

DEFINING DEFAMATION:  
COMMUNITY, HARM AND PLAINTIFF STATUS  
IN THE AGE OF THE INTERNET

By

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To my parents, Raymond and Patricia Sanders

You are my mentors and my best friends. Without your love and support, I could never have made it this far.

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Abstract of Dissertation Presented to the Graduate School  
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By

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Chair: Bill F. Chamberlin  
Cochair: John Wright  
Major: Mass Communication

By examining court cases in both federal and state courts throughout the United States, this study looks at how the courts are defining three components of defamation actions: community, harm and plaintiff status. This study examines defamation cases that have arisen both before and after the Internet became a popular medium of mass communication. For the most part, it appears courts are using the rules they crafted in cases before the Internet, with some modification, in the cases that have arisen during the Internet Age. In defining community and plaintiff status, some courts have begun to recognize the unique characteristics of the Internet – its appeal to the masses and global reach – which may provide the justification needed to craft rules specifically tailored for Internet defamation cases. Such advances have not been made in the area of harm, where the courts continue to apply the common law rules and constitutional mandates used in traditional print and broadcast defamation cases.

## CHAPTER 1 INTRODUCTION

A man's interest in his own reputation is likely one of the things he holds dearest, for his reputation colors all aspects of his life, including personal and professional relationships and transactions. Thus, the way society perceives a man may be more important than the way in which the man perceives himself. If, as it has been said, a man's word is his bond, then his reputation for truth, integrity, virtue and the like are of paramount importance. Theoretically, perhaps, as long as a man leads an upstanding and honorable life, his reputation should remain above reproach. The difficulty of reputation lies in its point of origin: Reputation is not only how a man lives his life, but it is also how others endeavor to characterize his actions.<sup>1</sup> Thus, society has developed a system for protecting reputational interests from the harms inflicted by others' characterizations. The tort of defamation attempts to do just that by protecting a man from the utterance of false factual assertions that would besmirch his reputation within his community.<sup>2</sup>

In the early days of the tort, ascertaining a man's community might have been as simple as discerning the members of his village or town. However, as society has become more technologically advanced and interconnected, a man's community may no longer consist only of those who reside within shouting distance. As mass communication and rapid transportation have developed, a man's community may instead consist of family in distant lands or business

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<sup>1</sup> Legal scholar David Anderson has noted that defamation law attempts to protect four types of reputational interests: a person's existing relationships with others, a man's future relations with others, a person's existing reputation among the general public and a person's right to prevent a negative public image should that person not have one already. See David Anderson, *Reputation, Compensation & Proof*, 25 WM. & MARY L. REV. 747, 764-66 (1984).

<sup>2</sup> "Defamation is an impairment of relational interest; it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his reputation and good name." *Keisau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004).

associates linked together by an interagency computer network. Indeed, a man's community likely includes members with whom he has never had face-to-face contact. This 21st century community, united by the Internet, is a far cry from the framework in which the traditional law of libel developed throughout the 19th and 20th centuries. Although the ability to instantly communicate with a global audience has created legal uncertainties as jurists struggle to adapt age-old jurisprudence to modern-day technologies, such innovations also hold much potential to promote an environment conducive to free expression that has long been contemplated.

Philosophers John Milton and John Stuart Mill could never have envisioned a marketplace of ideas quite like the Internet.<sup>3</sup> Entering its third decade in the public domain,<sup>4</sup> this 21st century information superhighway has taken on many of the characteristics of the marketplace imagined more than 150 years by the English thinkers. As a mass medium, the Internet has opened the door for an abundance of speech, ranging from the highly protected political speech to unprotected obscenity.<sup>5</sup> With the increasing amount of speakers and messages has come a flurry of litigation as courts struggle to regulate the medium of the masses – one which transcends nations, ages and cultures.<sup>6</sup>

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<sup>3</sup> See, e.g., JOHN MILTON, *AEROPAGITICA* (J. Suffolk ed., 1968) (1644); JOHN STUART MILL, *ON LIBERTY* (D. Spitz ed., 1975) (1859).

<sup>4</sup> See MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 11 (2d ed. 2005). In the late 1970s, the National Science Foundation created the Computer Science Network as a means of connecting American computer scientists. *Id.*

<sup>5</sup> See generally KEVIN J. CONNOLLY, *LAW OF INTERNET SECURITY AND PRIVACY* 24 (2003) for a discussion of the rise of the Internet as a mass medium.

<sup>6</sup> The U.S. Supreme Court first mentions the complexity of regulating the Internet along with other emerging media technologies in a 1995 case dealing primarily with the cable industry. See *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727 (1996) (holding that a provision allowing cable operators to prohibit patently offensive or indecent programming was constitutional as applied to leased-access channels but unconstitutional as applied to public-access channels). “As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology [sic] of the Internet and the World Wide Web approach the day of using a

Adding to this complexity is the multitude of sources who seek to communicate information via the Internet. Basic communication theory envisions a speaker-receiver chain in which the receiver is nearly certain of the origin of the received message.<sup>7</sup> The Internet does not provide such a simplistic single-source model of communication. Instead, it provides multiple speaking sources that are often unidentifiable by the receiver and may lack the credibility indicators associated with other forms of mass communication.<sup>8</sup> No longer can the receiver trace information back to a source in simple fashion. Thus, the rise of anonymous speakers in the Internet marketplace has contributed to the difficulty of its regulation.<sup>9</sup>

Like traditional mass media, the Internet allows speakers to communicate their messages to a large consuming public. However, because the content providers include independent speakers, whose information may be subject to minimal editing, as well as traditional media speakers, whose information is often verified and edited, defamatory speech, or false factual speech that injures a person's reputation, has greater potential to reach a widespread audience.<sup>10</sup> Evidence of this can be traced to numerous independent Web sites that purport to rate or rank

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common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others." *Id.* at 776-777.

<sup>7</sup> See generally CLAUDE E. SHANNON & WARREN WEAVER, A MATHEMATICAL MODEL OF COMMUNICATION (1949).

<sup>8</sup> See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 886 (2000).

<sup>9</sup> See generally *id.* (arguing that courts could utilize the opinion defense in a way that would provide more protection for anonymous Internet speakers).

