal sexual intercourse.⁸³ Though Snyder was aware of the protest – the funeral procession was diverted from the main entrance of the church to an alternate entrance – he only saw the protesters briefly and did not see the content of the signs.⁸⁴ Snyder did not contest the picket itself; his attorneys conceded that church members complied with instructions from police and did not violate Maryland’s laws related to funeral picketing.⁸⁵

In addition, the church posted on its Web site a video, which it called an “epic,” titled “The Burden of Marine Lance Cpl. Matthew Snyder.” In the video, the church alleged that Snyder had been “raised for the devil” and taught by his parents to defy God.⁸⁶ Church members had never met Snyder or his family.

Snyder filed suit in the federal court for the District of Maryland for intentional infliction of emotional distress, intrusion on seclusion, defamation, publicity given to private life, and conspiracy.⁸⁷ The district court granted

⁸² Brief of Petitioner for a Writ of Certiorari at 4, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751). Petitioners alleged that the specific signs were added to the signage arsenal of the church because church members knew that a funeral service for a Marine was being held at a Roman Catholic Church in Maryland. *Id.* Other signs displayed during the protest were “America is doomed,” “God hates America,” “You are going to hell,” “God hates you,” and “Thank God for dead soldiers.” 533 F. Supp. 2d at 570. *See also* Brief for Respondent, *supra* note 75, at 8. There was dispute over whether church members also displayed a sign bearing the slogan “Matt in Hell.” Petitioners claim the sign was present. Brief of Petitioner for Writ of Certiorari, *supra*, at 4. Church members deny displaying that particular sign, but argue that, even if they did, the sign was not aimed at Matthew Snyder, but at Matthew Shepard, a gay man who was tortured and murdered apparently because of his sexual orientation. Brief in Opposition to Petition for Writ of Certiorari at 1-2, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751); Brief for Respondent, *supra* note 75, at 8 n.3. The Court did not confront this dispute in its opinion.

⁸³ *See* Brief of Petitioner for Writ of Certiorari, *supra* note 82, at 4.

⁸⁴ Brief for Petitioner, *supra* note 75, at 4.

⁸⁵ In fact, one of Snyder’s attorneys later said the case would not have been brought had the only issue been the picket. *See infra* notes 223-24 and accompanying discussion.

⁸⁶ 533 F. Supp. 2d at 570. The video also reported:

God rose up Matthew for the very purpose of striking him down, so that God’s name might be declared throughout all the earth. He killed Matthew so that his servants would have an opportunity to preach his words to the U.S. Naval Academy at Annapolis, the Maryland legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

See Douglas Lee, *4th Circuit Affirms Protection for Repulsive Speech*, FIRST AMENDMENT CENTER (Sept. 25, 2009), <http://www.firstamendmentcenter.org/commentary.aspx?id=22138>.

⁸⁷ 533 F. Supp. 2d at 572.

summary judgment for the defendants on the defamation and publicity claims.⁸⁸ The statements made by the defendants consisted of religious opinion, the court held, and would not realistically tend to expose Snyder to public hatred or scorn. In addition, no private information had been made public.⁸⁹ The jury found in favor of Snyder on the remaining three claims – intrusion, intentional infliction of emotional distress, and conspiracy – and awarded him \$2.9 million in compensatory and \$8 million punitive damages.⁹⁰ On a post-verdict motion by the church, the district court reduced punitive damages to \$2.1 million.⁹¹ The defendants also had asked the district court to overrule the verdict, but the court found the evidence sufficient to support the jury’s verdict on each of the three claims.⁹²

The district court rejected the claim of Phelps and his church that the funeral was a public event and that Matthew and Albert Snyder became public figures because the father placed an obituary notice in newspapers.⁹³ Albert Snyder did not invite attention, the court held, and the increased interest in the funeral was primarily the doing of Phelps and his followers. They had contacted law enforcement officials, the court noted, because of past problems caused by their protests and, indeed, their presence resulted in increased police presence and media coverage. “Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Matthew Snyder was a public figure,” the court held.⁹⁴

The court also found that Albert Snyder’s testimony provided the jury with “sufficient evidence. . . to conclude that [he] had suffered ‘severe and specific’ injuries,”⁹⁵ and that those injuries were caused by the “extreme and outrageous” conduct of Phelps and his followers.⁹⁶ In addition, the court found that there had been intrusion on Snyder’s seclusion because of the protest and the posting on the Web site of the video about Matthew Snyder: “[W]hen Snyder turned on the television to see if there was footage of his son’s funeral, he did not ‘choose’ to see close-ups of Defendants’ signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion.”⁹⁷ The video, the court held, invaded Snyder’s privacy during a time of bereavement.⁹⁸ Finally,

⁸⁸ *Id.*

⁸⁹ *Id.* at 573.

⁹⁰ *Id.*

⁹¹ *Id.* at 571.

⁹² *Id.* at 576.

⁹³ *Id.* at 577.

⁹⁴ *Id.*

⁹⁵ *Id.* at 580-81. On the issue of severe emotional distress, *see infra* notes 174-77 and accompanying discussion.

⁹⁶ *Id.* at 581.

⁹⁷ *Id.*

⁹⁸ *Id.*

because there was evidence that the members of the Phelps family joined to accomplish unlawful acts, there was evidence of conspiracy.⁹⁹

The Fourth U.S. Circuit Court of Appeals reversed, finding that the speech of Westboro Baptist Church was protected by the First Amendment, primarily because it was opinion¹⁰⁰ or rhetorical hyperbole¹⁰¹ about matters of public concern.¹⁰² In making its ruling, the court did not specifically address the torts alleged by Snyder, but lumped them together, finding that the First Amendment granted virtually absolute protection “when a plaintiff seeks damages for reputational, mental, or emotional injury.”¹⁰³

The Fourth Circuit was critical of the district court for its focus on issues raised by Snyder that were addressed in *Hustler Magazine v. Falwell*¹⁰⁴ and *Gertz v. Robert Welch, Inc.*¹⁰⁵ The district court erred, the Fourth Circuit held, by determining whether Snyder was a public or private figure and whether the funeral was a public event.¹⁰⁶ The district court “focused almost exclusively on the Supreme Court’s opinion in *Gertz*, which it read to limit the First Amendment’s protections for ‘speech directed by private individual against other private individuals.’ The court therefore assessed whether Snyder was a ‘public figure’ under *Gertz* and whether Matthew’s funeral was a ‘public event.’”¹⁰⁷ The Fourth Circuit adopted the content-based analysis, and, though it was contrary to precedent, the Supreme Court adopted the same analysis.¹⁰⁸

The Supreme Court Decides *Snyder v. Phelps*

When the Supreme Court granted *certiorari* in *Snyder v. Phelps*¹⁰⁹ in March 2010, free speech advocates lined up to argue that, while the activities of Westboro Baptist Church in picketing the funeral of a serviceman killed in Iraq

⁹⁹ *Id.* at 581-82.

¹⁰⁰ *Snyder v. Phelps*, 580 F.3d 206, 219-20 (4th Cir. 2009).

¹⁰¹ *Id.* at 220.

¹⁰² *Id.* at 222-23.

¹⁰³ *Id.* at 218.

¹⁰⁴ 485 U.S. 46 (1988).

¹⁰⁵ 418 U.S. 323 (1974).

¹⁰⁶ 580 F.3d at 222.

¹⁰⁷ *Id.*

¹⁰⁸ Jeffrey Shulman wrote that the Court did not follow the rationale of the Fourth Circuit completely. Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 35, 37. The Fourth Circuit, he wrote, found the personal nature of the signs irrelevant because no reasonable reader would interpret them as anything but rhetorical hyperbole. *Id.* at 36. The Supreme Court, however, refused to follow that doctrinal path because to do so “would effectively leave victims of personally abusive speech without legal remedy.” *Id.* at 36-37.

¹⁰⁹ 130 S.Ct. 1737 (2010) (granting certiorari).

were obnoxious, the First Amendment rights of the church should be protected.¹¹⁰ That protection is necessary, these advocates wrote, in order to protect discourse on matters of public concern¹¹¹ and to avoid liability based on the fact that a target of obnoxious speech was merely offended.¹¹² Indeed, some news organizations even contended that a finding against the church would harm free press rights.¹¹³

While free speech is important, and while even obnoxious speech must be protected in order to preserve the freedom for “speech that matters,”¹¹⁴ much that has been written about the *Snyder* case is simply wrong. The elements of the tort of intentional infliction of emotional distress have been misstated, the potential damage to freedom of expression on matters of public concern has been greatly exaggerated, and, inexplicably, damage to newsgathering has been trumpeted as a reason the Court should uphold a finding that Albert Snyder should not be awarded damages for the church’s attacks on him and his family.¹¹⁵ Though Chief Justice Roberts mischaracterized the case,¹¹⁶ former Justice John Paul Stevens recognized it for what it was. Speaking at an annual law day celebration sponsored by the Federal Bar Council, Justice Stevens said that he would have joined Justice Samuel Alito’s dissent from the “holding that intentional infliction of severe emotional harm is constitutionally protected speech.”¹¹⁷ That is, Justice

¹¹⁰ See Brief of the Reporters Committee for Freedom of the Press and Twenty-one News Media Organizations as Amici Curiae in Support of Respondents at 3, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751).

¹¹¹ See Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. as Amici Curiae in Support of Respondents at 23, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751) [hereinafter Brief of the Thomas Jefferson Center].

¹¹² See Brief of Scholars of First Amendment Law as Amici Curiae in Support of Respondents at 7, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (No. 09-751).

¹¹³ See Brief of the Reporters Committee, *supra* note 110, at 2. Joining the Reporters Committee, among others, were the Society of Professional Journalists, the New York Times Co., the American Society of News Editors, the Association of American Publishers, the Citizen Media Law Project, E.W. Scripps Co., and the Newspaper Association of America. *Id.* at ii.-iii.

¹¹⁴ *Gertz v. Robert Welch, Inc.*, 318 U.S. 323, 341 (1974).

¹¹⁵ See Brief of the Reporters Committee, *supra* note 110, at 2. The fear that a finding for Snyder might harm newsgathering is apparently based on the concern that news organizations covering groups like the Westboro Baptist Church might become the targets of lawsuits by offended viewers. There is little support for the concern. Though Albert Snyder was alerted to the church’s activities by news reports, no media organization or reporter was ever a party to the suit, and could not be a party to an intentional infliction suit under such circumstances. Intentional infliction suits are designed to seek redress because of a targeted attack, rather than the dissemination of information. See *infra* notes 155-65 and accompanying discussion.

¹¹⁶ See *supra* notes 2-3 and accompanying discussion.

¹¹⁷ Justice John Paul Stevens, Address at the Federal Bar Council Annual Law Day (May 3, 2011), available at <http://www.supremecourt.gov/publicinfo/speeches> (Copy on file with the author.).

Stevens recognized that the case involved intentional infliction of emotional distress rather than simply controversial or unpopular speech.¹¹⁸

Chief Justice Roberts found that the case “turns largely on whether . . . speech is of public or private concern, as determined by all the circumstances of the case.” The Free Speech Clause of the First Amendment, he wrote, “can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.”¹¹⁹

The boundaries of the public concern test are not well defined, Chief Justice Roberts wrote, but the Court has established some guiding principles.¹²⁰ Matters of public concern, the chief justice wrote, are any matters “of political, social or other concern to the community,”¹²¹ including any subject “of legitimate news interest.”¹²² In addition, the inappropriate or controversial nature of the speech is irrelevant to the question of whether it deals with a matter of public concern.¹²³

To determine the public or private nature of speech, Chief Justice Roberts reported that the Court is obligated to make an independent examination of the whole record and consider the content, form and context of the speech.¹²⁴ “No factor is dispositive and it is necessary to evaluate all the circumstances of the speech,” he wrote, “including what was said, where it was said, and how it was said,”¹²⁵ that is, the content, form and context of the speech.

The Court held that the content of the protest “plainly relates to broad issues of interest to society at large,” that is, “the fate of our Nation, homosexuality in the military, and scandals involving the Catholic Clergy.”¹²⁶

The context of the speech also contributed to its public nature. While the Court found it of no significant import that church members spoke “in connection with a funeral,” it was important that the protest took place on public land.¹²⁷ Chief Justice Roberts noted that Albert Snyder had proved he had suffered severe emotional distress,¹²⁸ but found that public streets occupy “a special position” in terms of First Amendment protection, and a peaceful picket about matters of public concern in such a place is protected.¹²⁹ “Simply put, the

¹¹⁸ See *infra* notes 147-54 and accompanying discussion.

¹¹⁹ 131 S.Ct. 1207, 1215 (2011). Chief Justice Roberts cited *Hustler v. Falwell*, 485 U.S. 46, 50-51 (1988), but the cited portion supports his recitation of what constitutes a *prima facie* case and not the proposition that the First Amendment is a defense in state tort actions.

¹²⁰ *Id.* at 1216.

¹²¹ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

¹²² *Id.* (quoting *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

¹²³ *Id.* (quoting *Rankin v. McPeherson*, 483 U.S. 378, 387 (1987)).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1217.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1217-18.

¹²⁹ *Id.* at 1218.

church members had the right to be where they were,” the chief justice wrote.¹³⁰ Similarly, Chief Justice Roberts found it irrelevant that Snyder was able to prove that he suffered severe emotional distress by means of a targeted attack. Even if a few of the signs were viewed as containing messages related to Matthew Snyder or the Snyders specifically, he wrote, “[T]hat would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”¹³¹ In addition, the chief justice found that the record confirmed “that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”¹³²

Chief Justice Roberts also rejected outrageousness as a test in private-person intentional infliction cases, calling it “a highly malleable standard” with “inherent subjectiveness.”¹³³ Westboro was punished because of the content of its speech, he wrote, but the nature and location of the speech demanded special protection under the First Amendment.¹³⁴

Justice Stephen Breyer wrote a concurring opinion to emphasize that states are not powerless to provide private individuals with tort law protections, and that the Opinion of the Court does not touch on issues raised by Internet postings or broadcast television.¹³⁵ A state can regulate picketing, even on matters of public concern, he wrote. As an example, he noted that a person who engaged in physical assault could be punished, even if the purpose of the assault was to gain publicity. Similarly, picketing that engaged in the use of certain words could be punished, leaving the state with some remedy to protect private persons from speech-related attacks.¹³⁶ The Court’s holding, therefore, was narrow.¹³⁷ The Opinion of the Court, he wrote, “does not hold or imply that the

¹³⁰ *Id.*

¹³¹ *Id.* at 1217.

¹³² *Id.* at 1219.

¹³³ *Id.* (citing *Hustler*, 485 U.S. 46, 55 (1988)).

¹³⁴ *Id.* The Court also held that Albert Snyder was not part of a captive audience and, therefore, there was no intrusion. *Id.* at 1219-20. In addition, because there was no tort liability for either intentional infliction of emotional distress or intrusion, there could be no conspiracy. *Id.* at 1220. These holdings are not disputed in this article.

¹³⁵ *Id.* at 1221 (Breyer, J., concurring).

¹³⁶ *Id.* (Breyer, J., concurring). See also Shulman, *supra* note 108, at 39; Posting of Danielle Criton to <http://www.concurringopinions.com> (Mar. 6, 2011, 2:44 p.m.).

¹³⁷ Justices have been disappointed by interpretations of so-called “narrow” holdings. See, e.g., Justice John Paul Stevens’s reaction to what he found to be a misinterpretation of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), by the Court in *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1827 (2009) (Stevens, J., dissenting). Justice Lewis Powell concurred in *Pacifica*, specifically to note that the narrow holding in that case, 438 U.S. at 168 (Powell, J., concurring in part and in the judgment). The interpretation of the case, however, was not narrow. See W. Wat Hopkins, *When Does F*** Not Mean F***: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1, 11-13 (2011).

State is always powerless to provide private individuals with necessary protection.”¹³⁸

Only Justice Samuel Alito dissented. “Our profound national commitment to free and open debate is not license for the vicious verbal assault that occurred in this case,” he wrote. The church planned and “launched a malevolent verbal attack. . . at a time of acute emotional vulnerability,” he wrote. “Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents’ right to brutalize Mr. Snyder.”¹³⁹

Justice Alito pointed out that a case for intentional infliction of emotional distress can be made based on speech, but that the burden of proof is very difficult.¹⁴⁰ Nevertheless, he wrote, “[R]espondents long ago abandoned any effort to show that those tough standards were not satisfied here.”¹⁴¹

The church’s strategy of getting attention by picketing funerals demonstrates the outrageousness of their actions, Justice Alito wrote.¹⁴² In addition, the meaning of the signs used in the protest could not be missed. Because the church chose to protest a particular funeral rather than at countless other available venues, “[A] reasonable person would have assumed that there was a connection between the messages on the placards and the deceased.”¹⁴³

Justice Alito wrote that it is “abundantly clear” that church members went “far beyond commentary on matters of public concern” and “specifically attacked” the Snyders. Both Matthew and Albert Snyder were private figures, he wrote, and the speech was not on a matter of public concern and could not be insulated by the fact that it occurred on public property.¹⁴⁴

Justice Alito also criticized the majority for its failure to consider the video as part of the case:

The protest and epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress. The Court’s strange insistence the epic “is not properly before us”. . . means

¹³⁸ 131 S.Ct. at 1221 (Breyer, J., concurring).

¹³⁹ *Id.* at 1222 (Alito, J., dissenting). *See also* Sacks, *supra* note 2, at 65 (writing that the Court has created “a category of absolutely protected speech” with virtually no guidance as to how “the speech-tort line will be drawn”).

¹⁴⁰ *Id.* at 1223 (Alito, J., dissenting). For a discussion of the burden of proof in cases of intentional infliction of emotional distress, *see infra* notes 155-65 and accompanying discussion.

¹⁴¹ *Id.* (Alito, J., dissenting). *See also supra* note 13.

¹⁴² *Id.* at 1224 (Alito, J., dissenting).

¹⁴³ *Id.* at 1225 (Alito, J., dissenting). Because a church funeral raises thoughts of the afterlife, Justice Alito wrote, messages like “God Hates You” would very likely have been “interpreted as referring to God’s judgment of the deceased.” Other signs would have been interpreted as falsely suggesting that Matthew Snyder was gay. *Id.* (Alito, J., dissenting).

¹⁴⁴ *Id.* at 1226 (Alito, J., dissenting).

that the Court has not actually made “an independent examination of the whole record”. . . . And the Court’s refusal to consider the epic contrasts sharply with its willingness to take notice of Westboro’s protest activities at other times and locations.¹⁴⁵

The church engaged in outrageous conduct that caused great injury, Justice Alito wrote: “I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.”¹⁴⁶

Westboro Baptist Church and Intentional Infliction

Snyder v. Phelps is easy to mischaracterize. Free speech advocates, for example, contend that the tort of intentional infliction of emotional distress as applied to the case would allow recovery for the publication of material that is merely offensive,¹⁴⁷ that it would establish an offensiveness exception,¹⁴⁸ or that it would allow recovery based on listeners’ emotional reactions to speech.¹⁴⁹ Indeed, an attorney for the Reporter’s Committee for Freedom of the Press, glowing over the decision, said that a holding for Snyder “would have threatened a great deal of public debate on controversial topics if any listeners could show they were personally distressed to hear unpleasant speech.”¹⁵⁰

Similarly, Fourth Circuit Judge J. Harvie Wilkinson III, dissenting from that court’s holding in *Falwell v. Flynt*, wrote that the intentional infliction tort allows for damages “for no other reason than hurt feelings.”¹⁵¹ Daniel Solove writes that the fact that a person becomes “very upset” by speech is outweighed by the need to provide First Amendment protection for expression,¹⁵² and Rodney Smolla wrote in support of a rule that, in order for damages to be awarded in a speech case, there must be palpable evidence of some harm “other than” emotional distress.¹⁵³ In addition, the Thomas Jefferson Center for the Protection of Free Speech, in an amicus brief to the Fourth Circuit supporting the Westboro church, argued that, even though the content of the views expressed

¹⁴⁵ *Id.* at 1227 n.15 (Alito, J., dissenting).

¹⁴⁶ *Id.* at 1228 (Alito, J., dissenting).

¹⁴⁷ Amicus Brief of the Thomas Jefferson Center for the Protection of Free Expression at 30, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), 130 S.Ct. 1737 (2011) (No. 09-751) [hereinafter Amicus Brief of the Thomas Jefferson Center].

¹⁴⁸ Brief of the Reporters Committee, *supra* note 110, at 4.

¹⁴⁹ *Id.* at 10. *See also* Press Release, *supra* note 4.

¹⁵⁰ Press Release, *supra* note 4.

¹⁵¹ *Falwell v. Flynt*, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissenting from the denial of rehearing en banc).

¹⁵² Posting of Daniel Solove to <http://www.concurringopinions.com> (Mar. 16, 2010, 10:58 a.m.).

¹⁵³ Smolla, *supra* note 36, at 8.

may have constituted “extreme and outrageous conduct,” because the claim was “based entirely on distaste for the Phelps’ views,” the messages should enjoy First Amendment protection.¹⁵⁴

None of those characterizations aligns with the tort of intentional infliction of emotional distress, which has nothing to do with simply unpleasant speech or speech that is merely offensive or upsetting. To win an intentional infliction case, a plaintiff must prove: (1) the defendant’s conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; (4) the emotional distress was severe.¹⁵⁵ “Extreme and outrageous” is a test significantly different from “offensive.”¹⁵⁶

The impact of the speech must extend well beyond mere upset feelings, and the actions of the speaker must extend well beyond simply being offensive.¹⁵⁷ “Even if the defendant’s conduct is outrageous and intentional,” First Amendment scholar Robert E. Drechsel writes, “liability will not attach unless the emotional distress is severe.”¹⁵⁸ The distress “must be far more than minor discomfort.”¹⁵⁹ Indeed, the Kansas Supreme Court recently held that the absence of psychiatric or medical treatment “weighs against a finding of extreme emotional distress.”¹⁶⁰ An award of damages cannot be made, the court held, simply because of “elevated fright, continuing concern, embarrassment, worry and nervousness.”¹⁶¹ The tort “is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.”¹⁶² The *Restatement (Second) of Torts* reports that “the law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”¹⁶³ One court reported that the conduct “must be outrageous to the point that

¹⁵⁴ Amicus Brief of the Thomas Jefferson Center, *supra* note 147, at 30.

¹⁵⁵ See *Hustler*, 485 U.S. 46, 50 n.3 (1988) (citing 797 F.2d 1270, 1275 n.4 (4th Cir. 1986) (citing *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974))). See also RESTATEMENT (SECOND) OF TORTS § 46 (1977) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”).