<sup>10</sup> *Id.* at 864. "Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again." *Id.*

any number of subjects.<sup>11</sup> Such Web sites often contain opinion material interwoven with false factual assertions, which bring them into the purview of the defamation tort.<sup>12</sup>

Researchers have even coined a term for defamatory speech about corporations that appears on the Internet.<sup>13</sup> Cybersmear, as it has been dubbed, is often perpetrated by disgruntled former employees or customers who wish to harm a company's reputation.<sup>14</sup> Those wishing to defame a company can use any number of tools rooted in Internet communication. Chain e-mails, Weblog postings, online forums and dedicated Web sites provide ample opportunity to promote one's message. Additionally, specific cybersmear-based chatrooms have developed to unite those with common communication objectives.<sup>15</sup>

Corporations are not the only targets of defamatory speech on the Internet. Professionals, too, are encountering the consequences of injurious falsehoods on the Internet. For example, educators are seeing their reputations jeopardized by postings on professor-rating Web sites such as RateMyProfessors.com or MyProfessorSucks.com, with early litigation cropping up in the late

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<sup>11</sup> Some examples include: RateMyProfessors.com (allows students to rate college professors), DontDateHimGirl.com (allows women to rate ex-boyfriends), DrScore.com (allows patients to rate their health-care providers), TripAdvisor.com (allows travelers to rate hotels).

<sup>12</sup> Although defamation has been defined in numerous ways, this dissertation primarily relies on the *Restatement (Second) of Torts* definition, which says "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." See RESTATEMENT (SECOND) OF TORTS § 559 (1999).

<sup>13</sup> See, e.g., Scot Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533 (2002) (discussing the First Amendment implications of defamatory speech against corporations on the Internet).

<sup>14</sup> See Jon Swartz, *Corporations Fight Internet 'Cybersmear'*, S.F. CHRON., April 13, 1999, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1999/04/13/BU93359.DTL> (last visited March 6, 2006).

<sup>15</sup> See, e.g., Flame Broiled: The Disgruntled Ex-Burger King Employee Page, <http://www.geocities.com/capitolhill/lobby/2645/> (last visited July 19, 2007); Walmart Workers of America at Wakeup Walmart.com, <http://www.wakeupwalmart.com/workers/> (last visited July 19, 2007).

1990s.<sup>16</sup> However, as the online ratings industry expands, litigation, too, will likely increase. By 2006, more than 9 million students had accessed RateMyProfessors.com, according to a news release on the site.<sup>17</sup> The site contains more than 4.2 million ratings for professors from more than 5,400 universities, making it the largest professor-rating site on the Internet.<sup>18</sup>

While college professors were often the initial targets of such Web sites, even secondary school teachers have become fair game. Parents and students can log on to RateMyTeacher.com to evaluate and criticize those who educate elementary and high school students. The ratings mechanism includes several categories with numerical ratings scales as well as a narrative section where reviewers can enter prose of their own choosing. The categories include easiness, helpfulness, clarity, quality and hotness. These numerical rankings do not pose much likelihood for defamation litigation, given their nature as unactionable opinion statements. The narrative sections, however, provide more freedom for comment, allowing students to contribute false factual allegations that would be ripe targets for defamation lawsuits.

As more and more Internet-savvy communicators enter the online world, professionals and private people alike become likely targets of online defamation. According to a January 2006 study by the Pew Internet & American Life Project, 87 percent of Americans ages 12-17 were online.<sup>19</sup> Their college-aged counterparts reported 82 percent Internet adoption.<sup>20</sup> Like more

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<sup>16</sup> Early examples of cases include *Godfrey v. Cornell University* and *Curzon-Brown v. Lathowers*. For more information, see Carl S. Kaplan, *English Court May Test U.S. Ideals on Online Speech*, N.Y. TIMES, June 5, 1998, available at <http://www.nytimes.com/library/tech/98/06/cyber/cyberlaw/05law.html> (last visited July 30, 2007); Katie Dean, *Do Dissed Teachers Have a Case?*, Wired, June 12, 2000, available at <http://www.wired.com/culture/lifestyle/news/2000/06/36720> (last visited July 30, 2007).

<sup>17</sup> See About Us, <http://www.ratemyprofessors.com/About.jsp> (last visited March 6, 2006).

<sup>18</sup> *Id.*

<sup>19</sup> Mary Madden. *Generations Online 1*. (Dec. 2005), at [http://www.pewinternet.org/pdfs/PIP\\_Generations\\_Memo.pdf](http://www.pewinternet.org/pdfs/PIP_Generations_Memo.pdf) (last visited August 22, 2006).

<sup>20</sup> *Id.*

than 90 percent of Americans, these students flocked to the Internet to communicate; however, they viewed e-mail as old and instead prefer more interactive and real-time communication methods, including instant messaging and blogging.<sup>21</sup> Generation Y (ages 18-28) reported using the Internet primarily for school research (73 percent), health research (73 percent) and instant messaging (66 percent). Online teens (ages 12-17) reported similar usage patterns, with the heaviest consumption for online games (81 percent), instant messaging (75 percent) and getting information about a school/college (57 percent).<sup>22</sup> These age groups also tended to be more likely to read and contribute to Weblogs than their older counterparts.<sup>23</sup>

As their Internet usage has grown, Generation Y has also come to view the Internet as a decision-making tool, either by contributing content or consuming content contributed by others. For example, more than one-third of the respondents had gone online to rate a person or product.<sup>24</sup> Nearly 80 percent engaged in product research, indicating a reliance on the Internet as a source of trusted content.<sup>25</sup> In addition to consuming Internet content, younger Web surfers were also creating it. By November 2005, more than half of all teens had created content for the Internet.<sup>26</sup> Sharing self-authored content was the most popular form of content creation among those surveyed.<sup>27</sup> Thus, it seems only natural that Web sites such as RateMyProfessors.com or

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> Amanda Lenhart & Mary Madden. *Teen Content Creators and Consumers* 1. (Nov. 2005), at [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Content\\_Creation.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf) (last visited July 19, 2007).

<sup>27</sup> *Id.*

GirlDontDateHim.com, which allow a variety of these creation/consumption behaviors, have sprung up in cyberspace.

### **Purpose**

Given the speed with which such content can be disseminated and reputations injured as a result, it is important to examine the level of First Amendment protection available for defamatory speech online as courts begin to hear cases involving these Web sites. As an example, the increasing number of Web sites that allow users to rate products, services and professionals – such as educators and doctors – present ripe ground for defamatory speech. Given the frequent reliance upon the Internet as a research tool, defamatory speech can be searched and read by co-workers, employers and others.<sup>28</sup> Thus, defamatory statements published online have the potential to cause both reputational injury and economic harm – interests traditionally protected by the courts under the law of defamation.