¹⁵⁶ See Restatement (Second) of Torts § 46 cmt. d (1977).

¹⁵⁷ See, e.g., *Bass v. Hendrix*, 931 F. Supp. 523, 531 (S.D. Ohio 1996) (noting that mere insults and hurt feelings are insufficient to sustain liability); *Valadez v. Emmis Commc’ns*, 229 P.3d 389, 394 (Kan. 2010) (“The law will not intervene where someone’s feelings merely are hurt.”).

¹⁵⁸ Robert E. Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 345 (1984-85).

¹⁵⁹ *Id.* at 346.

¹⁶⁰ *Valadez*, 229 P.3d at 395.

¹⁶¹ *Id.* See also *Bass*, 931 F. Supp. at 532 (indicating that symptoms like psychological problems, suicidal tendencies and post-traumatic stress would be required for a finding of severe emotional distress).

¹⁶² William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939), *quoted in* Drechsel, *supra* note 158, at 339.

¹⁶³ Restatement (Second) of Torts § 46 (1977).

it goes beyond the bounds of decency and is utterly intolerable in a civilized society.”¹⁶⁴ The tort involves speech that is being used as a weapon, and – like “false rumors [and] invasions of privacy” – such “direct attacks” should be actionable.¹⁶⁵

Proving intentional infliction of emotional distress, therefore, is an onerous task that extends well beyond showing offensiveness or hurt feelings. It is clear, however, that members of the Westboro Baptist Church intentionally engaged in outrageous conduct that caused severe emotional distress.

The church, which has made a practice of picketing the funerals of dead military personnel because members find such protests to be a particularly effective means of conveying their message,¹⁶⁶ issued a press release and traveled from Kansas to Maryland in order to picket at Matthew Snyder’s funeral,¹⁶⁷ carrying with them an arsenal of signs aimed at the Snyders. Church members later posted on the church’s Web site a video attacking the Snyders. The conduct, therefore, was intentional.

There is little dispute that the activities of the church members were outrageous.¹⁶⁸ The signs they selected specifically targeted the Snyder funeral – the signs identified the Snyders as living in Maryland and attacked them because they were Roman Catholics and because Matthew Snyder was a Marine.¹⁶⁹ In addition, an expert witness for the Phelps testified that the signs used in the protest were personal to the Snyders and went beyond protesting a war.¹⁷⁰

Church members may have taken no specific action to draw the attention of Albert Snyder to the video posted on the church’s Web site,¹⁷¹ but that is irrelevant. No one associated with *Hustler* magazine notified Jerry Falwell of the

¹⁶⁴ *Valadez*, 229 P.3d at 394.

¹⁶⁵ Solove, *supra* note 152.

¹⁶⁶ See *Phelps-Roper v. Strickland*, 539 F.3d 356, 359 (6th Cir. 2008).

¹⁶⁷ See *Snyder v. Phelps*, 533 F. Supp. 567, 571 (D. Md. 2008).

¹⁶⁸ The Thomas Jefferson Center for the Protection of Free Expression is one disputant to the proposition. In a brief supporting the Westboro church, the center argued that the picketing was neither extreme nor outrageous. Amicus Brief of the Thomas Jefferson Center, *supra* note 147, at 16.

¹⁶⁹ See Brief of Petitioner for Writ of Certiorari, *supra* note 82, at 4. A video of their activities produced by a British journalist and posted on YouTube demonstrates not only the outrageous behavior of the church members, but their intent to be outrageous. *Westboro Baptist Church*, *supra* note 73. Daniel Solove writes that Westboro’s speech was not directed at a particular individual. Solove, *supra* note 152. This selection of signs, however, seems to at least establish the likelihood that persons were, indeed, targeted. See *supra* note 82.

¹⁷⁰ Brief for Petitioner, *supra* note 75, at 6.

¹⁷¹ The Thomas Jefferson Center argues that the posting of the video was “entirely lawful,” and the church is not liable for exercising its “legal rights in a permissible way.” Brief of the Thomas Jefferson Center, *supra* note 111, at 20. In addition, at least one justice – Scalia – seemed to think that the fact that Snyder chose to watch the video was dispositive for the Phelps. See Transcript of Oral Argument, *supra* note 8, at 5.

parody or drew his attention to it. One would not expect Falwell to be a reader of *Hustler*, and he became aware of the attack because of questions from a reporter,¹⁷² just as Snyder became aware of the full extent of the church's activities when he watched a news program. By virtue of publishing the parody, *Hustler* had demonstrated its intent to cause severe emotional distress. Similarly, the highly publicized demonstration followed by the publication of the video on the Internet ensured notice of the attack to millions of people – certainly to more people than the single issue of *Hustler* magazine could reach.¹⁷³

In addition, evidence of Snyder's emotional distress, as Chief Justice Roberts noted,¹⁷⁴ was compelling. He testified that he is often tearful and angry and becomes so sick that he actually vomits. He said he cannot separate thoughts of his son from the signs at the demonstration, and that he believes his emotional injury to be permanent.¹⁷⁵ The district court judge reported that Snyder was often reduced to tears during the trial, was "visibly shaken and distressed," and was granted the opportunity several times to leave the courtroom to compose himself. "The jury," the judge wrote, "witnessed firsthand Plaintiff's anguish and the unresolved grief he harbors because of the failure to conduct a normal burial."¹⁷⁶ In addition, expert witnesses testified that Snyder's diabetes had worsened and his depression deepened as a result of the actions by church members, "thereby preventing him from going through the normal grieving process."¹⁷⁷

Intentional infliction of emotional distress is very difficult to prove, but Albert Snyder clearly did so, to little effect. The Supreme Court shifted the standard in the tort to a subject-matter test, raising the bar for any private people who become subject to verbal attacks.

Analysis

The Supreme Court has established that under the First Amendment speech cannot be punished because it embarrasses, offends, or causes hurt feelings,¹⁷⁸ even if the very purpose of the speech is to cause offense.¹⁷⁹ The Court

¹⁷² See SMOLLA, *supra* note 27, at 1.

¹⁷³ Though the statistics are now out of date, *Reno v. ACLU*, 521 U.S. 844, 849-52 (1997), provides a nutshell report of how the Court views the Internet and the content distributed thereby.

¹⁷⁴ 131 S.Ct. 1207, 1217-18 (2011).

¹⁷⁵ *Snyder*, 533 F. Supp. 2d 567, 588-89 (D. Md. 2008). Much of this description was also quoted by the Fourth Circuit, 580 F.3d 206, 213 (4th Cir. 2009).

¹⁷⁶ *Id.* at 589.

¹⁷⁷ *Snyder*, 580 F.3d at 213-14.

¹⁷⁸ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *Street v. New York*, 394 U.S. 576, 592 (1969).

¹⁷⁹ See *Hustler v. Falwell*, 485 U.S. 46, 53 (1988) (The art of the editorial cartoonist, for example, "is often not reasoned or evenhanded, but slashing and one-sided;" it is a

has recognized that “not all speech is of equal First Amendment importance.”¹⁸⁰ Fighting words¹⁸¹ and obscenity,¹⁸² for example, have no First Amendment protection, while commercial speech,¹⁸³ indecent speech,¹⁸⁴ intimidating speech,¹⁸⁵ and speech of “purely private concern”¹⁸⁶ are protected, but have less protection than speech involving matters of public concern. Personal abuse, like fighting words and obscenity, “is not in any proper sense communication of information or opinion safeguarded by the Constitution.”¹⁸⁷

Snyder effected a shift in the paradigm.¹⁸⁸ While court-watchers are unsure about the significance of the case,¹⁸⁹ it seems clear that it has eviscerated what had been a reasonable balance between the interests of private persons and the need to protect robust debate about matters of public concern. There is no dispute that libel law is mired with problems in both theory and practice. Differentiating between private and public figures¹⁹⁰ and between matters of

weapon of attack, scorn and ridicule.); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”).

¹⁸⁰ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

¹⁸¹ *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁸² *See Roth v. United States*, 354 U.S. 476 (1957).

¹⁸³ *See Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York*, 447 U.S. 557 (1980).

¹⁸⁴ *See FCC v. Fox Television Stations*, 129 S.Ct. 1800 (2009); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

¹⁸⁵ *See Virginia v. Black*, 538 U.S. 343 (2003).

¹⁸⁶ *Dun & Bradstreet*, 472 U.S. 749, 759 (1985).

¹⁸⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

¹⁸⁸ A common reaction to the case by many Court watchers is that it adds very little to the debate over how to reconcile free speech with tort liability, *see Sacks, supra* note 2, at 66, and that it leaves many questions unanswered, *see Richards, supra* note 67.

¹⁸⁹ One commenter wrote, for example, that the decision “might define the term,” and that it constitutes a new chapter on unpopular speech, Robert Barnes, *Justices Allow Funeral Protests*, WASH. POST, Mar. 3, 2011, at A1, while another found it “eminently predictable” and that it broke no new ground, Posting of Kevin Golbert at <http://www.comlawblog.com> (Apr. 13, 2011, 8:20 p.m.). *See also* Joseph Russomanno, “Freedom for Thought That we Hate”: *Why Westboro Had to Win*, 17 COMM. L. & POL’Y 133 (2012) (writing that the Court reached an inevitable and correct conclusion in the case).

¹⁹⁰ *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 669 (1990) (writing that, though the public official branch of the public person distinction is relatively clear, the public figure branch “is ambiguous, half justified by the notion that speech about public figures is normatively relevant to democratic self-governance, and half by the notion that speech

public and private concern are among those problems.¹⁹¹ Definitional problems aside, however, a strong argument can be made that private persons – however they are defined – deserve more protection than public figures or public officials. Public people voluntarily inject themselves into matters of public concern and part of assuming public-person status is the willingness to accept the added risk of public commentary and criticism.¹⁹²

Private people, on the other hand, are private: They remain out of the view of the public not embroiled in debate on matters of public concern. The Court also has recognized a difference between public and private persons, especially in tort actions, and established a reasonable balance between protections for robust debate and for the rights of private persons to remain private.¹⁹³ Arguably private persons sometimes are involuntarily embroiled in matters of public concern, and when that happens, possibly, they should face the same burdens as public persons.¹⁹⁴ When they are targets, however, even though they are only bystanders, it is both unfair and legally illogical to saddle them with the same burdens as public persons, even when the issues used to attack them involve matters of public concern. Whatever logic one may argue for the existence of “involuntary public figures” in libel law, that logic does not apply to intentional infliction of emotional distress.¹⁹⁵ Indeed, until *Snyder*, the Court so recognized.¹⁹⁶

Hustler v. Falwell provided significant protection against lawsuits brought by persons who enter the fray of public debate, but it did not gut intentional infliction of emotional distress as applied to private persons – it altered some aspects of the tort but left others intact. For example, the Court, as Smolla writes, “was quite careful to limit the decision to public officials and public figures.”¹⁹⁷ It left untouched the application of the tort to private persons.

In addition, Robert Post writes, “It cannot be that *Falwell* absolutely protects all verbal means of intentionally inflicting emotional distress, all forms of racial, sexual, and religious insults, so long as the offending communications do not contain false factual statements.”¹⁹⁸ That is, the case did not eliminate the tort – though it may have done so as a practical matter for public persons. Jerry

about public figures concerns matters of ‘notoriety’ that have, in a purely descriptive sense, already caught ‘the public’s attention’”).

¹⁹¹ See *id.* at 670 (writing that the Court itself demonstrated the difficult task of determining what matters are of public concern by rejecting the *Rosenbloom* rule in *Gertz*).

¹⁹² See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 23-27 (2003).

¹⁹³ See *Gertz v. Robert Welch, Inc.*, 318 U.S. 323, 343-46 (1974).

¹⁹⁴ See Hopkins, *supra* note 192, at 44-49.

¹⁹⁵ See *Gertz*, 318 U.S. at 345. *But see*, Hopkins, *supra* note 192, at 44-49.

¹⁹⁶ See *supra* notes 54-63 and accompanying discussion.

¹⁹⁷ Smolla, *supra* note 36, at 427.

¹⁹⁸ Post, *supra* note 190, at 662.

Falwell would have won his case had the Court not ruled that he was required to prove actual malice. Indeed, Falwell *did* win his case until that standard was imposed. First Amendment scholar Diane L. Borden also suggests that the “invisible” person in the case – Falwell’s mother, Helen – would have won an intentional infliction case had she been alive when the parody was published.¹⁹⁹ Clearly, she would not have won under *Snyder*. Though she was a private person and not involved in the debate over pornography, she was fair game under the Court’s new rule: the outcome of a case is controlled by the fact that an attacker may target a private person not involved in matters of public concern so long as the attack is cloaked in the garb of matters of public concern and takes place in the public sphere.

In the *Snyder* case, for example, even if gays in the military, the sex-abuse scandal in the Roman Catholic Church, and related issues are matters of public concern, the Court granted protection for the use of those matters as a vehicle for an attack on private people not involved in a public debate. The attack by the Phelpses may not have been based on a personal animus toward the Snyders, but was predicated by animus toward any person who appeared to be in a position contrary to that of the Phelpses.²⁰⁰ Church members found Matthew Snyder a public person because of his military service and Albert Snyder a public person because he honored that service. The Snyders, therefore, were collateral damage – targeted because Matthew Snyder happened to be killed in the service of his country. Rather than due to animus, he and his father were targeted as part of a broader effort to spread hateful speech. The question is whether hateful speech targeted at private persons is constitutionally protected because of the broader effort. Until *Snyder*, the answer was no.

In libel law, Elmer Gertz represents the old rule and Carey D. Lorenz the rule in transition. Gertz was an attorney representing the family of an African-American man shot and killed by a Chicago police officer and, because of the representation, became the target of an attack by a publication advancing the views of the John Birch Society.²⁰¹ He filed a libel action against the publisher of the attack, and the Supreme Court eventually ruled that Gertz was a private person and, therefore, was not required to prove actual malice.²⁰² Gertz made the

¹⁹⁹ Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 60 GONZ. L. REV. 291, 393-94 (1989). The Reporter’s Committee for Freedom of the Press makes the same point, but, oddly, implies that First Amendment guarantees would be harmed if she successfully sued *Hustler* magazine. Brief of the Reporters Committee, *supra* note 110, at 20-21.

²⁰⁰ See *supra* notes 72-78 and accompanying discussion.

²⁰¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

²⁰² *Id.* at 351-52.

argument that an attorney should not be deemed a public figure by simply doing his job, and the Court agreed.²⁰³

Carey Lohrenz, however, was deemed a public figure by the United States Court of Appeals for the District of Columbia Circuit for just that reason. Because she finished at the top of her class in flight school with the U.S. Navy, she was given the option of choosing the type of flying to which her military training would then move. She chose fighter planes and, when a colleague was killed attempting to land a fighter on an aircraft carrier, Lohrenz, as the only remaining female fighter pilot in the Navy, was the target of an attack by a group claiming that women should not be allowed to fly Navy fighters.²⁰⁴ When she brought a libel action against Elaine Donnelly, the D.C. Circuit Court found her to be a public figure – simply because she chose to fly Navy fighter planes. She should have been aware of the accompanying controversy, the court held.²⁰⁵

Both Gertz and Lohrenz were doing their jobs and were uninvolved in any public debate. The Lohrenz case demonstrated a shift from the original public/private rules established by the Supreme Court. That shift was completed for intentional infliction cases by the *Snyder* Court.

Even though the Court did not specifically address private persons in *Hustler*, as Borden points out,²⁰⁶ that does not mean they are not implicated by the decision. To the contrary, she notes, “[I]f the Court’s logic were to be consistent, a private person would be required to meet a lower standard of fault than would a public person.”²⁰⁷ The extension of that logic, another authority writes, would mean private persons would have to prove actual malice in order to recover punitive damages for intentional infliction of emotional distress.²⁰⁸ Indeed, some courts have applied just that logic, holding that private persons bringing suits for intentional infliction of emotional distress sometimes face a more stringent burden.²⁰⁹

²⁰³ See Elmer Gertz, *Gertz v. Robert Welch, Inc., The Story of a Landmark Libel Case* 85-86 (1992) (quoting Gertz’s petition for a writ of certiorari).

²⁰⁴ Lohrenz v. Donnelly, 350 F. 3d 1272, 1275-76 (D.C. Cir. 2003).

²⁰⁵ *Id.* at 1281.

²⁰⁶ Borden, *supra* note 199, at 393-94. See also Alicia J. Bentley, *Hustler Magazine v. Falwell: The Application of the Actual Malice Standard to Intentional Infliction of Emotional Distress Claims*, 49 OHIO ST. L.J. 825, 839 (1988).

²⁰⁷ Borden, *supra* note 199, at 314.

²⁰⁸ See Bentley, *supra* note 206, at 840.

²⁰⁹ See, e.g., *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995) (applying New York law and holding that private persons bringing intentional infliction actions involving matters of public concern must prove gross responsibility, the same standard as private persons in defamation actions); *State v. Carpenter*, 171 P.3d 41, 55-56 (Alaska 2007) (holding that actual malice is required in Alaska when intentional infliction cases involve matters of public concern and the issue of truth or falsity is involved); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906 (Utah 1992) (holding that private persons must prove negligence in order to sustain actions for

Chief Justice Roberts, however, avoided all that by focusing on matters of public concern. Clearly the chief justice did not want to extend the balance established in libel through *Gertz*, *Firestone*, and *Dun & Bradstreet*, and in intentional infliction through *Hustler*.²¹⁰ The issue, then, was how the *Snyder* Court could avoid the public/private protocol that had guided tort law to that point. It did so in large part by its selection of facts and the law to be applied to those facts. Chief Justice Roberts, for example, found proof of outrageousness to be insufficient in cases involving matters of public concern, one of the Court's few nods toward *Hustler*.²¹¹ However, outrageousness was found insufficient in *Hustler* in order to preserve the breathing space necessary for public discourse.²¹² The direct result was that public persons were assigned a more stringent standard – the actual malice test. That rationale does not apply to private persons not involved in such debates – there is no breathing space to preserve in the absence of a debate.

Second, the Court chose to avoid the issue raised by the video attack on Snyder and thereby, as one authority wrote, decided half the case.²¹³ Chief Justice Roberts wrote that the Court was not considering the video, but his explanation is not satisfying: The video was not raised in the petition for certiorari, the Snyders had not made a strong enough argument in the brief on the merits, and the posting on the Internet “may raise distinct issues in this context.”²¹⁴ The chief justice, therefore, though acknowledging that the Court was required to make “an independent examination of the whole record,”²¹⁵ decided not to consider portions of the record focusing on the video.

The record and court documents were replete with references to the video. In addition to the one paragraph of argument in Snyder's brief on the merits – which Chief Justice Roberts found insufficient to warrant consideration – the brief noted that the targeting of the Snyder family continued after the funeral protest with the posting of the video, and that an expert witness for the Phelps found the so-called “epic” to be directed at the Snyder family.²¹⁶ There were a half-dozen other references to the video in the brief.

intentional infliction, since that is the burden of proof for private persons bringing libel actions in Utah).

²¹⁰ See Shulman, *supra* note 108, at 38.

²¹¹ 131 S.Ct. 1207, 1219 (2011). Except for the citation referenced at *supra* note 119, Chief Justice Roberts cites *Hustler* only once, 131 S.Ct. at 1215, reporting that the Court had held that “not all speech is of equal First Amendment performance.”

²¹² See *supra* notes 30-32 and accompanying discussion.

²¹³ See Sacks, *supra* note 2, at 64.

²¹⁴ 131 S.Ct. at 1214 n.1. Chief Justice Roberts wrote that Snyder did not include arguments about the video in the petition for certiorari and only devoted one paragraph to the video in the argument section of the opening merits brief. *Id.*

²¹⁵ *Id.* at 1216 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)).

²¹⁶ Brief for Petitioner, *supra* note 75, at 7-8.

In addition, Justice Scalia raised the issue of the video early in oral arguments, concluding that watching it was Snyder's choice: "[B]ut if he chooses to watch. . . he has a cause of action because it causes him distress."²¹⁷ Justice Alito returned to the video later in the arguments, asking whether it explained some of the "arguably ambiguous signs" that were displayed during the protest.²¹⁸ The video, he said, explained that the "you" in "You are going to hell" referred to Matthew Snyder.²¹⁹ Finally, the Fourth Circuit reported that "the epic cannot be divorced from the general context of the funeral protest."²²⁰

Justice Alito criticized the majority for not considering the video.²²¹ In addition, he wrote, the video was part of the evidence that the jury considered, and the protest and video were "parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress."²²² Indeed, Craig Trebilcock, one of Snyder's attorneys, said the case hinged on the video.²²³ Without it, Trebilcock said, the case is merely "a group with unpopular signs on a street corner." If that had been Snyder's entire case, "[W]e might not even have brought the case because mean people with unpopular signs on a street corner is generally recognized as First Amendment protected."²²⁴

Even without the video, however, Jeffery Shulman writes that there was a personal nature to the protest, one Chief Justice Roberts avoided by holding that those personal attacks were of a public nature.²²⁵ In so doing, the chief justice watered down the tort of intentional infliction of emotional distress.²²⁶ Under the Court's tort law jurisprudence, Shulman wrote, for the church to be protected, there must be something about Snyder's conduct that would allow speech to be directed at him, but there was no demonstrable connection between the Snyders and the church.²²⁷ Courts resolving cases involving involuntary public figures in

²¹⁷ Transcript of Oral Arguments, *supra* note 8, at 5.

²¹⁸ *Id.* at 10.

²¹⁹ *Id.*

²²⁰ *Snyder v. Phelps*, 580 F.3d 206, 225 (4th Cir. 2009).

²²¹ 131 S.Ct. 1207, 1226 (2011) (Alito, J., dissenting).

²²² *Id.* at 1226 n.15 (Alito, J., dissenting).

²²³ Melissa Nann Burke, *In Snyder v. Phelps, High Court Avoided Internet Speech Issue*, YDR.COM, <http://www.ydr.com>, Mar. 7, 2011. How many paragraphs would have been enough, Trebilcock asked.

²²⁴ *Id.* Jeffery Shulman agreed. He wrote that ignoring the video meant the Court the case on "half the record." Shulman, *supra* note 108, at 36. Shulman also wrote that by not considering the epic, the Court "took most of the good constitutional stuff" out of the case. *Id.* at 35. *See also* Sacks, *supra* note 2, at 65 (writing that ignoring the video left many questions unanswered).

²²⁵ Shulman, *supra* note 108, at 36-37.

²²⁶ *Id.* at 37.

²²⁷ *Id.* at 38.

other tort actions have agreed.²²⁸ Chief Justice Roberts found the speech protected, despite the personal attack, because of its “overall thrust and dominant theme.”²²⁹ He did not explain why the “overall thrust” outweighed the series of individual attacks on the Snyders, but one might expect that the reason was that such a focus helped define the speech as being on matters of public concern rather than a targeted attack.²³⁰

A focus on the issues presented – tort law in general and intentional infliction of emotional distress in particular – would have required the Court to either follow its precedent or explain why it was overruling, distinguishing or modifying that precedent. Prior to *Snyder*, there was a balance between speech on matters of public concern and speech aimed at private persons. Because of a compelling state interest in protecting private persons not involved in such matters, the Court crafted a rule that granted such people additional protection.²³¹

That rule was established in 1974 when the Court overruled *Rosenbloom v. Metromedia*²³² in *Gertz v. Robert Welch, Inc.*²³³ The *Rosenbloom* rule had provided that private persons who bring libel actions should not face the same hurdles in proving their cases as public officials or public figures²³⁴ simply because the speech at issue related to matters of public concern. The Court repeated its denunciation of the rule in *Time, Inc. v. Firestone*,²³⁵ and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, specifically noting that matters of public concern do not automatically entitle libel defendants to the protections of *Times v. Sullivan*.²³⁶

What has happened by way of *Snyder* is a stealth version of *Rosenbloom* creeping into the rules of intentional infliction of emotional distress, even though it has been banished from libel law. Accompanying the revival of *Rosenbloom* is the requirement that a targeted attack on a private person is allowable unless the language used in the attack can be proved to be false. The rule was apparently established for public persons in *Hustler*. Prior to the appropriation of the actual

²²⁸ See Hopkins, *supra* note 192, at 44-45 (writing that some courts have found libel plaintiffs to be involuntary public figures if they take actions that are likely to be scrutinized or publicized, even if they do not voluntarily enter the public eye).

²²⁹ 131 S.Ct. 1207, 1217 (2011).

²³⁰ See Wasserman, *supra* note 64.

²³¹ See *supra* notes 52-63 and accompanying discussion.

²³² 403 U.S. 23 (1971) (plurality).

²³³ 318 U.S. 323 (1974).

²³⁴ See *supra* notes 53-63 and accompanying discussion.

²³⁵ 424 U.S. 448 (1976).

²³⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (“In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*.”).

malice rule to intentional infliction suits brought by public persons, truth or falsity was irrelevant to the tort.²³⁷

Even if the public concern test is better than the public/private person test when applied to public persons in intentional infliction cases – and it may be²³⁸ – *Snyder v. Phelps* provided little guidance on when speech is public or private.²³⁹ Indeed, as some scholars have indicated, the holding is likely to rule out liability for intentional infliction of emotional distress cases when a court determines that the offending speech is about a matter of public concern,²⁴⁰ while, at the same time, insulating severely emotionally damaging speech aimed at strangers by publicity seekers.²⁴¹

Chief Justice Roberts clearly distinguishes speech on public issues from speech on private matters and finds the former dispositive regardless of the status of the person being verbally abused. He did so while, at the same time, admitting that the public concern test is not clearly defined.²⁴² It is unclear whether this shift is a new element deviating from precedent or whether it can be justified by precedent. Regardless, a version of the *Rosenbloom* rule has been introduced into the law of intentional infliction of emotional distress to the detriment of private-person targets, based on selective use of Supreme Court precedent related to the law of libel and intentional infliction of emotional distress.

In addition, what one authority has called a “significant shift” from a person-based to a content-based test is based on a set of facts that does not involve public debate.²⁴³ While the rights and privileges of gay persons and the war in Iraq are certainly matters of important public concern,²⁴⁴ the facts of the case do not indicate that the plaintiff was involved in the debate. Albert Snyder was a private person who became the target of an expressive attack without voluntarily entering a public debate, or, as a matter of fact, without participating in a public debate at all. As the Court made clear in *Gertz*, whether a libel case relates to matters of public concern is irrelevant when the plaintiff is a private figure. And, as the Court made clear in *Hustler*, only public figures and public officials face a heightened standard of proof in cases of intentional infliction of emotional distress. When private persons bring such suits, the heightened

²³⁷ See *supra* notes 33-40 and accompanying discussion.

²³⁸ See, e.g., *Rosenbloom*, 403 U.S. at 43 (plurality) (“If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved.”). Some scholars would disagree. See, e.g., Stephen J. Mattingly, *Drawing a Dangerous Lie: Why the Public-concern Test in the Constitutional Law of Defamation is Harmful to the First Amendment, and What Courts Should Do About It*, 47 U. LOUISVILLE L. REV. 739 (2009).

²³⁹ See Sacks, *supra* note 2, at 65; Wasserman, *supra* note 64.

²⁴⁰ See Richards, *supra* note 67.

²⁴¹ See Criton, *supra* note 136.

²⁴² 131 S.Ct. 1207, 1216 (2011).

²⁴³ Wasserman, *supra* note 64.

²⁴⁴ See *Snyder*, 580 F.3d 206, 223 (4th Cir. 200) ; Shulman, *supra* note 39, at 314.

standard is not an issue, and, therefore, whether offending language involves matters of public concern or whether the language constitutes statements of fact or statements of opinion is irrelevant. The question is whether the publisher – through action or speech – succeeded in intentionally inflicting serious emotional harm on a specific person, and whether the conduct or speech is outrageous.

As a result of *Snyder*, there is a disconnect between the torts of libel and intentional infliction of emotional distress. The Supreme Court has not decided a libel case in more than twenty years,²⁴⁵ but in that case, the Court adhered to its public/private protocol.²⁴⁶ That protocol no longer applies to intentional infliction cases, however, since the Court seems to be applying a type of *Rosenbloom* rule to the tort.

The same buffer between public and private persons that exists in libel law should apply in cases involving intentional infliction of emotional distress. It does not advance the cause of free expression to allow outrageous attacks on private persons who have not entered the fray of public debate. Similarly, as Jeffrey Shulman notes, “The speech-based emotional distress suit does not operate to restrict public discourse; it restricts only the use of speech to inflict injury, the use of words as weapons.”²⁴⁷ The purpose of the tort was to allow recovery for exactly the kind of speech targeted at Albert Snyder by the Westboro Baptist Church. The effect of the holding is to create a type of Catch-22 for the Snyders: if the speech was not about them, it was protected as a matter of public concern; if it was about them, it was protected as hyperbolic rhetoric.²⁴⁸

Justice Breyer seemed to recognize these infirmities. He wrote that the Opinion of the Court does not hold that the state is powerless to provide private individuals with protection.²⁴⁹ The argument rings hollow, however. In what circumstances would the Court hold that a plaintiff had proved intentional infliction of emotional distress? The attack would have to be outside the view of the public. Despite Chief Justice Roberts’ objection to Justice Alito’s use of the term “free-fire zone” to describe public space under *Snyder*,²⁵⁰ the Opinion of the Court reports that Westboro Baptist Church was protected, in part, because the

²⁴⁵ The last substantive libel case the Court decided was *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991). *Tory v. Cochran*, 544 U.S. 734 (2005) began as a defamation case, but the substantive issue for the Court was that of prior restraint.

²⁴⁶ *Masson*, 501 U.S. at 499 (holding that the plaintiff, as a public figure, must prove “the degree of falsity” required for a determination of actual malice).

²⁴⁷ Shulman, *supra* note 39, at 124.

²⁴⁸ *Id.* at 37

²⁴⁹ 131 S.Ct. at 1221 (Breyer, J., concurring).

²⁵⁰ Justice Alito, in his dissent, criticized the Court for creating a “free-fire zone” on the public streets in which “otherwise actionable verbal attacks are shielded from liability.” *Id.* at 1227 (Alito, J., dissenting). Chief Justice Roberts responded by writing that the characterization was wrong. There is no free-fire zone, he wrote, but Westboro’s actions on a public street “heightens concerns that what is at issue is an effort to communicate to the public the church’s views on matters of public concern.” *Id.* at 1218 n.4.

offending speech occurred in a place where the protesters “had the right to be”²⁵¹ Private people, therefore, are not likely to have a remedy when verbally attacked, if the attack is cloaked in the garb of matters of public concern and takes place in public.²⁵²

Conclusion

The speech of the Westboro Baptist Church is problematic, *not* because it involves matters of public concern. The speech is *not* utterly without redeeming social value, nor is it knowingly false. It *may be* speech that matters. Indeed there is some evidence that the activities of the church promote positive speech. Responses to the church’s demonstrations have included welcoming songfests²⁵³ and prayer meetings.²⁵⁴ The speech is problematic because it constituted a verbal assault. The speech might have constituted fighting words, that is, words that “by their very utterance *inflict injury* or tend to incite an immediate breach of the peace.”²⁵⁵ Even if the face-to-face confrontation of fighting words is not present in the *Snyder* case, one could clearly argue that the words used by church members inflicted injury by their very utterance. Since the Court enunciated the fighting words doctrine in 1942, however, it has not upheld a conviction under that doctrine,²⁵⁶ suggesting that the concept is no longer viable. As an alternative, the speech of the church was certainly “[p]ersonal abuse,” that is, speech the Court has held “is not in any proper sense communication of information or opinion safeguarded by the Constitution.”²⁵⁷ If the fighting words doctrine is dead, however, the Court is not likely to allow liability for speech that falls into the category of “personal abuse.” Since *Snyder* was not defamed,²⁵⁸ intentional infliction of emotional distress was his only remedy for the verbal attack.

Hustler and *Snyder* are very different cases, but neither involved speech that was being advanced as truthful fact. There was no doubt that the dispute in *Hustler* involved matters of public concern,²⁵⁹ and the Court provided extra

²⁵¹ *Id.* at 1218.

²⁵² *Id.* See also Criton, *supra* note 136; Richards, *supra* note 67.

²⁵³ See Lowell High School Students Counter Protest by Westboro Church, Apr. 29, 2010, <http://celbrifi.com>.

²⁵⁴ See Tonia Moxley, *Protesters Greeted by Crowds in Blacksburg*, THE ROANOKE TIMES, Apr. 10, 2010, available at 2010 WLNR 7455110.

²⁵⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (emphasis added).

²⁵⁶ See Note: *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1129 (1993). See also Hopkins, *supra* note 137, at 23-30 (writing that the Court has interpreted *Chaplinsky* narrowly to the point of eviscerating the doctrine established by the case).

²⁵⁷ *Cantrell v. Connecticut*, 310 U.S. 296, 310 (1940).

²⁵⁸ *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572-73 (D. Md. 2008).

²⁵⁹ See SMOLLA, *supra* note 27, *passim*.

protections for parties in a debate by requiring a heightened standard of proof for public-person disputants. The *Snyder* Court, on the other hand, diverted the issue from intentional infliction of emotional distress and ignored the public/private distinction. Under *Snyder*, a finding that abusive speech involves matters of public concerns trumps all other factors. That is unfortunate. Intentional infliction of emotional distress could provide private people with protection against unwarranted attack from persons who were not attempting to engage in a public debate but simply wanted attention. One has trouble imagining why a group would attack an innocent bystander for any but self-serving motives, and such attacks do not deserve First Amendment protection. Allowing the victim of such an attack to seek and win damages because of severe emotional distress – a cause of action that is difficult to prove – does not diminish the open marketplace of ideas, and eliminating that protection does not benefit the cause of free speech.

The *Snyder* Court easily could have used *Hustler* as the foundation for a rule that did not eliminate the balance between the rights of speakers and the private persons they attack. Rather than providing absolute protection when offending speech appears to involve matters of public concern, the Court could have established that First Amendment protection applies when the speech *both* involves matters of public concern *and* is targeted at public officials or public figures – or at private persons engaged in the debate. The rule has its foundation in *Hustler* and *Gertz* and is applicable to *Snyder*. The rule would not impact protesters who speak on matters of public concern without brutalizing private persons who are not involved in the debate.

Albert Snyder was not embroiled in debate over a matter of public concern when attacked by the Westboro Baptist Church – he was a mourning father doing no more than attempting to bury his son in peace. That right was denied him because of the designed efforts of church members to intentionally inflict upon him severe emotional distress. The boundaries of intentional infliction cases are narrowly drawn and, as such, provide protection for private people without burdening the guarantees of free speech and a free press. The balance provided by the tort of intentional infliction of emotional distress is lost, thanks to *Snyder v. Phelps*. That balance did not significantly inhibit free speech, but its loss serves to inhibit the rights of private people to be free from brutal, unwarranted attacks.

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TOWARD A MODEL LAW OF INTERNET LIBEL: PROTECTING CITIZEN JOURNALISTS WITH ACTUAL MALICE

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The Supreme Court of the United States has never explicitly extended to bloggers and Web-publishing citizen journalists the constitutional privilege – the actual malice doctrine – it created for institutional media in New York Times v. Sullivan and its progeny. Nevertheless, in an Internet-mediated information society, those “nonmedia” defendants have emerged as ubiquitous publishers distinct from “media” defendants such as well-heeled news and entertainment corporations. Consequently, there is a danger that courts in different jurisdictions will interpret the constitutional privilege differently, if at all, for nonmedia defendants and a need to “debug” libel law to unequivocally protect nonmedia publishers. This paper presents a contemporary analysis of the actual malice doctrine, which it argues should be extended to explicitly apply to bloggers and Web-publishing citizen journalists.

Keywords: Actual malice, public figure, libel, libel reform, defamation, information society, Internet speech, blogging, citizen journalism

In charity to all mankind, bearing no malice or ill-will to any human being, and even compassionating those who hold in bondage their fellow-men, not knowing what they do.

John Quincy Adams (1767–1848),
letter to A. Bronson, 30 July 1838

Introduction

Malice, historically, has been defined in common-law libel lawsuits as “ill will, hatred or spite.”¹ While the presence of common-law malice has traditionally been held to overcome certain common-law privileges, there were always limits to its importance. In 1837, for example, Judge Joel Parker of the New Hampshire

¹ RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 3:46 (2010).

Superior Court of Judicature observed that when “a defendant has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice.”²

In 1964, the Supreme Court of the United States defined a new fault standard called “actual malice” in libel lawsuits, ruling that pursuant to the First Amendment, a public official (later extended to public figure) could not recover “damages for a defamatory falsehood relating to his official conduct unless he proved that the statement was made with ‘actual malice.’”³ The court defined actual malice, not in a publisher’s ill will, hatred or spite, but in “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁴ Since that proactive decision, courts and jurists have accepted a distinction between constitutional actual malice and common-law ill-will malice.⁵

The requirement that a public plaintiff is required to show constitutional malice is the media defendant’s most important protection in a libel lawsuit. By failing to explicitly extend that protection to nonmedia defendants, however, existing constitutional law falls short of the expectations and needs of the information society.

Justice William J. Brennan’s observation, “Voluntarily or not, we are all ‘public’ men to some degree,”⁶ is far more true today than when it was written in a 1971 opinion for the court. In 2012, social media applications, blogs, and Wiki have all made it easy to claim, “We are all public figures now.”⁷ If law and its interpretation must evolve with technology and society, then there is a case to be made in favor of applying actual malice to protect nonmedia libel defendants such as bloggers and citizen journalists who publish in Web media, including social media.

The nonmedia defendants have emerged as ubiquitous publishers in the information society, just as actual malice has evolved into established doctrine in American libel law. They are “nonmedia” in the sense they are typically Common Janes or Joes, distinct from “media” defendants, which are typically legacy news companies and well-heeled entertainment corporations. Citizen journalists, who tend to use smart phones and Internet media, operate on their own and outside of the umbrella of any corporation and would invariably fall in the “nonmedia” category.

This paper argues that it is time that constitutional doctrine caught up with the information society. It calls for the constitutional requirement for public plaintiffs to prove actual malice to be extended to nonmedia defendants,

² *New Hampshire v. Burnham*, 9 N.H. 34, 42 (1837).

³ *New York Times Co. v. Sullivan*, 376 U.S. 254, at 279-280.

⁴ *Sullivan*, 376 U.S. at 280.

⁵ SMOLLA, *supra* note 1, § 3:46.

⁶ *Rosenbloom v. Metromedia*, 403 U.S. 29, 48 (1971).

⁷ For example, Facebook, Inc. reported 955 million active users in June of 2012. See Facebook, Inc., Quarterly Report (Form 10-Q), at 19 (July 31, 2012).

including citizen journalists.

Norm of Nonmedia Defendants in the Information Society

American and Japanese writers envisioned an information society in the 1960s.⁸ The Princeton economist Fritz Machlup introduced the concept implicitly in 1962 when he discussed “the knowledge industry,” referring to computers and newer technologies of communication as an “information machine industry.”⁹ In 1970, the American Association for Information Science met in Philadelphia on the theme of an “Information-Conscious Society.”¹⁰ Yujiro Hayashi coined the moniker “information society” in the Japanese as *johoka shakai* in 1969,¹¹ but it first appears in English in Daniel Bell’s 1973 book.¹²

The information society regards the creation, ownership and distribution of knowledge¹³ as a primary economic activity. It is identified by the extent to which information industries contribute to gross national product and is characterized by a relatively high proportion of “knowledge workers.”¹⁴ It is measured in reduced innovation costs and in new forms of content creation that would have been uneconomical in the past.¹⁵ It is a successor of the industrial society, with which it also coexists. In a cultural sense, it extolls individualization as the emergence of a second modernity.¹⁶ In a communication sense, Duke law professor James Boyle writes, it is defined by a relatively high proportion of

⁸ For a history of the term “information society,” see ALISTAIR DUFF, INFORMATION SOCIETY STUDIES 2-5 (2001).

⁹ FRITZ MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES 15 (1962). See generally MARK U. PORAT, THE INFORMATION ECONOMY: DEFINITION AND MEASUREMENT (U.S. Dep’t of Commerce 1977) (U.S. Dep’t of Commerce).

¹⁰ See Eugene Garfield, *Inaugural Address*, BULLETIN, Dec.-Jan. 2000, <http://www.asis.org/Bulletin/Jan-00/garfield.html> (last visited Aug. 28, 2012).

¹¹ See TESSA MORRIS-SUZUKI, BEYOND COMPUTOPIA: INFORMATION, AUTOMATION AND DEMOCRACY IN JAPAN 3 (1988).

¹² “I rejected the temptation to label these emergent features as the ‘service society’ or the ‘information society’ or the ‘knowledge society.’” DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING xxxvii (1973).

¹³ “All information in the ordinary sense of the word is knowledge.” MACHLUP, *supra* note 9, at 15.

¹⁴ Bell documented growth in the number of white-collar workers and decline in the number of other industrial workers as a harbinger of perceived social and economic transformation. BELL, *supra* note 12. Robert Reich described these workers as “symbolic analysts” who are highly educated, flexible and mobile, and who “solve, identify, and broker problems by manipulating symbols.” ROBERT REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM 198 (1992).

¹⁵ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16 (2004).

¹⁶ ULRICH BECK AND ELISABETH BECK-GERNSHEIM, INDIVIDUALIZATION vii (Patrick Camiller trans., 2002).

product cost going into content creation rather than distribution, or into message rather than medium.¹⁷

An “individualized condition”¹⁸ has emerged as a premise and effect of the information society. It privileges self-interest, not so much in the rational-selfish sense of Ayn Rand as in the liberating sense of the Vedanta. The netizen,¹⁹ the disembodied human, is its unit of analysis. Bloggers and Web-publishing citizen journalists represent an especially bohemian individualization; they are ubiquitous in the information society and increasingly prone to become lawsuit targets.

When Marx and Engels wrote of the bourgeoisie, “All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses his real conditions of life and his relations with his kind,”²⁰ they could well have described that cultural transformation. Communication and database technologies such as weblogs,²¹ social media applications such as Twitter and Facebook, and discussion platforms such as RSS, Wikis and SMS, are the pervasive and formative media of the information society. In operationalizing individualization, they also enable journalism and activism by citizen reporters.²² In an early survey, some 29 percent of American bloggers said motivating action in others was primarily why they blogged; 61 per cent called it a major or minor reason. Another 27 percent said their primary motivation was to influence others’ thinking.²³ In October of 2012, Wordpress, the popular open source blog

¹⁷ James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?* 47 DUKE L.J. 93, 93-94 (1997).

¹⁸ BECK AND BECK-GERNSHEIM, *supra* note 16, at xxii; see generally, JEAN FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington et al. trans., 1984).

¹⁹ For an introduction of the term “netizen” and other emergences, see generally, *THE TRUTH ABOUT THE TRUTH: DECONFUSING AND RECONSTRUCTING THE POSTMODERN WORLD* (Walter Truett Anderson, ed., 1995).

²⁰ Karl Marx & Friedrich Engels, *The Communist Manifesto* 54 (Signet Classics 1998) (1848).

²¹ The term “weblog” was first used in 1997 on robotwisdom.com, a site that published links to individually selected websites of interest. See DAVID BELL, ET AL., *CYBERCULTURE: THE KEY CONCEPTS* 10 (2004).

²² In a July 2006 survey, thirty-four percent of American bloggers said they considered their blog as a form of journalism. The survey estimated that 8 percent of Internet users, or 12 million Americans, kept a blog and that 39 percent or 57 million read blogs. More than half of American bloggers were under 30 years old, and only 60 percent were Caucasian compared to 74 percent of Internet users. Much has changed in the blogosphere since then, but much remains similar. See Amanda Lenhart & Suzannah Fox, *Bloggers: A Portrait of the Internet’s New Storytellers*, Pew Internet & American Life Project, July 19, 2006, <http://www.pewinternet.org/~media/Files/Reports/2006/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (last visited Aug. 28, 2012).

²³ *Id.*

application, had more than 56 million sites and Facebook, the dominant social media network, 1 billion users.²⁴ If bloggers “were their own country [they would] be the 65th largest nation in the world. There is truly a Content Nation out there, a growing body of opinion-makers who are influencing individuals and institutions as never before on a wide variety of issues.”²⁵ Consequently, one should expect bloggers and Web-publishing citizen journalists to be increasingly targeted by libel lawsuits.

Citizen journalists represent “We the Media,” the phenomenon of audiences actively helping produce public information, documented by digital media scholar Dan Gillmor.²⁶ Their reporting pervades the information society. Many legacy or institutional news organizations have successfully leveraged the blogosphere to supplement newsgathering.²⁷ As a result, while institutional media in the twentieth century “treated the news as a lecture,” twenty-first century models of news are based on “a conversation, or a seminar” with the audience.²⁸ Not only have bloggers transformed the models of news, they have vastly increased and actively mediated the sources of news, commentary or activism. They have become a vigorous “fifth estate,”²⁹ distinct from fourth estate newspapers, newsmagazines, broadcast and cable.³⁰ They are playing a role that

²⁴WORDPRESS STATS, en.wordpress.com/stats/; Zack Whittaker, *Facebook hits 1 billion active user milestone*, CNET, Oct. 4, 2012, http://news.cnet.com/8301-1023_3-57525797-93/facebook-hits-1-billion-active-user-milestone.