Although the U.S. Supreme Court has not yet issued any determinative opinions regarding Internet defamation, it has drawn on general First Amendment principles to guide the regulation of the Internet. Additionally, there is a long judicial history of traditional print and broadcast defamation cases that can be drawn upon to provide guidance in the regulation of online defamation. By highlighting the strengths and weaknesses of the existing jurisprudence, this study will examine how the courts have begun to address three key elements in online defamation cases: community, harm and plaintiff status. It will also provide guidance for future jurisprudence that furthers the goals of the First Amendment while balancing an individual's interest in protecting his reputation. Thus, this study examines the regulation of online

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<sup>28</sup> See, e.g., Madden, *supra* note 19; *The Deleting Online Predators Act: Hearing on H.R. 5319 Before the H. Comm. on Energy and Commerce Subcommittee on Telecommunications and the Internet*, 109th Cong. (July 11, 2006) (statement of Amanda Lenhart, Senior Research Specialist, Pew Internet and American Life Project), available at <http://www.pewinternet.org/ppt/Pew%20Internet%20Project%20SNS%20testimony%20-%207%2007%2006%20%20submitted.pdf> (last visited July 19, 2007).

defamatory speech by evaluating jurisprudence already established in key areas: traditional print and broadcast defamation cases and emerging Internet defamation cases.

The study will address three aspects of the tort of defamation as the courts have begun to apply them in the context of online defamation. Specifically, the research examines the definitions of community, harm and plaintiff status as they apply to online defamation by exploring how the courts have used the terms in defamation jurisprudence decided before and after the rise of Internet-based litigation. First, the study will explore how courts have defined “community” and “harm” in defamation cases that do not involve online defamation. Then, the study will examine how the courts have defined community and harm in early cases involving online defamation. In doing so, the study will address what considerations are important to courts when defining those elements of defamation. Finally, the study will also examine which First Amendment theories are important in defining the elements of community and harm.

Additionally, the study will explore how the courts have constructed plaintiff status in both traditional print and broadcast defamation cases as well as online defamation cases. To do so, the study will explore how courts have distinguished between public officials, public figures and private persons in defamation cases that do not involve online defamation. Then, the study will examine how the courts have distinguished between public officials, public figures and private persons in early cases involving online defamation. In doing so, the study will address whether there are differences when courts distinguished between public officials, public figures and private persons in cases dealing with traditional and online defamation. Finally, the study examines these distinctions in light of four prominent First Amendment theories.

### **Literature Review**

The goal of tort law is to repair a wrong that has been done, which can be accomplished in a number of ways through both legal and equitable remedies. Along this vein, the crux of

defamation law stems from the interest in protecting one's reputation from harm.<sup>29</sup> Historically, defamation law – broken into the law of libel for written defamation and the law of slander for spoken defamation – targeted reputational injury in both written and spoken form. As technology has evolved, the law of defamation has changed accordingly, often doing away with the distinctions between libel and slander in order to accommodate newer forms of communication, including television where the defamatory statements may come in the form of a written script spoken live over the broadcast airwaves.<sup>30</sup>

Scholars, as well as the courts, have begun to discuss the ever-changing role of defamation law in a technologically advanced existence. Along with television, the Internet has proven taxing to traditional defamation law because frequently the defamer and the defamed are no longer proximately located or even easily identifiable, as they often have been in the past. Such changes have left scholars and courts struggling to mold the historically speech- and print-rooted tort concepts into more malleable, flexible methods for protecting modern-day reputational interests.<sup>31</sup> As a result, much of today's defamation scholarship has taken on a normative approach, evaluating current practice while suggesting future courses of conduct for courts to follow.

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<sup>29</sup> RANDALL BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 1 (1987).

<sup>30</sup> *Id.* at 3. “[T]he libel tort has experienced profound change in the past 23 years. So, too, has the reconciliation between the values of a person’s good name and free expression.” *Id.*

<sup>31</sup> *Id.* at 3. “The most heavily penalized by suits and threats of suits ‘are the smaller, newer, and less conventional media voices’ who, to survive, must attract attention by tackling subjects not covered by other media. ‘In short, they must take risks. On the other hand, because of their financial insecurity, a libel suit, even through ultimately unsuccessful, would probably be fatal.’” *Id.* (quoting David A. Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422 (1975)).

Scholarly discussion of the tort of defamation typically addresses either the entire tort action or focuses on a specific element<sup>32</sup> that is required for plaintiffs to plead and prove to succeed in court. To simplify a review of the literature, this section has been broken down into the elements of the cause of action as delineated by the Restatement (Second) of Torts with a discussion of relevant literature included in each section. A final section discussing the literature that deals with the challenges posed by online defamation has also been included.

### **Defamatory Statement**

As a part of their case, plaintiffs must plead a statement that is capable of a defamatory meaning. The Restatement (Second) of Torts requires this to be a false and defamatory statement about a person.<sup>33</sup> Typically, these statements will fall into several categories of statements that address certain protected classes of reputational interest – or those areas of defamation seen frequently by the courts because of their likelihood for causing injury to reputation. Despite changing technologies used to communicate defamatory statements, the classes of reputational interests that are typically targeted have remained relatively consistent.

Research has suggested that certain types of plaintiffs are more likely to be the targets of defamatory statements. In a groundbreaking 1981 study of 291 libel lawsuits, Stanford law professor Marc A. Franklin found the six largest categories of plaintiffs consisted of business managers, professionals, miscellaneous government employees, law enforcement personnel,

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<sup>32</sup> See RESTATEMENT (SECOND) OF TORTS § 558 (1977). “To create liability for defamation there must be: (a) a false and defamatory statement concerning another;(b) an unprivileged publication to a third party;(c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Id.*

<sup>33</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (1977). “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.*

commercial corporations and government officials.<sup>34</sup> This, and other studies,<sup>35</sup> suggests these categories of people are more likely to be plaintiffs in defamation actions. Two of Franklin's studies found that the content most likely to trigger a defamation lawsuit falls into three prominent categories.<sup>36</sup> These categories included accusations of crime, serious moral failings and incompetence in trade or profession.<sup>37</sup> Additionally, many of the cases studied included a combination of the above-mentioned categories.<sup>38</sup> Crime and moral failings tended to be equally prevalent triggers for defamation lawsuits among all plaintiffs, while corporations and professionals, not surprisingly, tended to take particular offense to comments aimed at their incompetence in a trade or profession.<sup>39</sup> One Franklin study found that defendants had a 70 percent success rate at fending off lawsuits related to allegations of crime and moral failing.<sup>40</sup> The success rate of defendants at staving off suits involving allegation of incompetence in a trade or profession was much lower, suggesting this is where plaintiffs are more likely to get a victory or a settlement.<sup>41</sup> These trade and professional incompetence cases are precisely the type of cases that would address injury to professional reputation caused by defamatory statements posted online at Web sites rating educators, doctors and other professionals.

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<sup>34</sup> See Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 807.

<sup>35</sup> See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455; Randall Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789 (1986); Franklin, *supra* note 34, at 807.

<sup>36</sup> See Franklin, *supra* note 34, at 812; Franklin, *supra* note 35, at 481.

<sup>37</sup> See Franklin, *supra* note 34, at 812; Franklin, *supra* note 35, at 481.

<sup>38</sup> See Franklin, *supra* note 34, at 812.

<sup>39</sup> *Id.*

<sup>40</sup> See Franklin, *supra* note 34, at 814.

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

More recent research has focused on how to determine whether a statement is capable of a defamatory meaning. Much of this research was started in the 1990s as plaintiffs began to sue defendants who had labeled the plaintiffs as gay, and courts were struggling to determine whether being called a homosexual could adversely affect a plaintiff's reputation.<sup>42</sup> Attorney Randy M. Fogle, for example, suggested in 1993 a method through which courts could determine whether calling someone a homosexual would trigger defamation laws.<sup>43</sup> Using traditional defamation law as a guide, Fogle suggested looking at whether the plaintiff was subjected to "disgrace, ridicule or ostracization" to determine whether being called a homosexual would be defamatory in the area in which the plaintiff resides.<sup>44</sup> Fogle also suggested that gay rights laws in existence could be used to determine if the community perceived homosexuals in a negative light.<sup>45</sup> Fogle, like many other scholars, suggested an approach to defamatory meaning that looks at the context in which the statements were made to determine whether they are capable of being defamatory.

Law professor Jeffrey E. Thomas suggested that courts determine whether a statement is capable of defamatory meaning by relying on linguistic principles.<sup>46</sup> Thomas asserted that pragmatics, the linguistic concept of determining meaning based on the way language is used,<sup>47</sup>

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<sup>42</sup> See, e.g. *Gooden v. Town of Clarkton, N.C.*, Nos. 88-3630, 89-2019, 1990 WL 29198 (4th Cir. 1990); *Gray v. Press Comms. LLC*, 775 A.2d 678 (N.J. App. Div. 2001).

<sup>43</sup> See Randy M. Fogle, *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights and Free Speech*, 3 LAW & SEXUALITY 165 (1993).

<sup>44</sup> *Id.* at 185.

<sup>45</sup> *Id.* at 185-186.

<sup>46</sup> See Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333 (1999).

<sup>47</sup> *Id.* at 340.

can be traced to the common law-based jurisprudence in defamation.<sup>48</sup> Thomas argued that the courts lost sight of the pragmatic approach in their jurisprudence when they began to constitutionalize the law of defamation in *New York Times v. Sullivan* and its progeny.<sup>49</sup> From then on, the courts took on a more categorical approach to protecting speech based on what category of speech – political speech, social speech, commercial speech – was in question, which he argued devalues the meaning of the words themselves.<sup>50</sup> Thomas cited the results of Bezanson’s Iowa Libel Research Project,<sup>51</sup> and more recent data from the Libel Defense Resource Center (now Media Law Resource Center), to support his conclusion that meaning had essentially been removed from consideration in defamation jurisprudence until the Court’s decisions in *Milkovich v. Lorain Journal* and *Masson v. New Yorker Magazine*.<sup>52</sup> Despite the Supreme Court’s use of a more pragmatics-oriented approach in *Milkovich*<sup>53</sup> and *Masson*,<sup>54</sup>

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<sup>48</sup> *Id.* at 351.

<sup>49</sup> *Id.* at 364. “The recognition of constitutional doctrines applicable to defamation law initially reduced the importance of meaning by protecting statements without regard to their meaning. The constitutional doctrine evolved to protect speech in several categories based on something other than meaning.” *Id.*

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

<sup>51</sup> The Iowa Libel Research Project systematically interviewed libel plaintiffs to uncover information about who sued, why they sued and how the courts handled their cases. Its results were published in number of publications. *See generally* BEZANSON, *supra* note 29.

<sup>52</sup> *See* Thomas, *supra* note 46, at 377.

<sup>53</sup> 497 U.S. 1 (1990) (holding that statements contain false factual assertions are not protected opinion statements under the First Amendment). Michael Milkovich, a high school wrestling coach, sued for defamation per se after newspaper columnist implied in his column that he coach had lied under oath during a judicial proceeding. The state trial court ruled in favor of the newspaper and the state appellate court ruled on appeal that the statements were constitutionally protected opinion. The U.S. Supreme Court ruled 7-2 in favor of Milkovich, remanding the case to the Ohio courts to determine whether any false factual statements were reported.

<sup>54</sup> 501 U.S. 496 (1991) (holding that a jury is entitled to determine whether a journalistic practice amounts to actual malice).

Thomas noted the slim prospects of a pragmatics approach dominating defamation jurisprudence, based on the hesitance of lower courts to apply the guidelines the Court outlined in those cases.<sup>55</sup>

Because meaning is central to a defamation claim, attorney Peter Wadeley has proposed that defamatory meaning be addressed by courts during the early stages of defamation litigation.<sup>56</sup> He argued that courts should be required to make a ruling on meaning shortly after the close of pleadings to ensure that unnecessary litigation does not occur.<sup>57</sup> Citing Singapore as an example, Wadeley noted that most pleadings systems have rules in place that would allow such determinations to be made.<sup>58</sup> However, Wadeley asserted current pleading practice often encourages the plaintiff to plead the most specific defamatory meaning while the defendant pleads the most general meaning of the words possible.<sup>59</sup> Instead of allowing the parties to set the boundaries of meaning through their pleadings alone, Wadeley suggests that courts examine the meaning of the alleged statements early in the discovery process as a way to avoid needless litigation and clarify the issues, including whether a statement is defamatory, prior to a trial.<sup>60</sup>

### **Reputation in the Community**

In addition to considering the subject of the communication to determine if it is defamatory, the Restatement (Second) of Torts also requires that the statements must affect the

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<sup>55</sup> *Id.* at 395-96. “Few lower courts have recognized the role of meaning in the constitutional law of defamation. The Milkovich opinion has been interpreted by most courts to continue the substance of the fact/opinion distinction with different terminology.” *Id.* at 395.

<sup>56</sup> See Peter Wadeley, *Taking the Uncertainty Out of Defamation Law – Much Ado about Meaning*, 2005 SING. J. LEGAL STUD. 373.

<sup>57</sup> *Id.* at 374.

<sup>58</sup> *Id.* at 375.

<sup>59</sup> *Id.* at 392.