²⁵ John Blossom, *Content Nation: A World of Personal Publishers Declares their Influential Citizenship*, SHORE (July 24, 2006), <http://www.shore.com/commentary/newsanal/items/2006/20060724contentnation.html> (last visited Aug. 28, 2012).

²⁶ DAN GILLMOR, *WE THE MEDIA* (: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 2006).

²⁷ See, e.g., Scott Leith, *CNN starts Web site for viewers' journalism*, ATLANTA J. CONST., Aug. 1, 2006, at C1. (“We realize our viewers have a really valuable contributions to make,” said Susan Bunda, senior vice president of news for CNN/U.S. . . . For years, news organizations like CNN have received help from everyday people in covering big events. Consider images taken by amateurs during the terrorist attacks of Sept. 11, 2001, or the Asian tsunami of late 2004. . . . With each passing month, however, more people have gained the ability to shoot pictures and videos, thanks largely to the proliferation of cellphones and cameras.”)

²⁸ GILLMOR, *supra* note 26, at xiii.

²⁹ Alison Rowat, *Is the Cyber Media Finally Clicking into Place?*, THE HERALD, Jan. 20, 2006, <http://www.highbeam.com/doc/1P2-23620880.html> (last visited Aug. 28, 2012). Not to be confused with anarchist periodical FIFTH ESTATE published from Liberty, Tenn., and Detroit, Mich..

³⁰ The “fourth estate” represents a relatively early Scottish understanding of the role of the institutionalized press as a watchdog of the original three “estates of the realm” dating to the feudal Middle Ages, the Church (clergy), the Nobility (knights) and the Peasantry (farmers and other workers). An early reference to the fourth estate appears in the writings of Thomas Carlyle: “[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more

negotiates a fascinating dialectical tension between, on the one hand, a gatekeeping role assumed by journalists and, on the other hand, the ideal of democratic inclusion.

When this article refers to a blogger as “nonmedia,” it is referring to bloggers who are not affiliated with corporate or institutional organizations. Many such bloggers may enjoy a potentially diverse and trans-border audience; for others, a relatively small audience may actually access his or her musings, thus rendering the blogger akin to an unsuccessful offline speaker. In the information society, content coalesces with medium; the digital medium is in a sense composed of its message. Outside of it, a corporate or mass medium is one whose circulation has reached a critical mass for a given advertiser – any further increase would not significantly affect the advertiser’s returns.³¹ In noneconomic terms, a mass medium is understood as a singular speaker and a relatively vast audience that may or may not offer feedback.³² Further, courts have tended to define an institutional medium by its size, nature, circulation and type of audience.³³ If the fifth estate operationalizes a relatively unfettered information society, then bloggers’ libel protection should be a necessary theme in any discussion of expressive freedom.

Constitutional Privilege in Cases of Media and Nonmedia Libel Defendants

In conjunction with the equal protection clause of the Fourteenth Amendment, the free speech clause of the First Amendment offers, to quote Ohio State law professor Daniel P. Tokaji, a “First Amendment Equal Protection.” Such equal protection operationalizes “the democratic ideal that all citizens should

important than they all.” ON HEROES, HERO WORSHIP AND THE HEROIC IN SOCIETY 178 (1966) (1841). More recently, U.S. Supreme Court Justice Potter Stewart welcomed the role of the press as a “fourth institution outside the government to check the potential excesses of the other three branches.” Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 636 (1975).

³¹ Merrill Morris & Christine Ogan, *The Internet as Mass Medium*, 1 J. COMPUTER-MEDIATED COMM. 1 (1996).

³² For a discussion of communication models, see DENIS MCQUAIL, *MCQUAIL’S MASS COMMUNICATION THEORY* 52-59 (4th ed. 2000).

³³ Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 122, 122-23 (1987). The U.S. Supreme Court has not explicitly defined the Internet as a mass medium. The furthest the court has gone is to say, “The Internet is a unique and wholly new medium of worldwide human communication.” *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

have an equal opportunity to participate in public discourse.”³⁴ Yet, it is far from clear whether it is also available to nonmedia defendants.

As U.S. law stands, institutional media receive protection of the constitutional privilege created in the decision of *New York Times v. Sullivan*³⁵ and its progeny, including *Gertz v. Robert Welch, Inc.*³⁶ The strength of the privilege, defined in standards of fault, varies depending upon whether the plaintiff is a public official, public figure, or private figure. Writing for the court in *Gertz*, Justice Lewis Powell has explained the privilege by distinguishing private plaintiffs from public plaintiffs, who typically have greater access to media, a thirst for the limelight of public office or controversy, and who voluntarily expose themselves to a higher risk of libel.³⁷

In the Supreme Court cases, this privilege is explicitly applied to institutional media. As a consequence, relatively few media libel cases go to trial. The Media Law Resource Center, New York, has documented a strong downward trend in the number of media trials since 1980. The MLRC has found that libel trials in the 2000s had dwindled by more than half since the 1980s, when it had found 266 trials (26.3 per year). In the 1990s, the number dropped to 192 (19 per year), and in the past decade it dropped to 124 (12.5 per year). In 2009, there were only nine libel trials of media defendants.³⁸ A longitudinal study by the law professor David Logan³⁹ found “proof that Justice Brennan and his brethren [had] accomplished the goal articulated in *New York Times*: the creation of an environment in which public ‘debate on public issues is uninhibited, robust and wide open.’”⁴⁰

On the other hand, the law does not explicitly extend the constitutional privilege to nonmedia defendants. In 1982, the Supreme Court of Wisconsin observed that the Supreme Court of the United States “has not ruled as to whether the standards governing defamation actions set forth in *Gertz* apply to

³⁴ Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003).

³⁵ 376 U.S. 254 (1964).

³⁶ 418 U.S. 323 (1974).

³⁷ *Id.* at 344-345.

³⁸ John Koblin, *The End of Libel?*, N.Y. OBSERVER, June 8, 2010, <http://www.observer.com/2010/media/end-libel> (last visited Aug. 28, 2012). Even in London, which has been called the libel capital of the world, libel lawsuits are dwindling. See, Alex Novarese, *The Death of Libel?*, LEGAL WEEK, May 12, 2012, <http://www.legalweek.com/legal-week/feature/2070231/death-libel-defamation-beginning-libel-lawyers> (last visited Aug. 30, 2012). (“[T]he number of defamation writs issued in London since 1990 shows that the figures have fallen from a high of 560 in 1995. Between 2000 and 2009, writs have never exceeded 300 a year . . .”).

³⁹ See generally David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001).

⁴⁰ *Sullivan*, 376 U.S. at 270.

all defendants, or just media defendants.”⁴¹ Further, in 1994, Judge Frank Easterbrook concluded for the Seventh Circuit Court of Appeals, “There is still doubt whether the Constitution applies the same standards to media and private defendants.”⁴² In at least three cases, the high court has reserved its view on whether nonmedia defendants were protected by the actual malice doctrine. In another case, it has implied that bloggers or those engaged in public speech should be eligible for the constitutional privilege. Consequently, it is undecided or unclear at best if the privilege applies to nonmedia defendants.

Nine years before the high court decided *Dun & Bradstreet v. Greenmoss Builders*,⁴³ it ruled in *Gertz* that the First Amendment prohibited award of presumed and punitive damages to a private plaintiff unless the plaintiff showed actual malice. In *Dun & Bradstreet*, the court considered whether that *Gertz* rule applied when the libel involved a matter of private concern, and found that it did not. In other words, the First Amendment offered less protection to private speech, which Justice Powell defined for the court as “speech on matters of purely private concern” that does “not involve matters of public concern,”⁴⁴ than it offered to public speech. Further, the more speech was “solely motivated by a desire for profit” the less protection it would evoke for the defendant. Thus, recovery for presumed and punitive damages was permitted for private and profit-motivated speech without any burden on the plaintiff to show actual malice. It could be implied from that holding that bloggers who engage in speech that tends to be public and who are seldom motivated by desire for profit should be entitled to actual malice protection. But the Court has never made that explicit.

Indeed, the Court has specifically declined to do so. In 1979, *The Philadelphia Inquirer* published a series that included an allegation that Thrifty stores and their parent franchiser were connected to organized criminals that they used to get favors from state administration. Maurice S. Hepps, Thrifty’s principal stockholder, sued for libel in a case the high court heard as *Philadelphia Newspapers, Inc. v Hepps*.⁴⁵ Pennsylvania followed the common law presumption that the story was false and the *Inquirer* had the burden of proving it true, a rule upheld by the Supreme Court of Pennsylvania. On appeal, the U.S. Supreme Court reversed, ruling that a private plaintiff suing a media defendant must prove falsity of the allegation, thus turning the common law rule on its head. Thanks to the earlier case of *Gertz*, private plaintiffs also would prove a minimum standard of fault of negligence; therefore, they must show both falsity and fault. The *Hepps* court opinion written by Justice Sandra Day O’Connor and joined by four other associate justices specifically stated, “[We have no occasion]

⁴¹ *Denny v. Mertz*, 106 Wis. 2d 636, 660 (1982).

⁴² *Underwager v. Salter*, 22 F.3d 730, 734 (1994).

⁴³ 472 U.S. 749 (1985).

⁴⁴ *Id.* at 755.

⁴⁵ 475 U.S. 767 (1986).

to consider what standards would apply if the plaintiff sues a nonmedia defendant.”⁴⁶

Further, in *Milkovich v. Lorain Journal* four years later,⁴⁷ the majority opinion authored by Chief Justice William Rehnquist and joined by six associate justices also stated, “In *Hepps* the Court reserved judgment on cases involving nonmedia defendants and accordingly we do the same.”⁴⁸ In that case, Justice William Brennan’s dissenting opinion, joined by Justice Thurgood Marshall, was brilliantly instructive. It stated, “The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. I continue to believe that ‘such a distinction is irreconcilable with the fundamental First Amendment principle that [t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.’”⁴⁹ Justice Brennan’s view that “there has been an increasing convergence of what might be labeled ‘media’ and ‘nonmedia,’”⁵⁰ would be especially and ever more relevant in the information society.

Clearly, the Supreme Court’s reluctance to define any level of constitutional protection for nonmedia defendants can result in a chilling effect.⁵¹ In addition, even though the Electronic Frontier Foundation touts that “blogs

⁴⁶ *Id.* at 779 n.4.

⁴⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). The *Milkovich* court grappled with a post-World War II assumption of the common law that a statement of opinion, as opposed to a statement of fact, could not be proved true or false and was hence privileged and not defamatory. The high court refused to extend any special constitutional privilege to opinion, ruling that *News Herald* columnist Ted Diadiun’s allegation that “Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth,” was not protected purely just because it was an opinion. *Id.* at 6.

⁴⁸ *Id.* at 11 n.5 (Citation omitted).

⁴⁹ *Id.* at 23 (Citations omitted).

⁵⁰ *Dun & Bradstreet*, 472 U.S. at 782 n.7. In this case, at least six justices appeared to reject the distinction between media and nonmedia: “. . . In the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.” *Id.* at 783-784 (Justice Brennan, dissenting).

⁵¹ For example, the First Amendment scholar Lyrissa Barnett Lidsky wrote in 2000: “Defamation law . . . is so complex that it is almost impossible to state even the most basic proposition with certainty. Even for those relatively rare Internet users who have the resources to defend against a defamation action and who contemplate in advance whether their postings will subject them to liability, the inability to predict with any certainty what level of constitutional protection they will receive may itself have a chilling effect.” Lidsky, *Silencing John Doe*, 49 DUKE L.J. 855, 905 n. 261 (2000).

have the same constitutional protections as mainstream media,”⁵² bloggers would do well to expect legal consequences.⁵³ Nonmedia defendants face a “serious risk of being sued for libel”⁵⁴ when engaging in political reporting, commentary or activism; the law professor Paul Horwitz offers three arguments in favor of extending legal protection to bloggers. First, he contends that an “open press,” which blogs can represent, is equal to a “free press” of the First Amendment; second, journalism ought to have a functionalist definition that would not limit its practice to traditional members of “the press;” and finally, courts need to recognize autonomy of nontraditional private institutions under the press clause. He writes, “To the extent the blogosphere resembles the press of the founding era, it may then be natural to suggest that our thoughts concerning the constitutional status of and protection for blogs should stem as much from the Press Clause as from the Speech Clause.”⁵⁵

In addition, there is the “access argument,”⁵⁶ which several states have adopted to offer higher levels of protection to media defendants in lawsuits with public-figure plaintiffs, who have greater access to the media. In the information society, plaintiffs and defendants enjoy phenomenally and equally enhanced access to media. They exist in the same cyberspace, with the situation of an alleged libel distinguishing the plaintiff from the defendant. The absence of a physical, “real” or offline facet in cyberspace gives nonmedia and institutional media defendants a level playing field, which in turn offers a powerful argument in favor of extending the constitutional privilege enjoyed by institutional media. Because plaintiffs as a rule have greater access to media, defendants should merit correspondingly greater protections.

⁵² ELECTRONIC FRONTIER FOUNDATION, *Bloggers’ FAQ Online Defamation Law*, <https://www.eff.org/issues/bloggers/legal/liability/defamation> (last visited Oct. 17, 2012).

⁵³ *Id.* The EFF cites Justice Brennan’s dissenting opinion in *Hepps*.

⁵⁴ Marc Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 Cal. L. Rev. 809, 814 (1986); see also Steven Greenhouse, *Outspoken Private Critics Increasingly Face Slander Lawsuits*, NY TIMES, Feb. 14, 1985, at B11, col. 1 (nat’l ed.). The corporate accounting scandals of the 2000s may be seen as a result of the lack of protection to whistleblowers from liability in libel actions even for benign inaccuracies.

⁵⁵ Paul Horwitz, *Or of the Blog*, 11 NEXUS J. OP. 45, 50 (2006).

⁵⁶ The access, or self-help, argument of Justice Powell is a frequently held justification for different standards for private and public plaintiffs. It makes a case that a plaintiff’s access to the media to rebut the alleged defamation is relevant to the plaintiff’s status as a public figure. See *Gertz*, 418 U.S. at 344-345. The access argument is criticized in Justice Brennan’s majority opinion in *Rosenbloom*, 403 U.S. 29 at 46-67: “Denials, retractions, and corrections are not “hot” news, and rarely receive the prominence of the original story. . . . [In] the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media’s continuing interest in the story.”

The uncertainty of First Amendment privilege has resulted in a near barrage of claims against nonmedia defendants, some of which are documented by the Media Law Resource Center.⁵⁷ As of May of 2009, there was about \$1.7 million in trial awards against bloggers.⁵⁸ In 2007, “106 civil lawsuits against bloggers and others in social networks and online forums were tallied by the Citizen Media Law Project at the Berkman Center for Internet & Society at Harvard University, up from just 12 in 2003.”⁵⁹ Examples abound of tenacious public plaintiffs engaging nonmedia publishers: Two bloggers were jailed in Ohio for publishing allegedly critical comments against a judge, a case in which the charges included the bloggers’ use of their computer as a “criminal tool.”⁶⁰ In another case, the chairman of the Philadelphia Turnpike Commission launched libel proceedings against a Middletown, Pennsylvania, blogger for critical comments on the blog.⁶¹ The founder of an activist group seeking to defeat Pennsylvania lawmakers sued a website that criticized his campaign as a “moneymaking scheme.”⁶²

But it is not only public plaintiffs who could go after nonmedia defendants. In May of 2012, private corporate sites, namely Google, YouTube, Facebook, Twitter, Yahoo, MSN, Amazon and Wikipedia, in that order, had emerged as the top eight Web traffic destinations. Whether American or not, corporate dominance of Web traffic evokes all of the democratic and free speech issues discussed by the critical media scholar Robert McChesney.⁶³ On the one

⁵⁷ A listing and discussion of libel suits targeting bloggers and other netizens is available at the law professor Eric E. Johnson’s blog, *Blog Law Blog*, <http://bloglawblog.com/blog/?cat=138> (last visited Aug. 28, 2012); see also Electronic Frontier Foundation, <http://www.eff.org/bloggers/> (last visited Aug. 28, 2012).

⁵⁸ M.P. McQueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May 21, 2009, at D1.

⁵⁹ *Id.*

⁶⁰ *Ohio v. Baumgartner*, No. CR-05-470184-A (Ohio C.P. Ct., Cuyahoga County indictment Aug. 30, 2005); *Ohio v. DuBois*, No. CR-05-470184-B (Ohio C.P. Ct., Cuyahoga County indictment Aug. 30, 2005). Elsebeth Baumgartner of Oak Harbor and Bryan DuBois of Sandusky, the bloggers of www.erievoices.com, allegedly libeled and harassed retired Cuyahoga county judge Richard Markus, who presided over a libel lawsuit based on letters that Baumgartner, a former attorney who was disbarred in 2003, sent to a school board member. That trial ended with a \$175,000 verdict against Baumgartner.

⁶¹ *Deon v. McMonagle*, No. 2005-08774 (Pa. C.P., Bucks County filed Dec. 8, 2005). The blog in question was www.middletownnews.net (now defunct).

⁶² Martha Raffaele, “Founder of anti-incumbent group files libel lawsuit,” *PITTSBURGH POST-GAZETTE*, Feb. 18, 2006, at B2. The site in question was www.uncleansweep.com (now defunct).

⁶³ “Tragically the dominant notion of a ‘free press’ in the United States (and increasingly elsewhere) continues to regard the government as the only organized enemy of freedom. Imagine if the U.S. government had ordered that journalism staffs be cut in half, that scores of foreign bureaus be shut down and that the news be shaped to suit the interests

hand, netizens clearly enjoy a relative ease of falsifying email return addresses to criticize corporate actors anonymously, but on the other hand media goliaths have an oligopoly that could neutralize the disruptive, subversive and competitive capacity of the information society.⁶⁴ In addition, and not coincidentally, evidence of coercive or intrusive corporate advertising is rampant.⁶⁵

The ubiquitous corporate power raises serious concerns for digital democracy because, after all, the First Amendment protects expression from state action but leaves out of legal purview transgressions by corporations.⁶⁶ The First Amendment, write the jurists Thomas Ambro and Paul Safier, is to be interpreted in a light “of the dangers uniquely associated with government interference in the development and expression of ideas.”⁶⁷

Therefore, when corporations eye lawsuits and possible punitive damages as a way to silence outspoken consumers, disgruntled vendors or former employees, their motivation should be expected to be a desire to squash criticism or silence the critic rather than to restore any damaged reputation. The trend of such litigation represents in the information society a comeback of Strategic Lawsuits Against Public Participation.⁶⁸ The law professor Robert Post writes, SLAPPs “illustrate the disjunction between legal words and social ends,”⁶⁹ including democratic legitimation and competence, a search for truth, protecting institutions of the public sphere, checking government abuse, and public

of the U.S. government. It would doubtlessly constitute the gravest U.S. political crisis since the Civil War, making the red scares and Watergate look like a day at the beach. Yet when corporations pursue the exact same course, scarcely a murmur of dissent can be detected in the political culture.” Robert W. McChesney, *The Political Economy of Global Communication*, in *CAPITALISM AND THE INFORMATION AGE 18* (Robert W. McChesney, Ellen Meiksins Wood & John Bellamy Foster, eds. 1998).

⁶⁴ “The Internet has not spawned a new group of commercially viable media companies to compete with existing firms.” ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA* 221 (2004). See generally, ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY* ch. 3 (1999).

⁶⁵ *The Top 20 Internet News Sites*, *COLUM. JOURNALISM REV.*, March/April 2003, at 28.

⁶⁶ “Only the government may not restrict your right of free speech, others can. . . . [Americans] lack a coherent positive theory of freedom of expression that is widely accepted.” ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGIN OF RIGHTS* 179 (2004) (emphasis in original).

⁶⁷ Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and ‘Picking Winners,’* 87 *WASH. L. REV.* 397, 400 (2012).

⁶⁸ SLAPPs are lawsuits whose purpose is not to seek redress for reputational damage, which may or may not exist, but to silence a critic with a threat to burden defendants with litigation costs including time and attorney fees. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 *PACE ENVTL. L. REV.* 3 (1989).

⁶⁹ Robert Post, *Understanding the First Amendment*, 87 *WASH. L. REV.* 546, 550 (2012).

discourse.⁷⁰ Such lawsuits, it seemed, had been successfully stymied by state legislation passed over two decades – 29 states had anti-SLAPP statutes in March of 2012. Nevertheless, there was a case to be made that SLAPPs never really went away, because many anti-SLAPP statutes had been limited to or focused on speech that targeted or otherwise related to government officials.⁷¹

Generally, a corporation-netizen confrontation represents an unequal fight. In one case, a California jury found two ex-employees liable for invasion of privacy, libel, breach of contract, and conspiracy, and awarded their former company and two of its executives \$425,000 in general and \$350,000 in punitive damages.⁷² In another, a car insurance company sued a New Jersey man who had posted critical comments against the company on his 45-page website.⁷³ In yet another, a Nevada Internet marketing company sued a blogger who commented on search engine optimization for allegedly libelous comments and for publishing trade secrets.⁷⁴

The University of Pennsylvania legal scholar Edwin Baker observed, correctly, that disproportionate power wielded by private corporations has created a “skewed marketplace.”⁷⁵ Another author writes, “It is becoming clear that [on the Internet] corporations are using punitive damages as a form of self-help.”⁷⁶ Evidently, the threat to free speech in the information society may

⁷⁰ *Id.* “Defending even an unmeritorious suit can be costly and time-consuming, and this expense will likely discourage otherwise protected participation in public discussion.” *Id.*

⁷¹ For example, Georgia’s anti-SLAPP statute “covers only speech linked to official proceedings,” according to a 2007 ruling by the state supreme court. *Berryhill v. Georgia Cmty. Support and Solutions, Inc.*, 281 Ga. 439 (2006)(ruling on GA. CODE ANN. § 9-11-11.1).

⁷² *Varian Med. Sys. v. Delfino*, 35 Cal. 4th 180 (2005). In cases with media defendants, however, the award of punitive damages was on the decline. According to the Media Law Research Center, “There has been a dramatic shift from the 1980s to this decade in the ratio of compensatory and punitive damages in awards [in all cases, not just libel]. Of the total damages awarded in the 1980s, 39.0 percent was compensatory and 61.0 percent was punitive. In the 1990s, the ratio was 48.8 compensatory to 51.2 punitive. This decade, the ratio is 92.7 percent compensatory to only 7.3 percent punitive. In 2005, only 3.5 percent of the total damages awarded were punitive damages, an all time low for the [Complaint] Report.” Press release dated March 2, 2006. www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2006_Bulletin_No_1.htm (last visited Aug. 10, 2006; now defunct).