<sup>60</sup> *Id.* at 394. “This change of practice would, from a case management perspective, lead to significant savings in time and costs because cases that are without merit would be identified early (and disposed of), and those cases that do proceed all the way to trial would be narrowed down to the real issues in dispute.” *Id.*

plaintiff's reputation in his or her community.<sup>61</sup> Protecting reputation as a concept is neither a recent development nor one that is unique to the United States. The value of a person's reputation has long been recognized, and can be found in works dating as far back as Shakespeare's *Othello*, "[B]ut he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed."<sup>62</sup> In fact, many of the principles of American libel law can be traced back to its evolution from English common law, which sought to prevent and punish actions that cause injury to a person's reputation.<sup>63</sup> The goal of defamation law is to protect reputation in society. As one treatise noted:

There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection.<sup>64</sup>

Defamation law serves a number of social functions designed to promote an orderly discourse. One primary goal of defamation law is to protect human dignity by providing a forum in which to counter an undeserved attack.<sup>65</sup> As a secondary measure, defamation law can be seen as having a deterrent function to prevent false and damaging speech by providing compensation for injury to reputation.<sup>66</sup> Another social function served through the law of defamation is to provide

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<sup>61</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>62</sup> WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc.3.

<sup>63</sup> See ROBERT O'NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 20-21 (2001).

<sup>64</sup> See LAURENCE ELDREDGE, *THE LAW OF DEFAMATION* § 53, at 293-294 (1978).

<sup>65</sup> See Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791 (1979).

<sup>66</sup> ELDREDGE, *supra* note 64, at 6.

a balance of power between the mass media and the average speaker.<sup>67</sup> Defamation law provides a means of policing the media and ensuring the possibility of corrective speech.<sup>68</sup>

U.S. courts have frequently commented on the importance of reputation. Justice Potter Stewart enunciated the importance of reputation in *Rosenblatt v. Baer*:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being –a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.<sup>69</sup>

Justice Stewart’s remark would subsequently be echoed by the court again in *Gertz v. Welch*,<sup>70</sup> *Dun & Bradstreet v. Greenmoss Builders*<sup>71</sup> and *Milkovich v. Lorain Journal*.<sup>72</sup> Justice Stewart was not the only justice to recognize the importance of reputation. The Court has noted in other cases that reputation is worthy of being protected. Justice William Douglas mentions the value of reputation in a case where the plaintiff sued after a law enforcement official had posted notice that the plaintiff was not allowed to buy or receive liquor.<sup>73</sup> “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”<sup>74</sup> Despite this desire to protect a person through

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<sup>67</sup> William Van Alstyne, *First Amendment Limitations on Recovery from the Press – An Extended Comment on ‘The Anderson Solution,’* 25 WM. & MARY L. REV. 793, 801-809 (1984).

<sup>68</sup> See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979) (holding plaintiffs could inquire during discovery about editorial functions to establish actual malice).

<sup>69</sup> See 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

<sup>70</sup> See 418 U.S. 323, 341 (1974).

<sup>71</sup> See 472 U.S. 749, 758 (1985).

<sup>72</sup> See 497 U.S. at 22.

<sup>73</sup> See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

<sup>74</sup> *Id.* at 37.

legal means, defamation law continues to provide only limited remedy for those who have been defamed. “This great tradition of reverence for reputation, however, has never been matched with consistency or clarity in the legal system’s protection of reputation.”<sup>75</sup>

## **Publication**

The Restatement (Second) of Torts includes a requirement that a defamatory statement must be published to be considered actionable.<sup>76</sup> The Restatement defines “publication” to include the intentional or negligent transmission of message to a person other than the one whom the message is about.<sup>77</sup> As a result, the courts and legal scholars have devoted significant energy to discussing what constitutes a publication and whether a plaintiff should be allowed to sue for each and every defamatory publication.

The publication issues in traditional print and broadcast defamation are similar to those raised by online defamation. Among the most discussed issues is the single publication rule, which has been adopted by numerous states under the Uniform Single Publication Rule.<sup>78</sup> Such a rule limits the amount of damages for a single publication to one lawsuit or cause of action.<sup>79</sup> The Restatement also addresses the issue of single publication, saying that one communication

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<sup>75</sup> See RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:1, 1-4. (2d ed. 1999).

<sup>76</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977). “To create liability for defamation there must be: ... (b) an unprivileged publication to a third party.” *Id.*

<sup>77</sup> RESTATEMENT (SECOND) OF TORTS § 577. “(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed. (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.” *Id.*

<sup>78</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-651 (1982); CAL CIV. CODE §§ 3425.3 (DEERING 1984); AND FLA. STAT. § 770.06 (1987).

<sup>79</sup> Thus, if a plaintiff is defamed by *The New York Times*, he or she may not file a separate lawsuit in each state where the defamatory article was published. Instead, he or she may sue once for the aggregate damage caused by all the publications.

heard by multiple people constitutes a single publication.<sup>80</sup> Similarly, one edition of a print publication or broadcast of a radio or television program constitutes a single publication.<sup>81</sup> As a result, a plaintiff may then sue in only one jurisdiction, but may collect for damages occurring in all jurisdictions.<sup>82</sup>

Although the single publication rule has been pretty well settled for traditional print and broadcast publications of defamatory material, scholars continue to debate the application of the single publication rule to the Internet. While some have advocated the application of the single publication rule to the Internet,<sup>83</sup> others have staunchly criticized applying an old rule to the new medium.<sup>84</sup> Authors in favor of applying the rule to the Internet cite several key reasons, including the ability to easily determine when the statute of limitations should begin to run.<sup>85</sup> They also note that some states' single publication rules were specifically designed for the print media, but that courts have gradually expanded them to adequately cover the broadcast media as well.<sup>86</sup> Finally, they argue that a republication exception can be made for the Internet just as it has been made with traditional media to allow plaintiffs to sue a second time should the defamatory content be modified and republished.<sup>87</sup> These benefits, they argue, along with

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<sup>80</sup> RESTATEMENT (SECOND) OF TORTS § 577A (2) (1977). “A single communication heard at the same time by two or more third persons is a single publication.” *Id.*

<sup>81</sup> RESTATEMENT (SECOND) OF TORTS § 577A (3) (1977). “Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.”

<sup>82</sup> RESTATEMENT (SECOND) OF TORTS § 577A (4) (1977).

<sup>83</sup> *See, e.g.,* Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. Rev. 895 (2001).

<sup>84</sup> *See, e.g.,* Sapna Kumar, *Website Libel and the Single Publication Rule*, 70 U. Chi. L. Rev. 639 (2003); Odelia Braun, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U. L. REV. 325 (2002); Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 BROOK. L. REV. 921 (1996).

<sup>85</sup> Wood, *supra* note 83, at 896.

<sup>86</sup> *Id.* at 901-902.

<sup>87</sup> *Id.* at 913-914.

providing some consistency for defamation law, justify applying the single publication rule to the Internet.

Critics of applying the single publication to the Internet argue that the characteristics of the medium provide such a contrast to those of the traditional media that application of the rule does not make sense. In comparing the Internet and traditional media, scholars have noted that the Internet is a more pervasive, and potentially more permanent medium, than print, which often makes a short-lived, temporary impact.<sup>88</sup> Additionally, there may be other, more appropriate, remedies for defamatory content on Web sites. For example, one author points to the ability to remove content from the Web in contrast to the ability to regain control of every copy of a print publication as a justification for stronger take-down requirements instead of the single publication rule.<sup>89</sup> Based on these factors, the potential for widespread damage to reputation from Internet publications, critics have asserted, is strong enough to justify not applying the single publication rule to online defamation.

## **Fault**

Since the Supreme Court's decisions in *New York Times v. Sullivan*<sup>90</sup> and *Gertz v. Welch*,<sup>91</sup> many legal commentators have addressed the various fault standards created by the court.<sup>92</sup> Numerous scholars have compared actual malice, negligence and strict liability. Articles taking a comparative approach between defamation law in the United States and other countries have also

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<sup>88</sup> See Braun, *supra* note 84, at 332-323.

<sup>89</sup> See *id.*

<sup>90</sup> 376 U.S. 254 (1964) (holding that public officials must prove actual malice to succeed in a defamation action).

<sup>91</sup> 418 U.S. 323 (1974) (holding that private persons can succeed in defamation actions by proving negligence).

<sup>92</sup> See, e.g., Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1983/1984) (arguing application of the *New York Times* actual malice standard to public figures may not be desirable); Eileen Carroll Prager, *Public Figure, Private Figures and Public Interest*, 30 STAN. L. REV. 157 (1977) (arguing courts need to recalibrate the balance between protecting reputation and advancing discussion of public issues in cases involving public figures)

been written. Indeed, legal scholars have written numerous articles critiquing and evaluating the fault standards and their impact on defamation litigation.<sup>93</sup>

Such an article was written by law professors Russell Weaver and Geoffrey Bennett, who sought to compare the way American and British courts handle defamation claims.<sup>94</sup> After studying prominent libel cases and interviewing reporters, editors and attorneys, the authors concluded that the actual malice<sup>95</sup> standard provides adequate protection for the media and does not have a significant chilling effect on speech.<sup>96</sup> They noted that American journalists do talk to their attorneys and even change articles in light of U.S. defamation law, but that the standard places no undue burden upon free expression.<sup>97</sup> This, they said, was evidenced by the emphasis on accuracy and integrity compared with a fixation on liability.<sup>98</sup> As a result, Weaver and Bennett would support maintenance of the current fault system that incorporates actual malice into American law, despite its current detractors.<sup>99</sup>

In further examining the effects of actual malice, professor W. Wat Hopkins evaluated the Supreme Court's creation of a fault structure for defamation law, looking specifically at the

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<sup>93</sup> See, e.g., Charles Rothfield, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 17 YALE L. POL'Y REV. 165 (2000) (arguing First Amendment principles preclude the awarding of punitive damages in lawsuits by public figures); John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & PUB. POL'Y 289 (1996).

<sup>94</sup> See Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993).

<sup>95</sup> Black's Law Dictionary defines actual malice as "knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true." See BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>96</sup> Weaver & Bennett, *supra* note 94, at 1189.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

application of actual malice to public-figure plaintiffs.<sup>100</sup> In his article, which has been cited by *Smolla & Nimmer on Free Speech*<sup>101</sup> as well as a Puerto Rico appellate court, Hopkins noted that the Supreme Court, in *Gertz v. Welch*, referred to the involuntary public figure, to whom the actual malice requirement may be applied.<sup>102</sup> Despite the mention, however, the Supreme Court left lower courts to fully flesh out the application of actual malice to public figures, including the involuntary public figure.<sup>103</sup> As a result, there has been inconsistency in the application of actual malice to similarly situated plaintiffs, with some courts calling them involuntary public figures and others calling them private persons.<sup>104</sup> Instead of struggling to differentiate the three categories of public figures mentioned in *Gertz* – all-purpose,<sup>105</sup> limited-purpose<sup>106</sup> and involuntary<sup>107</sup> – Hopkins suggests abandoning the limited-purpose and involuntary public figure categories.<sup>108</sup> Under his resulting structure, those who are public officials and all-purpose public figures would be required to prove actual malice while courts would examine other plaintiffs individually to determine whether actual malice was the proper standard.<sup>109</sup> “The focus would be

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<sup>100</sup> See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003).

<sup>101</sup> See RODNEY A. SMOLLA, FREEDOM OF SPEECH § 23:4 (2007).

<sup>102</sup> See Hopkins, *supra* note 100, at 41.

<sup>103</sup> *Id.* at 44. “Lower courts, however, did not stop with so-called all-purpose involuntary public figures. Many courts established tests for demarcating involuntary public figures for limited purposes. Those tests, for the most part, focused on the involvement – though involuntary – of libel plaintiffs in public controversies.” *Id.*

<sup>104</sup> *Id.* at 45.

<sup>105</sup> *Gertz* defined all-purpose public figures as people who “occupy positions of such persuasive power and influence” in society. *Gertz*, 418 U.S. at 345.

<sup>106</sup> *Gertz* defined limited-purpose public figures as people who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.*

<sup>107</sup> *Gertz* defined involuntary public figures as people who “become a public figure through no purposeful action of his own.” *Id.* at 344.

<sup>108</sup> See Hopkins, *supra* note 100, at 45.

<sup>109</sup> *Id.* at 46.

not on the status of the libel plaintiff, but on the actions taken by that plaintiff as a participant in some matter of public or general interest.”<sup>110</sup> This approach was suggested in *Rosenbloom v. Metromedia*<sup>111</sup> by a plurality of the Court. Under such a framework, judges would look at whether the matter discussed was one of public concern while addressing the extent of the plaintiff’s involvement in the discussion to determine whether a plaintiff qualified as a public figure.<sup>112</sup>

Professors Clay Calvert and Robert Richards asserted that a system that categorizes plaintiffs such as Centennial Olympic Park bombing suspect Richard Jewell to be public figures actually harms journalism in the long-term.<sup>113</sup> Instead of insulating the press’ coverage of matters of public concern, Calvert and Richards argued that the court’s decision would actually chill speech by discouraging people to provide information of issues of safety and security.<sup>114</sup> To protect private citizens, Calvert and Richards proposed a “Good Samaritan Source” rule that would allow media sources to retain their private person status despite being interviewed by the media.<sup>115</sup> Such a rule would be limited in scope, applying only when sources ask questions posed by the media on matters of public concern and would serve to prohibit the courts from requiring such plaintiffs to prove actual malice should they later sue for defamation.<sup>116</sup> Calvert and Roberts assert that the rule is necessary to promote speech while striking the proper balance

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<sup>110</sup> *Id.*

<sup>111</sup> 403 U.S. 29, 48 (1971) (plurality opinion).