⁷³ *Penn Warranty Corp. v. DiGiovanni*, No. 600659/04 (N.Y. Sup. Ct., N.Y. County, dismissed Oct. 24, 2005). The site was www.pennwarrantylitigation.com (now defunct). The suit was dismissed after the court held that the comments on the site were protected speech.

⁷⁴ *Software Dev. and Inv. Nevada v. Wall*, Civil No. 051109 (D. Nev., filed Aug. 11, 2005). The blog is www.seobook.com.

⁷⁵ EDWIN C. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 250 (1989).

⁷⁶ Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?* 7 *CHAP. L. REV.* 39, 64 (2004).

emerge not so much from government,⁷⁷ as has been the premise in traditional freedom of expression theory, but from powerful corporations and their executives. The corporate threat, in addition to threats by public and other private plaintiffs, can chill speech and act as a prior restraint especially when anonymous netizens risk being identified by an Internet Service Provider⁷⁸ or when subpoenaing plaintiffs need only “set forth a prima facie cause of action.”⁷⁹ Consequently, there is a pressing need for policymakers in the information society to pan the spotlight from seditious to private libel lawsuits.

Why might corporate plaintiffs perceive Internet libel to be especially damaging, dangerous or enduring?⁸⁰ David Porter writes, “In a medium of disembodied voices and decontextualized points of view, a medium, furthermore, beholden to the fetishization of speed, the experience of ambiguity and misreading is bound to be less an exception than the norm.”⁸¹ Because of this ambiguity or misreading – as well as the Internet’s trans-border reach, amplification or anonymity – corporations and other private plaintiffs tend to react in a kneejerk fashion to online libel.⁸² Besides, the uncountable Web-based purveyors of information, including e-versions of institutional news outlets such

⁷⁷ In 1996, the Clinton administration proposed a *laissez faire* regulatory policy for the information society. The policy even urged other governments to not regulate the Internet. WORLD WIDE WEB CONSORTIUM (WC3), *A Framework for Global Electronic Commerce*, <http://www.w3.org/TR/NOTE-framework-970706> (last visited Aug. 28, 2012).

⁷⁸ For example, in September 2005. Reporters Without Borders accused Yahoo!’s Hong Kong operation of giving the Chinese government identifying information that led to the imprisonment of journalist Shi Tao of Hunan province. AMNESTY INTERNATIONAL, *Imprisoned for Peaceful Expression*, <http://www.amnestyusa.org/our-work/cases/china-shi-tao> (last visited Oct. 30, 2012).

⁷⁹ See, e.g., *Dendrite International, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

⁸⁰ John L. Hines, et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 THE SEDONA CONF. J. 97 (2003). “Disparagement is a weapon commonly used by disgruntled employees or former employees to attack their corporate employers. The Internet has lowered the cost of using this weapon, made it more effective and decreased the likelihood that its employee-user will be detected. Corporate reputations are thus more at risk than ever.” *Id.*

⁸¹ DAVID PORTER, *INTERNET CULTURE* xii (1997).

⁸² Regardless of whether a corporate plaintiff files suit for corporate defamation or for another corporate reputational tort, the plaintiff is required to prove four elements: derogatory publication, fault, a provably false statement, and pecuniary damages. DAN B. DOBBS, *THE LAW OF TORTS* §407 (2000). Despite significantly more demanding conditions than those of common law libel, corporate plaintiffs have won several punitive damage claims in Internet cases. See Rustad, *supra* note 76, at 64.

as nytimes.com and gossip forums such as drudgereport.com,⁸³ enable the information society to bristle with opportunities for error or malice, and thus liability for libel. If the old dictum in ad agencies that a customer shares a good experience with four others but a bad experience with a dozen is applied to the information society, it is clear that reputational damage from libel can be greatly exacerbated.

Issues of Nonmedia Libel Defendants

Nonmedia defendants typically have neither liability insurance coverage nor any corporate structure; they are especially vulnerable to libel claims.⁸⁴ Media defendants, on the other hand, typically have access to both.⁸⁵ There is an expensive legal irony in institutional media enjoying First Amendment privilege that nonmedia do not – not only in dollar terms for individual netizens but also for its chilling effect for the information society. The inequity is exacerbated when corporate or public plaintiffs use the efficient and reliable legal support in libel claims against nonmedia.

In addition to unfamiliarity with the law and legal procedure, Web-using citizen journalists tend to have nearly nonexistent support of unions and other forms of organization. They are randomly distributed, have no collective voice or lobby, and do not represent a constituency, all of which may explain why they have hardly made a case for explicit First Amendment protection in the first place.⁸⁶ On the other hand, media defendants represent a powerful constituency, with access to insurers of high stakes and an organized bar.⁸⁷ In their gatekeeper role, corporate media tend to regulate access to political news⁸⁸ and set an agenda

⁸³ David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201 (2000) (describing explosion of new broadcast media outlets featuring news coverage).

⁸⁴ Joe Strupp, *Web Publishers Can Be Found Liable for Libel: Few Publishers Have Insurance*, EDITOR & PUBLISHER, Oct. 2, 1999, at 16.

⁸⁵ For example, the National Association of Broadcasters has in the past arranged two levels of insurance coverage for its members – one policy covering libel and invasion of privacy suits and the other covering other First Amendment problems. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 169 (2006).

⁸⁶ A rare example of such a constituency was the Committee to Protect Bloggers, <http://committeetoprotectbloggers.blogspot.com> (now defunct).

⁸⁷ “Libel law reform . . . has no political constituency unless the media and their allies support it. So far they have not done so.” David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 546 (1991).

⁸⁸ Sarah A. Maguire, *A Misplaced Focus: Libel Law and Wisconsin’s Distinction Between Media and Nonmedia Defendants*, 2004 WIS. L. REV. 191.

for public discourse,⁸⁹ possibly motivated by a desire to perpetuate their privileged status quo. They could play an insidious role in dismantling effective participatory democracy, as McChesney has found.⁹⁰

In such a scenario, to offer corporate media First Amendment protection that nonmedia defendants do not explicitly enjoy frustrates the *New York Times* ideal of a “robust, uninhibited and wide-open” marketplace of ideas as a premise of democracy.⁹¹ In addition, institutional media traditionally have a limited circulation or reach relative to trans-border nonmedia. The double standard restrains independent writers and thinkers from expressing ideas for fear of a lawsuit, just the retribution that *New York Times* found the First Amendment intends to preempt.⁹²

Extending the Constitutional Privilege To Nonmedia Libel Defendants

The resulting chill impedes information society growth as well as its aggregate economic and social benefits. It affects nonmedia speakers outside of the information society as well, e.g., sources who are willing to let journalists publish their names. Given that sources play a primary role in the institutional newsgathering process,⁹³ this can have an adverse impact on news and on credibility of the institutional media. In addition to journalists’ sources, others affected by the chill include individuals who circulate petitions⁹⁴ and write letters to the editor,⁹⁵ databanks, credit reporting agencies, various information businesses, political and tenant groups, and publishers of handbills and local association newsletters.⁹⁶ It all throws up a specter of extensive self-censoring. It seems that given the constant expansion of the information society, libel litigation involving citizen journalists and other nonmedia defendants would

⁸⁹ For a discussion of anti-media sentiment in the United States, see BRUCE W. SANFORD, DON’T SHOOT THE MESSENGER: HOW OUR GROWING HATRED FOR THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 11-25 (1999).

⁹⁰ MCCHESENEY, RICH MEDIA, *supra* note 64; *see also* DOUGLAS RUSHKOFF, MEDIA VIRUS 206 (1996). Greg Ruggiero of the Immediast Underground, an electronic communication group that criticized coercive messages and media monopolies, was quoted as saying, “Media is a corporate possession. It is not a democratic right that we can locate in the [C]onstitution . . . You cannot participate in the media.” *Id.*

⁹¹ *See Sullivan*, 376 U.S. at 269.

⁹² ANTHONY LEWIS, MAKE NO LAW 914 (1992).

⁹³ *See* BRYCE T. MCINTYRE, ADVANCED NEWSGATHERING 50 (1991); ROBERT M. NEAL, NEWS GATHERING AND NEWS WRITING 134 (1940).

⁹⁴ E.g., *Good Gov’t Grp. of Seal Beach, Inc. v. Superior Court*, 586 P.2d 572 (Cal. 1978).

⁹⁵ E.g., *Karnell v. Campbell*, 501 A.2d 1029 (N.J. Super. Ct. App. Div. 1985).

⁹⁶ EVE PELL, THE BIG CHILL: HOW THE REAGAN ADMINISTRATION, CORPORATE AMERICA, AND RELIGIOUS CONSERVATIVES ARE SUBVERTING FREE SPEECH AND THE PUBLIC’S RIGHT TO KNOW 159-188 (1984).

continue to increase, resulting in a gradual compounding of the chilling effect,⁹⁷ which might only subside if the Supreme Court explicitly recognized a constitutional privilege for nonmedia defendants.⁹⁸

The inequitable treatment for media and nonmedia under current law is inconsistent with democratic self-rule, which the political philosopher Alexander Meiklejohn offered in 1948 as a theoretical defense of freedom of expression, and which has deeply influenced the Supreme Court's interpretation of the First Amendment. It also seems to gut the libertarian ideal of a marketplace of ideas in the face of an increasing need to protect such an ideal.

The Seventh Circuit Court of Appeals has noted that scholars and prosecutors, as nonmedia defendants, may have a greater need for privilege than broadcasters and newspapers.⁹⁹ In deciding a Wisconsin lawsuit in 1994, it observed that it made little sense to reserve constitutional protection for the institutional media. Noting that "all of Wisconsin's 'public figure' cases were against media defendants," the court added, "Just as the public has a strong interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements, so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest in reputation; that is why even the *New York Times* privilege is qualified rather than absolute. The private interest at stake is not greater when the defendant is a psychologist rather than a reporter."¹⁰⁰ But

⁹⁷ In a relatively early case, the Wisconsin Supreme Court had declared that a computer bulletin board did not qualify as a periodical, because posting a message there was "analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals." *It's In the Cards, Inc. v. Triple Play Collectibles*, 535 N.W.2d 11, 14 (Wis. 1995). The case was so early that the court used a footnote to define the Internet: "The online service [at issue in the case] is not the Internet, but is one network service. The Internet is a network of thousands of independent networks, containing millions of host computers that provide information services. Further, the Internet is not owned or controlled by a private company or the government," *Id.* at 13 n.2. The court ruled that the Internet was not a medium that could trigger the state's retraction statute, a position that was rendered generally obsolete by other judgments in later years.

⁹⁸ On the contrary, the legal scholar Eugene Volokh has documented other case law that recognizes no distinctions between media and nonmedia defendants. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 510-16 (2012).

⁹⁹ *Underwager v. Salter*, 22 F.3d 730, 734-735 (7th Cir. 1994).

¹⁰⁰ *Underwager and Wakefield v. Salter*, 22 F.3d 730, 734-735 (7th Cir. 1994). The *Wakefield* lawsuit was filed by authors of books on child sexual abuse against a critic of their research method. The plaintiffs' books, not accepted by the scientific community, argued that most accusations of child sexual abuse arose from "memories implanted by faulty clinical techniques rather than from sexual contact between children and adults." *Wakefield*, 22 F.3d at 731. Many scientists joined issue with the plaintiffs' method. The defendant was a former prosecutor who had received a grant to critique the authority that the authors cited, and after 18 months of research she determined that the plaintiffs'

after indicating it supported extending the actual malice rule to nonmedia defendants,¹⁰¹ only a year later it declined to rule on whether media sources were entitled to the constitutional privilege afforded by the actual malice doctrine.¹⁰² That opinion by Judge Myron H. Bright stated, “Whether the *New York Times* standard would apply to . . . a media source, need not be decided here.”¹⁰³ It also noted that the Supreme Court of Wisconsin had “limited the reach of *New York Times*.”¹⁰⁴ Finally, the doctrinal dichotomy makes even less sense when the U.S. Supreme Court has declined to grant institutional media any special status in non-defamation situations.¹⁰⁵

To conclude this point, the information society seems to have exacerbated the inequities of the law, notwithstanding the fact that libel is defined independently of medium. Current law fails to recognize the dissolution of distinctions between media and nonmedia defendants.¹⁰⁶ In light of historian Arthur M. Schlesinger’s cautionary note, “Change is threatening. Innovation may seem an assault on the universe,”¹⁰⁷ the writer proposes that the constitutional privilege enjoyed by media defendants should be definitively extended to nonmedia defendants, especially to bloggers and others of the fifth estate.

In a nutshell, the reason why the law ought to evolve could be at least partially expressed by a categorical syllogism: 1. *New York Times* gave First Amendment protection to media defendants; 2. The line between media and nonmedia defendants has blurred in the information society; 3. Therefore, the protection should extend to nonmedia defendants in the information society.

conclusions were wrong. She wrote a monograph, which was not published, gave several speeches, and appeared in television interviews to discuss her research, following which the plaintiffs filed suit alleging libel.

¹⁰¹ *Id.* at 734.

¹⁰² *Harris v. Quadracci*, 48 F.3d 247, 253 (7th Cir. 1995).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *E.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In this case, the court stated it would “draw no distinction between the media respondents” and the nonmedia respondent, Jack Yocum, who was head of a local taxpayers’ group who passed the offending content to the media. *Id.* at 525 & n. 8.

¹⁰⁶ The Electronic Frontier Foundation has urged the courts declare bloggers as journalists to protect them from revealing anonymous sources. See a discussion of the “*Apple v. Does*” documents available at the EFF site, <https://www.eff.org/search/site/Apple%20v.%20Does> (last visited Aug. 28, 2012). “The protections required by the First Amendment are necessary regardless of whether the journalist uses a third party for communications,” ELECTRONIC FRONTIER FOUNDATION, *Apple v. Does*, <https://www.eff.org/cases/apple-v-does> (last visited Aug. 28, 2012).

¹⁰⁷ ARTHUR SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 424 (1986).

Interpreting Actual Malice for Bloggers And Web-Using Citizen Journalists

If the actual malice doctrine is to be extended to nonmedia defendants, it is pertinent to ask how adaptable it is to the characteristics of the information society.¹⁰⁸ This section addresses the question by evaluating colorful doctrinal undertones.¹⁰⁹

An iconic 1996 article by David Johnson and David Post argued that the information society “radically subverts a system of rule-making based on borders between physical spaces.”¹¹⁰ The year after, the United States unveiled the first Internet regulatory framework¹¹¹ and policymakers began to recognize multiple personal jurisdictions as a key challenge to regulation. As the legal scholar Pamela Samuelson put it, “how to coordinate with other nations in Internet law and policy making so that there is a consistent legal environment on a global basis”¹¹² was a significant difficulty. Not only does the difficulty persist, a strong trend has developed over the years toward easing standards required to assert personal jurisdiction in Internet-related libel cases. In 2010, the Seventh Circuit and Tenth Circuit Courts of Appeal, the Supreme Court of Ohio, and the Supreme Court of Florida all ruled “that statements directed at people or businesses based in the forum state are sufficient to provide personal jurisdiction.”¹¹³ Since 1997, the United States’ laissez-faire e-commerce policy has purportedly served the libertarian interest, helping the information society blossom into a social construct informed by an individualization ethic.¹¹⁴ But as argued previously, America’s libertarian libel law seems to ignore the specific issue of nonmedia libel in that it neither explicitly protects members of the fifth estate nor is perfect to serve their need. One court has recognized the need for a tweaking it: “Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the

¹⁰⁸ The actual malice doctrine bars a public defendant “from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 279-80.

¹⁰⁹ The actual malice doctrine has been hailed as a “great civil liberties victor[y].” Logan, *Libel Law in the Trenches*, *supra* note 39.

¹¹⁰ David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996).

¹¹¹ *A Framework for Global Electronic Commerce*, *supra* note 77.

¹¹² Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751 (1999).

¹¹³ See generally John P. Borger, et al., *Recent developments in media, privacy, and defamation law*, 46 TORT TRIAL & INS. PRAC. L.J. 483 (2011).

¹¹⁴ See generally JOHN MOTAVALLI, *BAMBOOZLED AT THE REVOLUTION: HOW BIG MEDIA LOST BILLIONS IN THE BATTLE FOR THE INTERNET* (2003).

legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.”¹¹⁵

An effective way for a legislature to do so would be to modify the law prior to considering extending it to nonmedia defendants. Even when the actual malice doctrine’s complexities and imperfections are scrutinized,¹¹⁶ it remains a “great civil liberties victor[y]”¹¹⁷ that celebrates the libertarian ideal. The doctrine being consistent with the individualization ethic and with the marketplace of ideas, it would logically form a component of any libertarian theoretical framework of defining actionable libel in the information society. Extending a modified doctrine to protect citizen journalists would redeem the perceived inadequacies of the law. The next few paragraphs offer a brief critique of the actual malice doctrine.

While the primary goal of a libel suit should be the restoration of a falsely injured reputation, the actual malice doctrine and the litigation in general is concerned not so much with the truth as it is with damages.¹¹⁸ Damages might mean little to a John Doe plaintiff who is aware of the relative poverty of a Jane Doe defendant living physically in a separate, perhaps international, jurisdiction numerous miles away. John Doe is seeking only to restore his reputation with no intention to seek damages; he would find the obligation to prove actual malice an impediment or distraction.

For the media defendant, the doctrine can create a prospect of expensive, intrusive and protracted litigation causing public criticism of the defendant. It can divert focus to the plaintiff’s attacks on the integrity of the defendant, letting the plaintiff intrude into the defendant’s creative processes. It can impose large expenses before and during trial and cause occasional large judgments to continue to chill speech.¹¹⁹ Media defendants won less than forty per cent of the libel trials between 1980 and 2004, in which year an average damage award of \$3.4 million was imposed on them.¹²⁰

For the general public, the doctrine can seem confounding in its purpose to protect dissemination of falsehoods, small though they might be. A critic might conclude the truth seems to matter little, and because the doctrine’s purpose is to

¹¹⁵ *It’s in the Cards*, 535 N.W.2d at 14. This writer has taken inspiration from the court’s suggestion to develop, in a separate paper, a model law to implement new normative recommendations.

¹¹⁶ For an excellent critical anthology, see REFORMING LIBEL LAW (John Solosky & Randall P. Bezanson, eds. 1992).

¹¹⁷ Logan, *Libel Law in the Trenches*, *supra* note 39, at 503.

¹¹⁸ See generally REFORMING LIBEL LAW, *supra* note 116; WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* (1989); and LEWIS, *supra* note 92.

¹¹⁹ See, e.g., Anderson, *supra* note 87.

¹²⁰ Media Resource Center, *Status of libel litigation against media*, press release dated Feb. 25, 2006, <http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2749>.

deny remedy to some plaintiffs whose reputation has been harmed by defamatory falsehoods, it might actually undermine truth in public discourse. Consequently, to quote an admission of Justice White, “the stream of information about public officials and public affairs is polluted and often remains polluted by false information.”¹²¹ In addition, there is the specter of other possible social costs – discouraging participation in public life, adverse effects on the well-being of the political process, and a dilution of the quality of public discourse.

In light of the above difficulties, United States libel law, writes the law professor Marc Franklin, “has developed into a high stakes game that serves the purposes of neither the parties nor the public.”¹²² Going even further, the law professor David Riesman writes, “[W]here tradition is capitalistic rather than feudalistic, reputation is only an asset, ‘good will,’ not an attribute to be sought after for its intrinsic value. And in the United States these business attributes have colored social relations. The law of libel is consequently unimportant.”¹²³ Riesman’s argument implies that the actual malice doctrine treats reputation as a pre-capitalist value informed by socially conservative or colonial offline societies rather than by any post-industrial individualization condition. This writer, however, accepts neither Professor Franklin’s strident conclusion nor Professor Riesman’s devaluation of reputation. American libel law is, by any measure, as consistent with the libertarian ethos as law anywhere in the offline world.

For citizen journalists to thrive, the system of freedom of expression should be served by law that has evolved in a dialogue that involves courts and efficiently addresses the tensions inherent in balancing freedom with order.¹²⁴ The dialogue ought to be developed in an iterative fashion. Normative analyses such as this one, the author hopes, could act as catalysts of the dialogue.

Does Freedom Need Protection for Falsity?

The actual malice doctrine seems to presume a centrality of damages but not truth or reputation, which lacuna a normative libel framework should repair by restoring the truth or at least vindicating the plaintiff’s reputation. Justice Brennan’s opinion for the unanimous court in *New York Times* frames the issue with an opening statement that “constitutional protections for speech and press

¹²¹ *Dun & Bradstreet*, 472 U.S. at 769 (White, J., concurring).

¹²² Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 222 (1983).

¹²³ David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730 (1942).

¹²⁴ “The ruling was not addressed to and has no logical bearing on whether a court might declare a defamatory statement false. Nothing in it suggests that falsely maligned plaintiffs would need to prove [actual] malice if they sought no money damages but only a judgment declaring falsity.” Pierre N. Laval, 101 HARV. L. REV. 1287, 1290 (1988). See generally HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988).

limit a State's power to award damages in a libel action."¹²⁵ The justice explains the court's dissatisfaction with the common law defense of truth: "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars."¹²⁶

Even though the high court later held that both public and private plaintiffs bear the burden of proving falsity,¹²⁷ it failed to specify whether the burden of proof must shift from defendant to plaintiff in cases with nonmedia defendants, in cases not involving matters of public concern, and in cases explicitly seeking a declaration of falsity rather than any damages.¹²⁸ As one scholar pointed out, the original purpose of the doctrine may well have been purely to prevent large money judgments from killing off press freedom, and so the law may not require proof of actual malice in a suit that seeks no monetary damages.¹²⁹ But specifically, the actual malice doctrine's primary purpose could be interpreted as protecting useful falsehoods. "Erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they need . . . to survive."¹³⁰ A normative system would need to restore a primacy of truth, assuming the truth is provable, by dispelling any adduction of the doctrine intention to protect falsehoods per se.

Reforming the Public Figure Doctrine

The actual malice doctrine originally applied to a public official plaintiff, but over several years after 1964 its logic was extended to explicitly cover other categories of plaintiff.¹³¹ In 1967, the high court applied the doctrine to public

¹²⁵ *Sullivan*, 376 U.S. at 256.

¹²⁶ *Id.* at 279.

¹²⁷ *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

¹²⁸ *Id.* at 775-776.

¹²⁹ *Laval*, *supra* note 124.

¹³⁰ *New York Times*, 376 U.S. at 271-272.