<sup>112</sup> *See Hopkins, supra* note 100, at 47.

<sup>113</sup> *See Clay Calvert & Richard Roberts, A Pyrrhic Press Victory: Why Holding Richard Jewell is a Public Figure is Wrong and Harms Journalism*, 22 LOY. L.A. ENT. L. REV. 293 (2002).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

between an individual's right to comment on public matters and a media outlet's right to defend itself from legal action.<sup>117</sup>

### **Defamation Moves into Cyberspace**

Traditional defamation law, rooted in print and broadcast defamation, encompasses expression published by newspapers, magazines, pamphleteers or word of mouth. The nation's constitutional framework for addressing the tort stems from series of cases that began in the 1960s, long before the Internet burgeoned.<sup>118</sup> Thus, much of the jurisprudence on the issue of online defamation is continuing to take shape. Legal scholarship, however, has been on the cusp of online defamation since the mid-1990s. These academic discussions have addressed numerous issues that had not cropped up in the legal system at the time, but were likely to arise in the future. These articles range from discussions of jurisdiction<sup>119</sup> to critiques of the definition of community as it is used in litigation<sup>120</sup> to comments on the effect of anonymous speech.<sup>121</sup>

For example, University of Florida law professor Lyriisa Lidsky posited that the courts have continued their piece-meal approach to constructing libel law with the Internet libel cases that have begun to make their way through the legal system.<sup>122</sup> She chronicled the difficulties of courts struggling to deal with "John Doe" Internet cases, where small-time Internet publishers were being sued by corporations, who claimed to have been defamed. The primary legal

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

<sup>118</sup> See, e.g., *Sullivan*, 376 U.S. at 254; *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Rosenblatt*, 383 U.S. at 75; *Ashton v. Kentucky*, 384 U.S. 195 (1967); *Curtis Publishing v. Butts*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

<sup>119</sup> See Stephen Wilske and Teresa Schiller, *International Jurisdiction In Cyberspace: Which States May Regulate The Internet?*, 50 FED. COM. L.J. 117, 140 (1997); R. Timothy Muth, *Old Doctrines On A New Frontier: Defamation and Jurisdiction In Cyberspace*, WIS. LAW. 10, 11 (Sept. 1995).

<sup>120</sup> See Lyriisa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1 (1996).

<sup>121</sup> See Wilson, *supra* note 13, at 533.

<sup>122</sup> See Lidsky, *supra* note 8, at 855.

deficiencies, Lidsky asserted, were the uncertain levels of First Amendment protection given to John Doe defendants, the unknown degree to which corporations and other plaintiffs could be treated as public figures and the wavering role that context played in determination of objective facts.<sup>123</sup>

## **Jurisdiction**

Given the Internet's global nature, one of the first issues to crop up in online defamation cases was jurisdiction. Jurisdiction is commonly thought of in the legal field as having two distinct definitions, both of which have entangled courts and legal scholars. First, jurisdiction refers to "a government's general power to exercise authority over all persons and things within its territory."<sup>124</sup> Second, it can also include "a court's power to decide a case or issue a decree."<sup>125</sup> Thus, in an online defamation action, it must first be asked whether the court has the ability to exercise authority over a person, known as personal jurisdiction. Additionally, the court must consider whether it has the legal authority to address the issues of the case, known as subject matter jurisdiction.

Much of the literature in the area of jurisdiction focuses on the second type of jurisdiction. In his 2006 article, professor Eric Barendt examined the ability of foreign courts to exercise jurisdiction over online defamation cases arising in the United States.<sup>126</sup> After examining key decisions in Australia, England and Canada, Barendt outlined three approaches that could be taken in online defamation cases.<sup>127</sup> The first approach gave sole jurisdiction to the location in

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<sup>123</sup> *Id.* at 945.

<sup>124</sup> *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>125</sup> *See id.*

<sup>126</sup> *See* Eric Barendt, *Jurisdiction in Internet Libel Cases*, 110 PENN. ST. L. REV. 727 (2006).

<sup>127</sup> *Id.* at 733.

which the defamatory communication was created.<sup>128</sup> Basically, this approach represented an offshoot of the American single-publication rule,<sup>129</sup> in which a plaintiff must choose one location in which to file suit with the goal of avoiding a multiplicity of defamation actions.<sup>130</sup> The second jurisdictional approach focused not on where the defamatory communication was first communicated, but instead upon where it was directed.<sup>131</sup> Such a targeted approach has been taken by American courts in several cases, including *Young v. New Haven Advocate*.<sup>132</sup> The third plausible approach was based on the notion of foreseeability. Under this method, courts could maintain jurisdiction in cases where “the defendant should have foreseen that the claimant would suffer a loss to reputation rights in the forum state as a result of computer users' downloading the allegations.”<sup>133</sup> This strategy was employed by the High Court of Australia when it decided *Dow Jones v. Gutnick*.<sup>134</sup> Concluding that it is unlikely one of the three jurisdictional approaches would be adopted everywhere, Barendt suggested that a country’s courts be more flexible in their approach to jurisdiction by relying on the doctrine of forum non conveniens<sup>135</sup> for guidance.<sup>136</sup>

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<sup>128</sup> *Id.* “In Internet cases, the state of initial publication would be the state where a defamatory message was first placed on a server; the courts of another state would have to disclaim jurisdiction, even if an action was brought by a plaintiff wholly resident in that state and the communication was directed to its public.” *Id.*

<sup>129</sup> RESTATEMENT (SECOND) OF TORTS § 577A (2) (1977). “A single communication heard at the same time by two or more third persons is a single publication.” *Id.*

<sup>130</sup> *See* Barendt, *supra* note 124, at 733.

<sup>131</sup> *Id.* at 734. “Courts in the forum could only exercise jurisdiction in Internet (or other) libel suits emanating from another state when it is clear that the defendant has ‘targeted’ the communication at readers in the forum state.” *Id.*

<sup>132</sup> 315 F.3d 256 (4th Cir. 2002) (holding West Virginia courts lacked jurisdiction in a libel case brought by a prison warden regarding allegations published by a Connecticut newspaper on its Web site concerning treatment of Connecticut prisoners in West Virginia jails).

<sup>133</sup> *Id.* at 735.

<sup>134</sup> *Dow Jones & Co. v. Gutnick*, (2002) 210 CLR 575 (rejecting the defendant’s claim that New Jersey law should apply in the case because of the location of the defendant’s servers).