¹³¹ The more than two dozen prominent libel cases decided by the U.S. Supreme Court since *Sullivan* are in chronological order: *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Gertz*, 418 U.S. 323; *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157 (1979); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Dun & Bradstreet*, 472

figures, defined as plaintiffs who held no official position but “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”¹³² Four years later, the court applied the doctrine to candidates for public office¹³³ and to appointed officials, including “at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.”¹³⁴

The public figure doctrine would protect netizens if only it acknowledged the existence of a fifth estate; it is outdated in that it fails to recognize the digital democratization of communication. It should be reconsidered in one of two possible ways: By (1) abandoning it altogether so that all information society plaintiffs are considered as private plaintiffs, or by (2) allowing courts to either define a public figure on a case-by-case basis, perhaps by level of Internet access. In the latter scenario, access to or participation in the information society may become a court’s criterion to define a public figure instead of official status, intimate involvement, or fame. Any corporation with a Web presence would, thus, trigger constitutional privilege for a blogger that it sued for libel. In addition, a proposed trans-border Internet Empowerment Agency,¹³⁵ with jurisdiction in all information society libel lawsuits, would be free to recognize other norms to identify public figures among plaintiffs.

The writer posits that the second is the better option as it is amenable to the libertarian ethos and as the doctrine harms none. If not all plaintiffs, which would be the less contentious and more effective approach, then the courts should decide on a case-by-case basis which ones are public figures. That proposition would serve as an effective resolution of the doctrinal anachronism. It is justified in several decisions of the Supreme Court and lower courts.

One of the frequently used rationalizations of the actual malice doctrine is “self help by access,” by which public plaintiffs are less vulnerable to reputational harm than private because they usually have more access to media and therefore more opportunities to protect reputation through self help.¹³⁶ Justice Brennan criticized it when he wrote seven years after *New York Times*, “In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of

U.S. 749; *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *HarteHanks Commc’ns v. Connaughton*, 491 U.S. 657 (1989); *Milkovich*, 497 U.S. 1; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

¹³² *Curtis Publishing Co.*, 388 U.S. at 164 (Warren, C.J., concurring). *See also* *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir. 1964) (opinion by Judge Henry Friendly).

¹³³ *See* *Monitor Patriot Co.*, 401 U.S. at 265.

¹³⁴ *Rosenblatt*, 383 U.S. at 85.

¹³⁵ Nikhil Moro, *Normative Theory for the Information Society*. 2011 SW MASS COMM. J. 53 (spring).

¹³⁶ *See* *Curtis Publishing Co.*, 388 U.S. at 155.

a private individual depends: the unpredictable event of the media's continuing interest in the story."¹³⁷

His criticism, however, does not affect the access argument for the information society, in which the "media's continuing interest in the story" vis-à-vis the nonmedia's cannot have measurably diminished when it can hardly be measured in the first place. Besides, the very concept of media has undergone a transformation from democratization, decentralization and individualization as discussed earlier. The definition of a plaintiff as public by high level of access to the Web or a high ability to counter an alleged libel with response-expression would reasonably be immune to Justice Brennan's criticism.

In addition, the revised definition is consistent with the attempt of some lower courts to view the two public plaintiff categories as coextensive. For example, police officials are almost invariably classified as public plaintiffs no matter what their rank,¹³⁸ and public figures have been deemed to include not only those who seek to influence public affairs¹³⁹ but also attract media attention by success in their career¹⁴⁰ or avocation¹⁴¹ or by a relationship with celebrities.¹⁴² The courts have also ruled, already, that a public figure plaintiff's fame or influence need not be widespread – notoriety within a circle is sufficient in claims of defamation within that circle.¹⁴³ Whistleblowers, of which there is no shortage in the fifth estate, are already recognized as public figures for the public debates created by their disclosures.¹⁴⁴

¹³⁷ *Rosenbloom*, 403 U.S. at 46-47. "Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . the argument loses all of its force." *Id.* at 46.

¹³⁸ *E.g.*, *Roche v. Egan*, 433 A.2d 757, 762 (1981).

¹³⁹ *E.g.*, *Associated Press v. Walker*, 388 U.S. 130, 154 (1967). The court found that a politically prominent man involved in a college campus riot was a "public figure."

¹⁴⁰ *E.g.*, *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979) (*en banc*) (professional football player); *James v. Gannett Co.*, 353 N.E.2d 834, 839 (N.Y. 1976) (belly dancer).

¹⁴¹ *E.g.*, *Holt v. Cox Enter.*, 590 F. Supp. 408, 412 (N.D. Ga. 1984) (college football player).

¹⁴² *E.g.*, *Brewer v. Memphis Publ'g Co.*, 626 F.2d 1238, 1255 (5th Cir. 1980) (former girlfriend of Elvis Presley, wife of retired football star).

¹⁴³ *E.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1300 (D.C. Cir. 1980) (innovator in grocery store business was public figure for limited purpose of comment on his own business); *Williams v. Pasma*, 656 P.2d 212, 216 (Mont. 1982) (former candidate for U.S. Senate who was well known in state was public figure).

¹⁴⁴ *E.g.*, *Grass v. News Group Publ'ns*, 570 F.Supp. 178, 183-84 (S.D.N.Y. 1983) (a private citizen, challenging a claim made by a gubernatorial candidate, was a public figure); *Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (a state employee reporting on public corruption was a public figure); *Rodrigues-Erdmann v. Ravenswood Hospital*, 545 N.E.2d 979 (Ill. App. 1989) (a doctor reporting malpractice at a hospital was a public figure);

To sum up, the definition of public figure should be left to the court but may include plaintiffs who have easy access to the Web or a high capacity to respond to alleged libels, among other standards adopted at the discretion of the proposed Internet Empowerment Agency. The following two paragraphs explain this proposition.

When *Gertz* and *Curtis* were decided, a defendant could be easily defined as “media,” specifically as either a print publishers or broadcaster.¹⁴⁵ In the information society, however, there is a vast diversity of defendants: The current public figure doctrine makes no distinction between a Dave Winer (blogger of neimanlab.org) and the New York Times Co. (a media corporation). When sued by a public figure or a corporation, Winer, a Common Joe, should get the same legal protection as the New York Times Co, a powerful corporation.¹⁴⁶

On the other hand, the public figure doctrine recognizes diversity in plaintiffs. With media-critical bloggers rampant, media corporations have reason to take on a nontraditional role as libel plaintiffs in order to counter claims made in the blogosphere.¹⁴⁷ Threats of libel lawsuits by institutional media against bloggers were serious enough for a group of media-critical bloggers to have hired a well-regarded media lawyer to ward it off.¹⁴⁸ Such plaintiffs need to be recognized legally explicitly as corporations and must prove a higher standard of fault, actual malice, consistent with the libertarian ethos. So a New York Times Co. or CNN as plaintiff would be considered a corporation, but if an individual writer of that organization such as Maureen Dowd or Anderson Cooper sued a blogger on her or his own behalf, she or he would be considered a media plaintiff and would prove the lesser standard of fault, negligence. Essentially, the court would use its discretion to decide if an information society plaintiff is a public figure, perhaps by using a rationale that higher a plaintiff’s access to the Internet, or frequency of online activity, the harder that plaintiff has to work for legal relief. The rationale would be justified in that such a plaintiff would have ample

Einhorn v. Lachance, 823 S.W.2d 405 (Tex. App. 1992) (pilots reporting on airline safety infractions were public figures).

¹⁴⁵ “As a result, the [*Gertz*] Court crafted the public figure test with a relatively homogeneous class of defendants in mind. By looking only to the public or private status of the plaintiff in determining the appropriate degree of fault, the public figure doctrine assumes equality among media defendants.” Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 834 (2006).

¹⁴⁶ When a media or nonmedia plaintiff sues a corporation, though, the lower fault standard of negligence should apply. See table in conclusion section.

¹⁴⁷ STEPHEN D. COOPER, WATCHING THE WATCHDOG: BLOGGERS AS THE FIFTH ESTATE (2006).

¹⁴⁸ “The group of mediacritic bloggers [Media Bloggers Association]. . . [have] hired Clifton, N.J.-based media lawyer Ronald Coleman as their general counsel. . . . The purpose of the MBA is to protect ‘the little guys from assertions of power by the big guys,’ Coleman says.” Wendy N. David, *Fear of Blogging*, A.B.A. J., July 2005, at 16.

opportunity to counter the libel with a response of his or her own – all at the discretion of the court that is asserting personal jurisdiction. The public figure doctrine thus refined would present a libertarian solution to encourage a multiplicity of voices, take pressure off the regular courts, and encourage a culture of dialogue. It would be consistent with the self-policing idea promoted by user groups such as the Internet Corporation for Assigned Names and Numbers. In addition, it would combine the public figure and public official categories.

Distinguishing Libel Plaintiffs

Three years after *New York Times*, the Supreme Court created a category of limited-purpose or “vortex” public figure,¹⁴⁹ a category that seems especially relevant to the information society given the relatively fragmented nature of much debate. The writer accepts the category as relevant to the information society, but as a corollary of the earlier discussion, a vortex public figure should primarily have high access to the Internet or a high frequency of online activity in order to be considered a public figure in the first place.¹⁵⁰

In the consolidated opinion in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Associated Press won on grounds that the plaintiff had failed to show actual malice as required by *New York Times*.¹⁵¹ But although the justices disagreed on the appropriate standard of fault to be applied, the majority justices were in agreement that the plaintiff was a public figure, in part, because of the access rationale. Justice John Harlan, joined by three others, wrote for the court, “Walker commanded a substantial amount of independent public interest at the time of the [publication. He achieved public figure status] by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, [and he] commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”¹⁵² Notably, the high court used the “self-help by access” rationale to define Walker as a public figure, a rationale that this and the previous section have offered for the information society.

Plaintiff categories ought to explicitly include corporations, including media corporations, requiring a burden of proof of actual malice. The difference between a corporate and media plaintiff would be that the latter is a reporter, columnist or other journalist suing on his or her own behalf, while the former is an organization. The actual malice doctrine seems to make an unsupported

¹⁴⁹ The Court defined a limited-purpose or “vortex” public figure as one who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Curtis Publishing Co.*, 388 U.S. at 155.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 154-155.

distinction between a defendant who initiates a new public debate and one who participates in an ongoing debate.¹⁵³ While there is no actual malice protection for the first type, the second type enjoys the status of a public figure in a traditional sense. To be equitable, a citizen journalist who has broken a story, or the pioneer in a blog discussion or in a multiuser domain or a discussion group, should have the same protection as those who post later messages after the pioneer's salvo has precipitated a netizen discussion. Those discussions should be considered in their entirety for the purpose of defining a public figure – with the corollary that a public figure's primary defining characteristic remains that plaintiff's access to the Internet and frequency of online activity.¹⁵⁴

Libel Doctrinal Idiosyncrasies

A unique procedural tradition in actual malice doctrine is that even though public figures' classification ought to be a finding of fact, the lower courts almost universally treat the question as one of law, to be decided not by a jury but by a judge.¹⁵⁵ If deciding public figure status were to be left to the jury then the plaintiff would be hard pressed to prepare the case or know what to prove, and therefore the judge typically makes the call in a pre-trial motion when public figure status is not obvious. This makes the actual malice doctrine consistent with libel claims in the information society, where it may be hard to get a jury of one's "peers" given the multiplicity of possible jurisdictions.

Second, the doctrine significantly differs from other civil law by requiring actual malice to be proved not by "a preponderance of evidence" but by a higher burden of "convincing clarity"¹⁵⁶ or "clear and convincing proof."¹⁵⁷ Procedurally, this standard might put the torts of libel at par with crimes, which typically

¹⁵³ See generally REFORMING LIBEL LAW (John Solosky and Randall P. Bezanson, eds. 1992).

¹⁵⁴ See table in conclusion section for proposed standards of fault for various plaintiff categories.

¹⁵⁵ *Rosenblatt*, 383 U.S. at 88. "As is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" *Id.*

¹⁵⁶ *Sullivan*, 376 U.S. at 285-86.

¹⁵⁷ *Gertz*, 418 U.S. at 342; *Philadelphia Newspapers*, 475 U.S. at 773. "Proof of actual malice in a defamation action brought by a public figure requires the plaintiff to demonstrate, by clear and convincing evidence, that the publisher made the statements either knowingly or with reckless disregard for their truth or falsity; clear and convincing evidence may be defined as that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." E.H. Schopler, *Libel and Slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice*, 20 A.L.R.3d 988 (1968).

require proof “beyond reasonable doubt.”¹⁵⁸ The clear-and-convincing-proof burden applies not only at the trial stage but also during pretrial motions such as a motion for summary judgment.¹⁵⁹ The higher burden is useful to operationalize the individualization condition.

Third, the judge, whether trial or appellate, does not defer to the jury in the traditional sense, i.e., setting aside a jury verdict only if clearly erroneous.¹⁶⁰ The libel judge is required to independently review a jury’s finding of actual malice in order to satisfy herself of the evidence being constitutionally sufficient.¹⁶¹ It allows judges to overturn jury verdicts that under usual civil procedure would be accepted. This idiosyncrasy seems to fit with the judge also deciding the plaintiff’s classification.

Finally, after *New York Times*, to establish truth is no longer a responsibility of the defendant. Instead, the plaintiff has to show falsity. Thus, a case may be made that truth is not less important but an even stronger protection for the defendant.

Discussion and Conclusion

In summation, the information society, whose enthusiasts dub it the “last frontier of freedom,”¹⁶² has greatly benefited from *New York Times*. A frequently used rationalization for the actual malice doctrine, waiver, is less persuasive outside of the information society than inside. The waiver argument offers that “an individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of

¹⁵⁸ “In criminal cases the burden on the prosecution is to prove every element of the crime beyond a reasonable doubt. If the accused raises a so-called defense by introducing sufficient evidence that element is added to the case which the prosecution must prove beyond a reasonable doubt. With respect to those few federal statutes creating a true affirmative defense, the defendant bears the burden of establishing such defense to be more probably true than not true; as to insanity the defendant bears the burden of clear and convincing evidence.” 2 Handbook of Fed. Evid. § 303:3 (7th ed.)

¹⁵⁹ FED. R. CIV. P. 56.

¹⁶⁰ In *Bose Corp. v. Consumer Union, Inc.*, , the U.S. Supreme Court explained, “The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’” 466 U.S. 485, 511 (1984).

¹⁶¹ *Sullivan*, 376 U.S. at 284-85.

¹⁶² See, e.g., Elon University/Pew Internet Project, *Imagining the Internet*, http://www.elon.edu/predictions/john_perry_barlow.aspx. To quote John Perry Barlow, “That’s the thing about cyberspace. It’s the last frontier and it will be a permanent frontier. It’s infinite and it’s continuously changing.” *Id.*

closer public scrutiny than might otherwise be the case. . .”¹⁶³ and hence must be left without remedy when the public scrutiny amounts to defamatory falsehoods. Given the “great leveler” nature of the information society, this is relatively irrelevant.

This paper has offered an argument to explicitly extend the actual malice doctrine to bloggers and Web-publishing citizen journalists in whom, evidently, the conception of media has come to manifest. The argument does not intend, and is not tailored, to cover other netizen-defendants including trolls, corporations that use social media, and commenters on online discussion boards.

The actual malice doctrine is clearly consistent with a libertarian ethic of the First Amendment, as well as with a Miltonian marketplace of ideas. It reflects the First Amendment’s paradox of enforced liberty (“no law”), gels with the individualization condition, and represents a major philosophical stride to protect libertarian eccentricities of public discourse. Consequently, bloggers and citizen journalists in the information society would be greatly benefited by it.

Nonmedia defendants should be protected by the actual malice doctrine by increasing the burden of plaintiff’s recovery. At the same time, media and nonmedia plaintiffs need relief from the actual malice doctrine, because their situation or status in the information society is hardly different from that of nonmedia and private defendants. Thus, although the media do not ordinarily act as corporate plaintiffs, when they do, they should be considered akin to any corporation – that is, if, say, *The New York Times* columnist Paul Krugman sued on his own behalf, he would be a media plaintiff, but if the New York Times Co. sued on his behalf then it would be a corporate plaintiff. When a media plaintiff is also a public figure, as Krugman is, the “media” status would override the “public figure” status. Thus, if Krugman sued on his own behalf, he would not have to prove actual malice in a libel suit against a neoconservative blogger. But if the New York Times Co. sued on his behalf, it would have to show actual malice in order to prevail. Similarly, the talk show ideologues Bill O’Reilly, Michael Savage and Neal Boortz would have to prove the lower standard of fault – negligence – in libel suits against critical bloggers, but only if they sued on their own behalf. If, however, they depended on their employers, Fox News Channel, Talk Radio Network, or Cox Radio, respectively, to sue on their behalf, then those employers would need to prove actual malice.

In other words, while the institutional media may be miffed with a blogger,¹⁶⁴ the categorization of libel plaintiff as “corporation” or “media” would depend on who files the suit – the company or an individual columnist. This second recommendation indicates that the identity of the litigant is the sole criterion on which to decide the standard of fault, leaving out the subject matter

¹⁶³ *Gertz*, 418 U.S. at 344-45.

¹⁶⁴ In *WATCHING THE WATCHDOG: BLOGGERS AS THE FIFTH ESTATE*, *supra* note 147. Cooper documents the media-critical and other activist roles of bloggers.

of the dispute (that is, whether it is a matter of public concern). It marks another modification or strengthening of *New York Times*, which presumes for a public plaintiff (but not a private one) that the matter is necessarily about a matter of public concern.

The table below encapsulates the proposed standard of fault requirements:

Plaintiff (across) Defendant (down)	Public figure	Corporation	Media or nonmedia
Media or nonmedia	Actual malice	Actual malice	Negligence
Public figure	Actual malice	Actual malice	Negligence
Corporation	Actual malice	Actual malice	Negligence

Table: A permutational representation of proposed standards of fault.

The United States constitutional law of libel recognizes explicitly neither the coextensive nature of media and nonmedia defendants nor their thriving fifth estate. Clearly, there exists ample justification to definitively extend actual malice doctrinal protection to bloggers and Web-publishing citizen journalists, who have emerged as ubiquitous defenders of freedom of expression. It is time for the legal understanding of a public figure to thus catch up with the information society.

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BLOGGERS' LIBEL LIABILITY: A COMPARATIVE ANALYSIS OF SOUTH KOREA AND THE UNITED STATES

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The influence of bloggers has increased to the degree that they are more and more frequently becoming involved in defamation and invasion-of-privacy suits. Bloggers threatened with legal action often remove potentially libelous content rather than deal with the difficulty and expense of litigation. This paper aims to trace the strains of controversy surrounding the application of journalistic standards of liability to bloggers. This study furthermore analyzes court cases and relevant statutes regarding bloggers' liability in South Korea and the United States and suggests a more reasonable approach to holding bloggers liable for libel.

Keywords: blog, libel, liability, comparative analysis, Internet

Blogs are a popular means for expressing, online, one's ideas and opinions. Their rise in popularity has been attended by increased scrutiny as well as power. Blogs can be defined as "online publications that typically present contents in inverse chronological order, time-stamped, and with hyperlink pointing at original sources online that bloggers refer to."¹ Individuals who produce, contribute, or publish content found on blogs are known as bloggers. Some bloggers reach a wide enough audience and appear to wield enough power over public opinion that they can find themselves in court. In the United States, bloggers are increasingly being sued for defamation and invasion of privacy.² In July 2008, the Media Law Resource Center reported that 159 civil and criminal court lawsuits had been filed against bloggers since 2004.³ The number of reported cases involving bloggers' libel liability has, in recent years, sharply

¹ Ari Heinonen, *Blogger*, in THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION 339 (Wolfgang Donsbach ed., 2008).

² M. P. Mcqueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May 21, 2009, at D1.

³ Huma Yusuf, *Lawsuits Against Bloggers Seen Rising*, ABC NEWS, July 20, 2008, available at <http://abcnews.go.com/Technology/story?id=5406538> (last visited June 6, 2012).

increased.⁴

Who exactly is being affected? Bloggers come from “all corners of society, from serious journalists ... to teenagers seeking tacit networks of interpersonal communication.”⁵ Hence, legal judgments regarding their libel liability affect innumerable Internet users, as well as the suppliers of online interactive media. Bloggers facing legal threats will often simply remove potentially libelous content rather than deal with the difficulty and expense of litigation.

If bloggers were held legally responsible for their comments, quite arguably the Internet would soon be rid of a great deal of offensive or irresponsible content. On the other hand, such a policy could have a chilling effect on freedom of political, cultural, or societal, expression. All in all, as one scholar indicated, “Any benefits of regulation must be balanced against the cost of over deterring speech by bloggers, who usually have weaker incentives to speak than career journalists.”⁶

With this in mind, this paper seeks to identify notable controversies about bloggers' legal responsibilities. It specifically analyzes court cases and relevant statutes regarding bloggers' liability in South Korea and the United States. This article tries to resolve two questions: 1) How has the libel liability of bloggers been applied in South Korea and in the United States, and 2) What kind of legal approach is more reasonable for Internet blogs regarding libel liability?

Background

Though the Internet is a globally shared space utilizing the same technology worldwide, the legal approaches to dealing with content on the Internet have developed differently within individual countries. In the United States, under Section 230 of the Communications Decency Act (hereinafter “CDA”),⁷ the party who provides an “interactive computer service”⁸ is not responsible as the “publisher” or “speaker.”⁹ Courts have interpreted and applied

⁴ Available at <http://www.foxnews.com/us/2011/12/22/bloggers-not-journalists> (last visited June 6, 2012).

⁵ Jennifer Meredith Liebman, *Defamed by A Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J. L. TECH. & POL'Y 343 (2006).

⁶ Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 188 (2006).

⁷ In 1997, in *Reno v. American Civil Liberties Union*, the U.S. Supreme Court invalidated two sections of the CDA that were enacted to protect minors from “indecent” and “patently offensive” communications on the Internet. Those two sections are Section 223(a) and Section 223(d). Section 230, however, survived and has functioned as a crucial defense for ISPs ever since.

⁸ H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 374-75 (2008).

⁹ Communications Decency Act, 47 U.S.C. §230(c)(1) (1996).

the CDA broadly.¹⁰

In South Korea, by contrast, courts recognize no difference, in terms of libel liability, between traditional forms of media and Internet Service Providers (hereinafter "ISPs"). Hence, bloggers can be sued for any potentially offensive content.¹¹ To what extent, then, should ISPs and bloggers be held accountable? It may behoove one here to reflect on policy considerations and not rely solely on legal logic. A country's libel laws reveal, to a large extent, how it values the interest of reputation and freedom of the press.¹² Depending on the particular sociocultural situations they face, countries enact significantly different libel laws. Such differences are on display in a review of the approaches taken by South Korea and the United States to online libel. Both countries have developed their own libel laws, and the differences embedded in their traditional libel laws affect the legal approach to libelous content on the Internet.

A significant body of research has dealt generally with ISPs' libel liability. Relatively few studies, however, have addressed this issue as it pertains to anonymous blog posts.¹³ At a global level, bloggers' libel liability is a critical, though still emerging, issue. The case of *Doe v. Cahill*,¹⁴ reported in 2005, was one of the earliest cases that brought the issue of bloggers' libel liability to the surface.

Currently, the characteristics of the "blogosphere" resist a unified understanding.¹⁵ One commentator asserts that the usual bloggers are more akin to "diarists" or gossip-creators than to serious citizen journalists.¹⁶ However, it is also true that a large number of citizen journalists are playing an important role in society.¹⁷ Therefore, a distinction needs to be drawn between frivolous blogs with few visitors and blogs that connect to a broader audience. Some scholars cite

¹⁰ YONG S. PARK, LIBEL LAW 1381-1384 (2008).

¹¹ See, e.g., Supreme Court [S. Ct.], 2007Do8155, February 14, 2008.

¹² Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 1, 3 (1980).

¹³ See, e.g., Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L. J. 320 (2008); S. Elizabeth Malloy, *Anonymous Blogging and Defamation: Balancing Interests of the Internet*, 84 WASH. U. L. REV. 1187 (2006); Daniel Haier, *In the Matter of Ottinger v. Non-Party The Journal News*, 54 N.Y.L. SCH. L. REV. 603 (2009/10); Jessica L. Chilson, *Note, Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389 (2009).

¹⁴ *Doe v. Cahill*, 884 A.2d 451 (Del. Sup. 2005).

¹⁵ Anthony Ciolli, *Defamatory Internet Speech: A Defense of the Status Quo*, 25 QUINNIPIAC L. REV. 853, 855 (2007).

¹⁶ Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195 (2006).

¹⁷ See, e.g., <http://www.cnn.com/exchange/blogs>.

evidence of blogs' important roles in American politics.¹⁸ A minority of bloggers are communicating with other bloggers and readers in a serious, positive and productive way.¹⁹ Thus, any discussion of blogs and their ramifications for public discourse calls for a cautious approach.²⁰

Blogs and bloggers have varying degrees of importance in society. Journalists have historically taken a pivotal role in bringing to the light of day needed information, playing a "watchdog" role over government and public officials. The conventional wisdom is that a thriving free press is critical to sustaining a participatory democracy. In the twenty-first century, some bloggers are doing what traditional journalists have long been doing. This raises the question of whether common-law-originated privileges for journalists should be applied to bloggers. Another question, conversely, is whether a blogger's content should be treated like other traditional media content in terms of legal responsibilities. In many cases, bloggers exercise "editorial control" over their content. Indeed, such unresolved issues reflect a need for more attention to be given to bloggers' legal rights and liabilities for their activities in cyberspace.

Internet Libel: A Comparative Review

Conventional wisdom holds that a person who defames another is legally responsible for the defamation. In the process of Internet communication, however, many parties — the publisher, distributor, and common carrier — are involved. In many cases, a defamed person does not know who the anonymous commenter (e.g., anonymous blogger) is. Consequently, the defamed person may ask an ISP to disclose the identity of the anonymous commenter or directly sue the ISP.

At this point, legal discussions arise regarding the ISPs' libel liability. Here, U.S. courts have classified the businesses related to the distribution of information on the Internet as publishers, distributors, or common carriers.²¹ As against these actors, victims of libel have received negligible protection, and criticism against providing "blanket immunity" is increasing steadily in the United States.²² Interestingly, controversy is also stirred up when some countries,

¹⁸Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs*, available at <http://www.cs.duke.edu/courses/spring05/cps182s/readings/blogpowerpolitics.pdf>; See also Cass R. Sunstein, *REPUBLIC.COM 2.0* 138-150 (2007).

¹⁹ See <http://jcmc.indiana.edu/vol12/issue4/schmidt.html>.

²⁰ Axel Bruns & Joanne Jacobs, *Introduction*, in *USES OF BLOGS* 1, 3 (A. Bruns & J. Jacobs ed., 2006).

²¹ See, e.g., Paul Ehrlich, *Communication Decency Act 230*, 17 *BERKELEY TECH. L. J.* 401 (2002).

²² Robert G. Magee & Tae H. Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 *COMM. L. & POL'Y* 369, 402 (2007).

such as South Korea, impose the same level of responsibility on ISPs as is imposed on traditional media. Critics claim that the policy “could be possibly abused to suppress legitimate online freedom of speech.”²³ The discussions of libel on the Internet have mainly developed out of a focus on ISPs’ liability.

Although the issues surrounding ISP’s libel liability differ from that of bloggers, a person claiming to be defamed is likely to bring a lawsuit against an ISP as a means of obtaining the anonymous blogger’s identity. There is in most circumstances an inseparable relation between the two liabilities. Thus it is appropriate to review, before examining bloggers’ libel liability, ISPs’ libel liability.

Internet libel in South Korea

In South Korea, several laws regulate ISPs, including Internet portals or blogs. Among those laws, the most important are the Telecommunications Business Act (hereafter “Telecom Act”),²⁴ and the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (hereafter “Information Act”).²⁵ Article 44 of the Information Act provides:

1. No user may circulate any information violative of another person’s rights, including intrusion on privacy and defamation, through an information and communications network.
2. Every provider of information and communications services shall make efforts to prevent any information under paragraph (1) from being circulated through the information and communications network operated and managed by it.

²³ Tong H. Kim, *Web Portals Alert over Libel Suits*, SOUTH KOREA TIMES, August 7, 2009, available at http://www.SouthKoreatimes.co.kr/www/news/nation/2009/08/123_49782.html.

²⁴ See JUNGITONGSINSAUPBOP [TELECOMMUNICATIONS BUSINESS ACT] [HEREINAFTER “TELECOM ACT”], Law No. 4394 of 1991, amended by Law No. 9705 of 2009. The translated version of this law is *available at* <http://elaw.klri.re.kr>.

²⁵ See JUNGBOTONGSINMANG-LEEYONGCHOKJIN-MEET-JUNGBOBOHO-DEUNGE-GUANHANBOP [ACT ON PROMOTION OF INFORMATION AND COMMUNICATIONS NETWORK UTILIZATION AND INFORMATION PROTECTION, ETC.] [HEREINAFTER “INFORMATION ACT”], Law No. 6360 of 2001, amended by Law No. 10465 of 2011. The translated version of this law is *available at* <http://elaw.klri.re.kr>.

3. The Korea Communications Commission may prepare a policy on development of technology, education, public relations activities, and other activities to prevent violation of another person's rights by information circulated through information and communications networks, including intrusion on privacy and defamation, and may recommend providers of information and communications services to adopt the policy.²⁶

According to the Information Act, the following legal provisions apply to ISPs' libel liability: request for deletion of information (Article 44.2),²⁷

²⁶ INFORMATION ACT, art. 44.

²⁷ *Id.*, art. 44.2 (“(1) Where information provided through an information and communications network purposely to make it public intrudes on other persons’ privacy, defames other persons, or violates other persons’ right otherwise, the victim of such violation may request the provider of information and communication services who handled the information to delete the information or publish a rebuttable statement (hereinafter referred to as “deletion or rebuttal”), presenting it materials supporting the alleged violation. (2) A provider of information and communications services shall, upon receiving a request for deletion or rebuttal of the information under paragraph (1), delete the information, take a temporary measure, or any other necessary measure, and shall notify the applicant and the publisher of the information immediately. In such cases, the provider of information and communications services shall make it known to users that it has taken necessary measures by posting a public notice on the relevant open messages board or in any other way. (3) A provider of information and communications services shall, if there is any unwholesome medium for juvenile published in violation of the labeling method under Article 42 in the information and communications network operated and managed by it or network without any measures to restrict access by juvenile under Article 42.2, delete such content without delay. (4) A provider of information and communications services may, if it is difficult to judge whether information violates any right or it is anticipated that there will probably be a dispute between interested parties, take a measure to block access to the information temporarily (hereinafter referred to as “temporary measures”), irrespective of a request for deletion of the information under paragraph (1). In such cases, the period of time for the temporary measure shall not exceed 30 days. (5) Every provider of information and communications services shall clearly state the details, procedure, and other matters concerning necessary measures in its standardized agreement in advance. (6) A provider of information and communications services may if it takes necessary measures under paragraph (2) for the informations circulated through the information and communications network operated

discretionary temporary measures (Article 44.3), self regulation (Article 44.4), verification of identity of users of open message boards (Article 44.5), claim to furnish user's information (Article 44.6), prohibition on circulation of unlawful information (Article 44.7), and defamation dispute conciliation division (Article 44.10). Other laws, such as the Civil Code, Criminal Code, and the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reporters (hereafter "Press Arbitration Act"),²⁸ are applied to the ISPs' activities if those activities fall into the realm of relevant laws.

In 2009, the South Korean Supreme Court ruled that Internet portals are responsible for content on their websites because the portals recognized the specific defamatory content and actively chose and distributed them.²⁹ The Supreme Court also held that Internet portals are jointly liable with original content creators for defamatory content.³⁰

According to the majority opinion, ISPs, including Internet portals, have legal responsibilities, under certain conditions, for the content that appears on their sites. That is, the Supreme Court ruled that ISPs have an obligation to respond to a request from an allegedly defamed person asking for the deletion of information or blocking access to the content in question.³¹ The Court also ruled that regardless of whether the request for deletion is received, ISPs may be held liable if they knew or if it was clear on its face that they could have known about the existence of the content on their site. Enforcement of this requirement assumes it is technically and economically manageable for them to control the content.³²

Many perspectives on ISP liability have come forward. These range from the view that Internet portals are simply non-journalistic mediators or transmitters to the view that Internet portals assume the role of journalist and should thus be considered as a realm where important societal discourse occurs. The controversy still exists, however, as to whether or not Internet portals can be treated as traditional media in terms of libel liability. South Korea has concluded that no difference exists between traditional media and ISPs, including Internet portals.

and managed by it, have its liability for damages caused by such informations mitigated or discharged.").

²⁸ERONJUNGAEMEETPIHAEGUJAEDEUNGAEGUANHANBOPYUL [ACT ON PRESS ARBITRATION AND REMEDIES, ETC. FOR DAMAGE CAUSED BY PRESS REPORTS] [HEREINAFTER PRESS ARBITRATION ACT], Law No. 7370 of 2005, amended by Law No. 10587 of 2011. The translated version of this law is available at <http://elaw.klri.re.kr>.

²⁹ Supreme Court [S. Ct.] 2008Da53812, April 16, 2009 (en banc), available at <http://eng.scourt.go.kr/eng/crtcdcsns/NewDecisionsView.work?seq=286¤tPage=0&mode=6&searchWord=2008Da53812>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

In the current legal system, when libel results from news coverage, remedies may take the form of regulating the autonomy of the press and other media. Money damages may be obtained through the Criminal Code and the Civil Code. The Information Act also provides detailed remedies. It provides for the establishment of a defamation dispute conciliation division to handle allegations that information on communication networks – which include ISPs – infringe on others' rights.

Most importantly, the Press Arbitration Act, which was recently revised in South Korea, also applies to Internet libel.³³ The Press Arbitration Act covers ISPs,³⁴ who are responsible for the news reports that appear on their sites and who must respond to the right-of-reply requests like traditional forms of media do.³⁵ The Act, however, does not regulate damage caused by bloggers' reports.

Internet Libel in the United States

Congress passed the CDA as a way of addressing anticipated problematic situations on the Internet. Among other things, the act immunized interactive computer services from liability for defamatory content from third-party content providers. Before the passage of that law, courts mainly relied on the classification of publishers, distributors, and common carriers when making legal judgments regarding the libel liability of ISPs.³⁶ According to that model, which was applied in the common law tradition, distributors who did not exercise

³³ PRESS ARBITRATION ACT, art. 1 (“The purpose of this Act is to make the freedom of the press compatible with public responsibilities thereof, by establishing any effective remedial system, including conciliation or arbitration, to settle disputes, if any, concerning reputation, rights or other legal interests violated through any press report or medium by any press organization, etc.”); See also PRESS ARBITRATION ACT, art. 5 (“(1) The press, any Internet news service, or any Internet multimedia broadcasting (hereinafter referred to as ‘the press, etc.’) shall not infringe other person’s life, liberty, body, health, reputation, privacy, portrait, name, voice, dialogue, works, personal documents, any other personal worth, etc. (hereinafter referred to as the ‘personality right’) and, where the press, etc. has violated other person’s personality right, such damage shall be remedied promptly in accordance with the procedure prescribed by this Act.”).

³⁴ *Id.*

³⁵ PRESS ARBITRATION ACT, art 17.2.

³⁶ For a discussion of the distinction between “publisher” and “distributor” under the common law tradition, see *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006) (“We conclude that section 230 prohibits ‘distributor’ liability for Internet publications. We further hold that section 230(c)(1) immunizes individual ‘users’ of interactive computer services, and that no practical or principled distinction can be drawn between active and passive use.” *Id.* at 513.).

editorial control were exempt from liability for the allegedly defamatory content.

In the case of *Cubby v. CompuServe*, the U.S. District Court for the Southern District of New York ruled that ISPs could be subject to traditional defamation law for the content that appeared on their sites.³⁷ But the court considered CompuServe a mere distributor, rather than a publisher. In this case, CompuServe “neither knew nor had reason to know of the allegedly defamatory [online newsletter] statements,”³⁸ and it maintained no more editorial control other than that of a library, bookstore, or newsstand. It was thus exempt from liability for defamatory content.³⁹

A few years later, in the case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York State Supreme Court agreed that ISPs could be held liable for the defamatory postings provided by their users.⁴⁰ In this case, however, Prodigy maintained editorial control over the materials on its bulletin boards; Prodigy suggested content guidelines for users, enforced those guidelines with “Board Leaders,” and utilized filtering software designed to eliminate offensive language.⁴¹ Based on the reasoning that these activities could be considered editorial control, the court regarded Prodigy as a publisher of the allegedly defamatory content.⁴² According to the reasoning of this case, if ISPs made a good faith effort to remove offensive content by monitoring or filtering it, they exposed themselves to greater risk of liability. This ironic situation led Congress to enact Section 230 of the CDA in 1996.⁴³

In *Zeran v. America Online, Inc.*, the first post-CDA decision, Zeran alleged that America Online (“AOL”) delayed the deletion of defamatory content provided by an anonymous person on an AOL Web board.⁴⁴ The U.S. Court of Appeals for the Fourth Circuit ruled that AOL was not liable for defamatory content posted on its bulletin board.⁴⁵ The court explained that Congress’s rationale in adopting §230 was to prevent a filtering obligation from causing a chilling effect, deterring ISPs from delivering third-party content to the public.⁴⁶

The U.S. District Court for the District of Columbia in *Blumenthal v. Drudge* also ruled that the operator of a web site was immune from liability for the libelous content posted on its web site.⁴⁷ In this case, AOL was the publisher

³⁷ *Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

³⁸ *Id.* at 139.

³⁹ *Id.*

⁴⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir., 1997).

⁴⁴ *Id.* at 329.

⁴⁵ *Id.* at 331.

⁴⁶ *Id.*

⁴⁷ *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

of the allegedly defamatory content while exercising editorial control.⁴⁸ The court determined, however, that AOL was exempt from liability, relying on the same reasoning used in the *Zeran* case.⁴⁹

In *Barrett v. Rosenthal*, the California Supreme Court followed *Zeran*, holding that Rosenthal was a “user of interactive computer services” and thus immune from libel liability under CDA §230. A lower court ruling in the case had initially opined that the CDA did not repeal common law defamation liability regarding the distribution of defamatory content on the Internet.⁵⁰

Overall, CDA §230 “erased the distinction between publishers and distributors for courts trying to determine liability ... Thus, the only parties that could be held liable for defamatory online content are the primary creators of that content.”⁵¹ The original intent of CDA was not letting offensive and untruthful information flow freely on the Internet but “[maintaining] the robust nature of Internet communication.”⁵²

Accordingly, scholars have gradually argued that applying §230 should not provide the same immunity to ISPs regardless of their actions.⁵³ Some of those who are against extended immunity have claimed that a determination of immunity should be based on ISPs' involvement with third-party content.⁵⁴

A few courts have recently taken a position against blanket immunity under CDA §230.⁵⁵ In *Grace v. eBay Inc.*, for example, a California state appellate court ruled that CDA §230's immunity does not exclude web operators' liability as a distributor of defamatory content,⁵⁶ and that if the operator knew or had reason to know that the information was defamatory and distributed the information anyway, the operator would not be exempt from liability.⁵⁷ In the instant case, however, eBay was relieved from liability because a clause in the User Agreement between Grace and eBay exempted eBay from disputes between service users.⁵⁸

Grace had bought a few items from another individual on eBay's online

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Barrett v. Rosenthal*, 40 Cal. 4th 33, 146 P. 3d 510, 51 Cal. Rptr. 3d 55 (Cal. Sup. Ct. 2006).

⁵¹ Liebman, *supra* note 5, at 348. In *Batzel v. Smith*, the U.S. Court of Appeals for the Ninth Circuit also endorsed the argument that courts have applied CDA §230 too broadly. 333 F.3d 1018 (2003).

⁵² *Zeran*, 129 F. 3d at 330.

⁵³ See Magee & Lee, *supra* note 22, at 370.

⁵⁴ *Id.*

⁵⁵ Min Jeong Kim, *Liability of Internet Service Providers (ISPs) in the Age of Web2.0: Examination of Recent Cases Changing §230 Immunity of the Communications Decency Act*, 12(1) J. KOREA INFO. L., 135, 145 (2008); See *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp.2d 1142, 1149 (D.Ariz. 2005).

⁵⁶ *Grace v. eBay Inc.*, 16 Cal. Rptr.3d 192 (Cal. App. 2004).

⁵⁷ *Id.* at 195.

⁵⁸ *Id.*

auction site and then left negative comments about the seller in regard to some of the transactions.⁵⁹ These comments resulted in the seller's posting defamatory comments about Grace on the website.⁶⁰ Because other users could see those offensive comments, Grace notified eBay that the comments from the seller were defamatory, but eBay did not take any action.⁶¹ Grace filed a lawsuit against eBay, asserting that eBay was not immunized from libel liability under the CDA §230.⁶²

The court found eBay to be immunized from publisher or speaker liability as either a provider or user of an interactive computer service.⁶³ Under CDA §230, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶⁴ The court opined in dicta, however, that Congress did not intend to exclude distributor's liability through CDA §230.⁶⁵

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the U.S. Court of Appeals for the Ninth Circuit ruled that CDA immunity "did not apply to acts of operator in posting questionnaire and requiring answers to it...."⁶⁶ Roommates.com managed a website designed to match people searching for roommates or housemates.⁶⁷ Users of the site were expected to create a profile consisting of answers, such as sex, sexual orientation, and whether the user would bring children to a household, before use of the site would be permitted. Roommates.com also encouraged users to write an "additional comment" on the site. The Ninth Circuit reversed the lower court's decision and found Roommates.com could be regarded as an information content provider. The court found that the operator conducted more than a passive role in delivering the information because it created the discriminatory questions and used the answers in regard to its service. This case did not deal with libel liability, however, and remains one of only a few cases that did not apply CDA §230's immunity to all ISPs.

Libel and Related Lawsuits against Bloggers

South Korea

In 2008, the South Korean Supreme Court overturned a lower court

⁵⁹ *Id.* at 196.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 197.

⁶⁴ See 47 U.S.C. §230(c)(1) (1996).

⁶⁵ *Grace*, 16 Cal. Rptr.3d at 198-99.

⁶⁶ *Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

⁶⁷ *Roommates.com*, 521 F.3d at 1161.

decision and ruled that a person-to-person secret dialogue on a blog can constitute libel.⁶⁸ Whether a libelous statement has the characteristic of being publicly stated is an important factor in deciding a libel case. Under the Criminal Code and Information Act of Korea, libel liability requires “[defaming] another by publicly alleging facts or false facts.”⁶⁹

When courts decide whether a given libel case meets this condition, they largely rely on the following criterion: whether or not a libelous statement occurs in a situation where people with a specific relationship to the speaker, and who may or may not have been meant to be exposed to the information, hear the libelous statement and subsequently disseminate it, or where a large number of people are exposed to the allegedly libelous statement.⁷⁰ According to the South Korean courts' reasoning, an important consideration is the recipient's potential for further disseminating the statement from the speaker or publisher.⁷¹ Thus, if a person sends a letter that defames a third party to a recipient who can further disseminate the content of that letter, the sender is guilty of criminal libel.⁷²

In 2006, one person (a defendant) wrote a story titled “gold-digger” on his blog.⁷³ The story was about a woman who had been receiving monetary compensation from a company's director as payment for reporting on another manager's private life. The defendant described the woman in the story as a blogger the defendant knew. When a visitor asked, in a person-to-person dialogue on the blog, about the heroine's real identity, the defendant gave the heroine's pen name used in the blogosphere, suggesting that the woman was a real gold-digger. The defendant did this only after receiving a promise from the visitor that he would not tell anyone. In the blog, the defendant wrote that the real names and pictures of the characters in the story were available upon request by e-mail or private message.

The question in this case was whether this amounted to online libel. In South Korea, whether libelous content comes from a third party or not makes no difference in constituting online libel.⁷⁴ ISPs are expected to make every effort to prevent illegal content infringing another's rights from being posted on their sites. They are legally responsible for deleting potentially illegal content that may infringe another's rights, publish a rebuttal statement upon request from the allegedly defamed person, or take temporary measures such as blocking access the content in question.⁷⁵ If they fail to carry out this duty, they are risking legal

⁶⁸ Supreme Court [S.Ct.], 2007Do8155, Feb. 14, 2008.

⁶⁹ CRIMINAL CODE, art. 307.

⁷⁰ PARK, *supra* note 10, at 1187.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 2007Do8155.

⁷⁴ INFORMATION ACT, art. 44.

⁷⁵ See Kim, *supra* note 25.

disputes raised by the defamed person.⁷⁶ In the “gold-digger” case, the creator of the defamatory content was the blogger himself, so third party content and its legal treatment do not figure in to it. The issue, again, is whether the defendant, alleging false facts, defamed the plaintiff publicly.

A lower court ruled that since the allegedly libelous statement occurred in a blog's person-to-person secret dialogue, the defendant did not “publicly” defame the other.⁷⁷ However, the Supreme Court vacated and remanded the lower court's decision, asserting that the lower court failed to thoroughly look over the case to determine whether the recipient had the possibility of further disseminating the statement.⁷⁸

One thing is clear: According to the Supreme Court's reasoning, a private dialogue, online or offline, can constitute libel, if the recipient can disseminate the statement. That is, South Korea recognizes no difference, in terms of legal treatment, between online libel and offline libel.⁷⁹

In 2010, in determining a blogger's libel liability, one district court of South Korea addressed the distinction between a matter of private concern and public concern upheld by South Korea's Supreme Court.⁸⁰ In that case, the defendant posted a message on a blog falsely accusing the plaintiff, a famous instructor at an online academic institution, of faking a final diploma. After considering the blogger's intention to write the statement, circumstances and background, the overall structure of the writing, and the level and means of expression, the court ruled the blogger was not liable. According to the court, despite trivial factual errors and exaggeration, if the statement, as a whole, was made for public interest, the defendant's act shall not be punishable. The court also considered the fact that it was difficult to determine whether the defendant knew the allegation was not true.

The United States

American courts have broadly applied CDA §230, exempting individual website operators from libel liability regarding a third party posting.⁸¹ And of late, courts have been applying this exemption to bloggers.⁸² In *Batzel v. Smith*, the

⁷⁶ *Id.*

⁷⁷ Uijeongbu District Court [Dist. Ct.], 2007No579, Aug. 30, 2007.

⁷⁸ 2007Do8155.

⁷⁹ South Korea's Supreme Court runs an official website that offers a comprehensive search for archived legal cases. The authors of this paper performed keyword searches (blog, blogger, libel, and combination of these words) and could find only two cases in regard to bloggers' libel liability.

⁸⁰ Incheon District Court [Dist. Ct.], 2010No3208, Dec. 24, 2010.

⁸¹ *See, e.g.*, *Batzel v. Smith*, 333 F. 3d 1018 (9th Cir. 2003).

⁸² Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV, 1447, 1450 (2006).

United States Court of Appeals for the Ninth Circuit exempted from libel liability a blogger who republished an allegedly defamatory e-mail provided to him by a third party.⁸³ The court opined that immunity granted by CDA §230 could not be allowed if “providers and users of ‘interactive computer service[s]’ knew or had reason to know that the information provided was not intended for publication on the Internet.”⁸⁴

In 1999, Ellen Batzel, the plaintiff, employed a handyman, Robert Smith, the defendant, to do odd jobs around her house.⁸⁵ While he worked for the plaintiff, he was told that her grandfather had a close relationship with Adolf Hitler and that some of the artworks in her house had been inherited.⁸⁶ Based on his conversations and experience with the plaintiff, Smith concluded that the plaintiff was a granddaughter of a key player in the Nazi Party during World War II. He emailed another defendant, Ton Cremers, a proprietor of a web site committed to finding stolen art.⁸⁷ After communicating with Smith, Cremers posted Smith’s e-mail on his web site.⁸⁸ The e-mail’s message was opened to the public by Cremers’s posting on the web site’s listserv.⁸⁹ In this case, Smith argued that if he knew that his e-mail would be exposed to the public, he would not have sent it.⁹⁰

The court ruled that “because Cremers did no more than select and make alterations to Smith’s e-mail, Cremers cannot be considered the content provider of Smith’s e-mail for the purposes of CDA §230.”⁹¹ According to the court’s reasoning, the second defendant did not perform the “development of information,” which requires “something more substantial than merely editing portions of an e-mail and selecting material for publication.”⁹² Based on that reasoning, the court applied CDA §230’s immunity to the second defendant.⁹³

The dissenting opinion argued that the judgment as to whether CDA immunity applies to a defendant should not be based on whether the creator of allegedly defamatory content intended that content to be disseminated on the Internet.⁹⁴ Rather, the dissent argued that the legal judgment regarding a defendant as a distributor of the defamatory content should be determined by the

⁸³ *Batzel*, 333 F. 3d at 1034.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1021.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1022.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1031.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

defendant's actions, not by the author's intent.⁹⁵

According to the dissent's reasoning, whether the defendant took responsibility as a distributor of the content should be determined based on the defendant's specific activity.⁹⁶ Referring to the objective of CDA §230, the dissent said that if a defendant actively took a role in screening or blocking the defamatory content or obscene information, then it should receive exemption from liability.⁹⁷ However, if the defendant exercised editorial control over the dissemination of the original content and chose to distribute the harmful or offensive content, he could be considered a creator on a case-by-case basis.⁹⁸

Bloggers often post content anonymously, which makes it difficult for a person defamed by an anonymous blog posting to identify who posted the content. In *Doe v. Cahill*, the Supreme Court of Delaware held that a defamed plaintiff who wants to identify an anonymous defendant must meet a stricter standard than "good faith."⁹⁹ Among other requirements, the Court ruled that the plaintiff must try to let the anonymous defendant know that he is subject to a subpoena or discovery request.¹⁰⁰ Specifically, the plaintiff should post a notice about the plaintiff's discovery request on the same web site where the original defamatory content was posted.¹⁰¹

In that case, an anonymous commenter, using the pseudonym "Proud Citizen," posted allegedly libelous statements on the website supported by the *Delaware State News*, "Smyrna/Clayton Issues Blog."¹⁰² An elected town councilman, Patrick Cahill and his wife filed a lawsuit against four John Doe defendants, arguing that the libelous statements on the site damaged their reputation and infringed their privacy.¹⁰³ The Plaintiffs demanded that Comcast, the ISP, disclose the identity of Proud Citizen, known as John Doe No.1.¹⁰⁴ The defendant "filed an 'Emergency Motion for a Protective Order' seeking to prevent the [plaintiffs] from obtaining his identity from Comcast."¹⁰⁵ However, applying the good faith standard,¹⁰⁶ the trial court refused this motion, so the defendant

⁹⁵ *Id.* at 1037-38.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1039-40.

⁹⁸ *Id.* at 1040.

⁹⁹ *Doe*, 844 A. 2d at 458.

¹⁰⁰ *Id.* at 461.

¹⁰¹ *Id.*

¹⁰² *Id.* at 454.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 455.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 455 ("Under the good faith standard, the Superior Court required the Cahills to establish: (1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source.").

filed an appeal.¹⁰⁷ The Supreme Court of Delaware reversed the decision of the trial court, dismissing the plaintiff's claim with prejudice, focusing on the fact that Doe's comments were considered "no more than unfounded and unconvincing opinion."¹⁰⁸ In this case, the "Guidelines," at the top of the blog, stated "[t]his is your hometown forum for opinions about public issues."¹⁰⁹ While this case addressed criteria for disclosure of an anonymous blogger's identity, it did not deal with the applicability of §CDA 230.

In the 2006 case of *DiMeo v. Max*, the Eastern District Court of Pennsylvania held that a party who manages a web site with an interactive element such as a bulletin board or a blog comments section is exempt from libel liability for third party content under the provisions of CDA §230.¹¹⁰ In this case, the defendant, Tucker Max, ran a web site that had a bulletin board, in which Internet users could comment anonymously regarding various topics.

After finding defamatory content against him, DiMeo sued Max. DiMeo argued that though Max did not write the defamatory comments himself, he was responsible for them "because [he] can select which posts to publish and edits their content ... exercis[ing] a degree of editorial control that rises to the development of information."¹¹¹ However, the court denied the plaintiff's claim, holding that "development of information" must involve "something more substantial than merely editing portions of content and selecting material for publication."¹¹² Later, the plaintiff appealed, and the United States Court of Appeals for the Third Circuit affirmed the district court decision, applying the same reasoning.¹¹³

Discussion of blogger libel liability

Perspective 1: Traditional libel laws should apply to blogs

The upheaval in communication technology has made defining journalism and a journalist more difficult. Judges are facing the tough question of whether Internet newspapers, Internet portals, or blogs could be considered "news media." No consensus has emerged regarding whether libel laws applied to traditional journalists should be applied to citizen journalists or to bloggers. Indeed, there seems no right or wrong answer to this question. Some scholars argue that traditional libel laws should be applied to blogs and bloggers, focusing

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 468.

¹⁰⁹ *Id.* at 454.

¹¹⁰ *DiMeo v. Max*, 433 F. Supp.2d 523 (E.D. Pa. 2006).

¹¹¹ *DiMeo*, 433 F. Supp.2d at 530 (inner quotes omitted).

¹¹² *Id.*

¹¹³ *DiMeo v. Max*, 248 Fed. Appx. 280 (3d Cir. 2007).

on the fact that some bloggers are performing journalistic roles within society.¹¹⁴ Because blogs are partially responsible for the deterioration of responsible and credible reporting, they should be regulated as traditional media is. That is, proponents of this view believe that the offensive and illegal content that pervades the Internet today should be regulated, allowing more people to enjoy the full potential of the Internet.¹¹⁵

One scholar argues that traditional libel laws should be applied to bloggers for two principal reasons.¹¹⁶ First, general bloggers read all information provided to them and then decide whether to post it, acting the same as a traditional editor or publisher.¹¹⁷ Second, many bloggers insist that their sites have credible and important information and compete with traditional media in terms of providing people with timely and credible news.¹¹⁸

Perspective 2: Exemption from liability using various remedies for the defamed

Some scholars argue that traditional libel laws are not suitable for the blogosphere.¹¹⁹ They argue for implementing various remedies for a defamed person while exempting blogs and bloggers.¹²⁰ One scholar notes, "the Internet's low barriers to entry make self help remedies such as counterspeech and online retractions both accessible to defamed parties and cost effective to online speakers."¹²¹ The original intent of CDA §230 and the broad immunity it has awarded Internet services was to facilitate the Internet's free flow of information. Given this understanding, some commentators, including Jennifer Meredith Liebman, support setting up difficult requirements for requests to disclose anonymous commenters and applying CDA §230 broadly.¹²²

While some bloggers adhere to journalistic standards, most bloggers use "hyperbolic speech for comedic effect" aimed at attracting more attention.¹²³ These common blogs are not expected to screen illegal content or conduct a high-

¹¹⁴ See, e.g., Troiano, *supra* note 82.

¹¹⁵ See Matthew G. Jeweler, *The Communications Decency Act of 1996: Why §230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

¹¹⁶ Troiano, *supra* note 82, at 1474.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Liebman, *supra* note 5; Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J. L. & TECH. 301 (2008) (The author's discussion is not limited to bloggers' liability, but his arguments could be applied to bloggers' liability cases.).

¹²⁰ Liebman, *supra* note 5.

¹²¹ *Id.* at 374-75.

¹²² *Id.* at 374.

¹²³ *Id.*

level of verification.¹²⁴ Given this reality, blogs are at a higher risk for committing libel through their postings. Nevertheless, one scholar argues that it is important for people to consider a self-corrective mechanism of the blogosphere in evaluating the risk that attends blogs' irresponsible content.¹²⁵

According to Ribstein, bloggers' amateur journalism includes several forms of interactivity such as links, comments, and trackbacks, and is subject to the page-ranking mechanisms of modern search engines.¹²⁶ Although bloggers can access the Internet and post their thoughts, ideas, or feelings, not all bloggers can secure the attention of the public at large. As Ribstein notes, the process of attracting attention, particularly through Google and other search engines, "provides a neutral mechanism for establishing credibility that avoids conventional journalism's potentially biased filtering."¹²⁷ After all, in a broad sense, the blogosphere is self-corrective, and therefore tends toward accuracy.¹²⁸ The scholars who support this idea contend that adopting self-help-based remedies to defamatory content, while ensuring the CDA's immunity to interactive online users, is the optimal solution to this the digital era issue.¹²⁹

Perspective 3: Applying slander laws to blogs

One scholar argues that the libel liability of bloggers should be treated as slander, not libel.¹³⁰ In the common law tradition, one defamed by slander, the spoken form of defaming another, is subject to an enhanced burden of proof and the amount of money for remedies is limited to some extent.¹³¹ Glenn Reynolds supports the notion of regulating defamatory content on blogs as slander for the following reasons: In the blogosphere, erroneous information can be fixed within a few minutes, so the destructive power of false information is temporary; the distribution range of that information is limited to the people who know the existence of those blogs; people pay little attention to blogs' content because blogs belong to a low-trust culture; and the parties defamed by blogs' postings could easily refute them at a low cost.¹³² Due to the development of search technology, he argues, the blogosphere has its own self-correcting function, and the fact that victims of defamatory content could easily rebut the content by themselves should provide bloggers with different legal treatment compared to

¹²⁴ *Id.*

¹²⁵ Ribstein, *supra* note 6, at 249.

¹²⁶ *Id.* at 218.

¹²⁷ *Id.* at 188.

¹²⁸ *Id.* at 218.

¹²⁹ Liebman, *supra* note 5, at 376.

¹³⁰ Glenn H. Reynolds, *Libel in the Blogosphere: Some preliminary Thoughts*, 84 WASH. U. L. REV. 1157 (2006).

¹³¹ PARK, *supra* note 10, at 1331.

¹³² Reynolds, *supra* note 130.

that of traditional media, such as newspapers and television or radio broadcasters.¹³³

However, finding anonymous bloggers is not always successful and removing all defamatory messages from blogs is virtually impossible. Also, as Anthony Ciolli noted, "if defamatory blog speech is treated as slander rather than libel, the victim would have to prove special damages in order to recover any damages unless the defamatory statement fell into one of the slander per se categories."¹³⁴

Comparative analysis and review

As noted earlier, some scholars argue that significant differences between digital libel and traditional libel allow the public to worry less about digital libel.¹³⁵ To support this argument, they suggest that the Internet has its own self-corrective function.¹³⁶ The overflow of information on the Internet makes people seek more credible and reliable sources. Because people do not take the credibility of information at face value, they filter the information selectively depending on their own judgment criteria. So, libelous material might lose significance while passing through this filtration, and, the theory goes, people eventually arrive at the truth.

However, it seems naïve to suppose that this self-correcting mechanism will always work. Due to the user-friendly technical characteristics of the Internet, damage caused by Internet media can be duplicated perpetually through "linking" and "dragging and dropping" regardless of time and location. Once damage occurs, it is virtually impossible to completely delete the problematic material from the Internet. Also, there is no established rule for screening untrustworthy content or correcting information. As one commentator said, "the extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that 'the truth rarely catches up with a lie.'"¹³⁷

Some scholars, including Hall, argue that the victim of digital libel could easily refute the libelous content by posting rebuttals.¹³⁸ Some people believe that this accessibility to the problematic content helps differentiate between digital libel and traditional libel. Though a defamed person can access and rebut the

¹³³ *Id.*

¹³⁴ Ciolli, *supra* note 15, at 865.

¹³⁵ See, e.g., Caitlin Hall, Note, *A Regulatory Proposal for Digital Defamation: Conditioning §230 Safe Harbor on the Provision of a Site "Rating,"* 2008 STAN. TECH. L. REV. 1, 2 (2008); see also Ciolli, *supra* note 15, at 860.

¹³⁶ *Id.* at 11.

¹³⁷ Lyrisa B. Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 864 (2000).

¹³⁸ See, e.g., Hall, *supra* note 135; see also Reynolds, *supra* note 130.

untruthful and distorted information on the Internet, the necessity of remedies might not always decrease.

First of all, because of the speedy and free dissemination of information on the Internet, finding the alleged defamatory materials can be quite difficult. Also, as of now, the "right of reply" does not apply to ISPs in the United States. Courts have been reluctant to adopt the "right of reply," because they think it might conflict with freedom of speech. In addition, disparities still exist in accessibility to computers and the Internet.

There is no "one-size-fits-all" solution to the problem of digital libel. So, various approaches, which have been developed by each country, need to be explored and compared. In the United States, under the CDA §230, ISPs have not been considered publishers of content provided by third parties and are indemnified against libel claims. On the other hand, the South Korea's Supreme Court ruled that ISPs are responsible for the content that appear on their websites.¹³⁹ South Korea recognizes no difference between traditional forms of media and ISPs in terms of legal responsibility for libel.

South Korea and the United States over-emphasize either reputational right or freedom of expression, both of which must be protected. Each country's different approaches to regulating Internet libel fail to strike a balance between two indispensable interests. As one scholar has pointed out, the differences in relative value placed upon reputational right and freedom of expression are quite common across countries, since each country has developed its libel laws according to their own sociocultural milieu.¹⁴⁰

However, the characteristics and potential of the Internet sphere, including the blogosphere, as a public forum should be considered. This potential should not be neglected due to the excessive emphasis on the justification for the regulation of illegal content that appear on the Internet. Thus, the original intent of CDA §230's immunity should generally be applied to blogs. However, courts should reconsider the "blanket immunity" currently granted to ISPs. Courts should no longer neglect the regulation of illegal content or proper remedies to defamed parties.

In the absence of clear standards defining a journalist in today's shifting media environment, U.S. courts have struggled with outdated state shield laws directed at traditional journalists. In 2011, a U.S. District Court judge ruled that the self-proclaimed "investigative blogger," was not a journalist in the case of *Obsidian Financial Group, LLC v. Cox*.¹⁴¹ In that case, the district court judge drew a line between bloggers and journalists. For the purposes of journalistic privileges or libel protection, the judge employed a seven-factor test to decide a blogger's status as a journalist:

¹³⁹ See *supra* note 29.

¹⁴⁰ Jae Jin Lee, Freedom of the Press and Right of Reply under the Contemporary Korean Libel Laws: A Comparative Analysis, 16 UCLA PAC. BASIN L. J. 155, 196 (1998).

¹⁴¹ No. CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011).

(1) [A]ny education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the [blogger] and his/her sources; (6) creation of an independent product rather than assembling writing and posting of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, a [blogger] is not “media.”¹⁴²

These elements are subject to some debate. Little doubt exists that some of the requirements he suggested are essential to defining a journalist. It seems clear, however, that a significant determining factor cannot be whether a blogger has a journalism degree or any certificates. Indeed, not all journalists have an official journalism degree. Also, the second requirement to be a journalist seems controversial though it can be a seemingly clear standard in determining a blogger’s status as a journalist. Finally, as to the last requirement—contacting “the other side” to get both sides of a story—some current journalists fail to even meet this requirement while reporting.

Journalism scholar Jason Shepard suggested instead the following criteria: 1) whether news-gathering and dissemination is one of the blogger’s stated main purposes, 2) whether, as mainstream media do, news-gathering and editorial decision-making processes are employed on a regular basis, and 3) whether the blogger’s publication was sufficiently useful to invigorate public discourse within the context of public interest.¹⁴³ One thing is clear; society as a whole needs more rigorous discussion about what defines a journalism and journalist.

Over the past few years, Congress has tried to pass legislation defining a “journalism,” as well as legislation that would apply state shield laws to non-traditional journalists. According to the “Free Flow of Information Act of 2011,” introduced by Republican congressman Mike Pence, “journalism” is defined as the “gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”¹⁴⁴ Such efforts deserve more attention since the issue is closely related to the question of whether bloggers can claim journalistic privileges and under what circumstances.

Not all bloggers are the same. Some bloggers performing journalistic

¹⁴² *Id.* at 9.

¹⁴³ Jason M. Shepard, *Bloggers after the Shield: Defining Journalism in Privilege Law*, 1 (3/4) J. MEDIA L. & ETHICS 186 (2009).

¹⁴⁴ See <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2932.IH>:

functions deserve journalistic privileges. And with such privileges must come the legal responsibilities that traditional forms of media are burdened with. If a blogger is actively engaged in the gathering and spreading of information to the public, the blogger needs to take responsibility, on a "publication-by-publication basis," for what appears on his or her blog.¹⁴⁵ It seems reasonable to state that traditional libel laws should be applied to bloggers' liability when such bloggers are functioning as journalists. In that case, the distinctions among publishers, distributors, and common carriers needs to be sustained in the digital era. Blogs are different from ISPs in that some blogs perform journalistic functions as mainstream media does and bloggers are able to monitor problematic comments before they publish them on their sites.¹⁴⁶

Conclusion

Online defamation is a matter too long neglected. As one scholar noted, "It is important not to silence communication on the Internet, but it is just as important not to silence victims of defamation."¹⁴⁷ Thus, what matters most is striking a balance between the necessity of prohibiting illegal acts and maintaining the free flow of information.¹⁴⁸ Bloggers are generally powerful in that they can block or remove offensive comments provided by a third party on their web sites.¹⁴⁹ This ability differs from that of ISPs. It is possible for bloggers, unlike ISPs, to monitor all content.¹⁵⁰

Imposing severe monitoring responsibilities on ISPs, including bloggers, however, calls for a cautious approach because such a burden might lead "interactive computer services" to wholly remove potentially problematic content rather than take any kind of legal risk.¹⁵¹ The quantity and quality of online information generation would be severely diminished, if not wholly stymied.

Applying common law distinctions among publishers, distributors, and common carriers to bloggers is reasonable. Considering the original intent of CDA §230, which was designed to facilitate the free flow of information on the Internet, bloggers who act as mere distributors of comments should be exempted from liability. This immunity should be given to bloggers who do not perform much editorial control over the content they post.¹⁵² Most importantly, CDA

¹⁴⁵ Troiano, *supra* note 82, at 1476.

¹⁴⁶ See also Troiano, *supra* note 82, at 1469-75.

¹⁴⁷ S. Elizabeth Malloy, *Bloggership: How Blogs Are Transforming Legal Scholarship: Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1193 (2006).

¹⁴⁸ Assaf Hamdani, *Who's Liable for Cyberwrongs?* 87 CORNELL L. REV. 901, 956 (2002).

¹⁴⁹ Liebman, *supra* note 5, at 353.

¹⁵⁰ See Troiano, *supra* note 82, at 1479-80.

¹⁵¹ See *Batzel*, 333 F. 3d 1018, 1039 (9th Cir. 2003).

¹⁵² Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet*, A

§230's immunity should be limited to interactive communication services that perform "good faith efforts" to block or screen illegal content on their web territories. In deciding liability, a court must consider whether those interactive communication services, including ISPs and blogs, exercised such efforts.

On the other hand, bloggers should not be exempt from liability if they exercise control over their content or know or have reason to know that defamatory content exists on their blog and still fail to take any action. As one court ruled, if bloggers conducted the "development of information," which requires "something more substantial than merely editing portions of [the content] and selecting material for publication,"¹⁵³ they would have assumed legal responsibility regarding the content. Whether it is through the legislation of new laws or the revision of existing laws, applicable laws need to reflect the characteristics of blogs and bloggers sufficiently. Individual rights, including personal reputation, should not be considered a lower priority than or overshadowed by freedom of expression.

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Suggested Approach, 6 RICH. J. L. & TECH. 9, 33 (1999); *See also* Jeweler, *supra* note 115.

¹⁵³ *Batzel*, 333 F.3d at 1031.