<sup>135</sup> “The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum

Professor Patrick J. Borchers addressed the lack of bright-line jurisdictional rules for online defamation claims.<sup>137</sup> In his article, Borchers suggested that the courts should not rely on the malleable constitutional guidelines created by weaving together U.S. Supreme Court opinions.<sup>138</sup> Instead, he suggested that the best method for creating predictable outcomes in personal jurisdiction issues is to construct a framework through state or federal legislation.<sup>139</sup> Citing New York as an example, Borchers explained that excluding libel defendants from far-reaching long-arm statutes<sup>140</sup> may create some hardships initially, but would save considerable resources in the long-run by resolving any preliminary questions about jurisdiction.<sup>141</sup> Alternatively, he suggested the less radical approach resembling the single-publication rule, which also was considered by Barendt.

### **Anonymity**

The idea of anonymous and pseudonymous writings has a long history in the United States, tracing back to the era of the American Revolution. Numerous examples of such writings can be found in any study of American history, from Thomas Paine’s anonymous “Common

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in which the action might also have been properly brought in the first place.” See BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>136</sup> Barendt, *supra* note 124, at 739.

<sup>137</sup> See Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473 (2004).

<sup>138</sup> *Id.* at 489. “The highly fact-specific nature of the Supreme Court’s jurisdictional jurisprudence invites the drawing of narrow distinctions. The largely judicially-created nature of jurisdictional principles in the United States inevitably produces the sort of uncertainty that has emerged in this area.” *Id.*

<sup>139</sup> *Id.* at 490-492. “One obvious solution would be for long-arm statutes to be modified to prohibit the exercise of long-arm jurisdiction over non-resident libel defendants.” *Id.* at 491.

<sup>140</sup> Black’s Law Dictionary defines long-arm statutes as “A statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect.” See BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>141</sup> Borchers, *supra* note 137, at 490-491.

Sense”<sup>142</sup> to Publius’ pseudonymous “Federalist Papers,” a collection of writings by Alexander Hamilton, James Madison and John Jay.<sup>143</sup> For many of the anonymous or pseudonymous writers, the cloak behind which they wrote insulated them from punishment.

In modern times, the Internet has contributed to the rise of anonymous speech, allowing users to e-mail, chat and blog using either a fictitious identity or no identity at all. During the late 1990s and into 2000, a flurry of cases involving companies seeking to uncover the identity of anonymous Internet communicators entered the court system.<sup>144</sup> In 2002, professors Margo E.K. Reder and Christine Neylen O’Brien examined these lawsuits and concluded that a piecemeal approach to determining whether a defendant’s identity could be revealed undermined the predictable nature of the legal system’s rules.<sup>145</sup> The authors suggest that a method of providing a uniform approach to allowing the discovery of anonymous posters’ identities would be to adopt the test established by Judge MacKenzie and refined by the New Jersey Superior Court in *Dendrite International v. John Doe 3*. There, the court established a three-part test to determine whether to compel disclosure of a person’s identity.<sup>146</sup> First, a trial judge must require plaintiffs to make an effort to notify anonymous posters that they have been subpoenaed.<sup>147</sup> Second, the plaintiffs must delineate the exact statements posted by the anonymous speakers that the plaintiff

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<sup>142</sup> ISAAC KRAMNICK, EDITOR’S INTRODUCTION TO THOMAS PAINE, COMMON SENSE 29 (Penguin Classics 1976).

<sup>143</sup> CLINTON ROSSITER, INTRODUCTION TO THE FEDERALIST, at ix, xv (Clinton Rossiter, ed. 1961).

<sup>144</sup> See, e.g., *Dendrite International, Inc. v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div., 2001); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003).

<sup>145</sup> Margo E.K. Reder and Christine Neylon O’Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. TECH. L. REV. 196, 217 (2002).

<sup>146</sup> *Dendrite*, 775 A.2d, at 771-772.

<sup>147</sup> *Id.*

believes are actionable.<sup>148</sup> This essentially requires a prima facie showing for the desired legal action.<sup>149</sup> Finally, the court must balance the defendant's First Amendment right to speak anonymously with the strength of the plaintiff's case as well as the plaintiff's need for the disclosure.<sup>150</sup> Doing so, the authors posit, would properly balance speech and privacy rights with the right to protect reputational interests.<sup>151</sup>

More recently, Lidsky and University of Minnesota law professor Thomas Cotter provided guidance to legislators about drafting legislation that targets the disclosure of anonymous speakers.<sup>152</sup> They suggested that both the First Amendment and democratic theory weighed in favor of protecting anonymous core speech – political and social speech – because current precedent would require that the government assert a compelling interest to mandate disclosure of a speaker's identity.<sup>153</sup> In addition, they suggested the creation of an evidentiary privilege, based loosely on that developed by the Delaware Supreme Court in *Doe v. Cahill*, which would provide some protection for defendants to prevent plaintiffs from merely alleging wrongdoing to uncover a speaker's identity.<sup>154</sup> The first part of the privilege would require notice to the speaker.<sup>155</sup> This would allow a potential defendant to attempt to protect his or her identity before it is revealed by placing the onus on either the plaintiff or the Internet Service Provider to

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See Reder & O'Brien, *supra* note 145, at 217.

<sup>152</sup> See Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*. 82 NOTRE DAME L. REV. 1537 (2007).

<sup>153</sup> *Id.* at 1539-1540.

<sup>154</sup> *Id.* at 1596.

<sup>155</sup> *Id.* at 1598.

attempt to notify the defendant either by posts on the same Web site or using customer information as contact information. The second step requires the courts to determine if an anonymous speaker is legally protected under an absolute or qualified privilege, which would protect the speaker from legal punishment.<sup>156</sup> If so, the burden then shifts to the plaintiff, who must overcome such a privilege.<sup>157</sup> Under the third step, a plaintiff may overcome a defendant's privilege to speak anonymously by making a prima facie showing of his or her case.<sup>158</sup> Finally, Cotter and Lidsky suggest adding a step that requires the court to balance the harm to the defendant before revealing his or her identity.<sup>159</sup> In this instance, even if the plaintiff presented a prima facie case that overcame the defendant's privilege, the defendant would have one last opportunity to demonstrate any harm that may come to him or her based on the revelation of his or her identity.<sup>160</sup>

### **ISP Immunity Under the Communications Decency Act**

In part because of the initial difficulty of suing anonymous John Doe defendants, the early litigation focused on suing the Internet Service Providers, including CompuServe<sup>161</sup> and Prodigy.<sup>162</sup> In the midst of the courts' developing jurisprudence in the Internet arena, Congress undertook a legislative re-working of the 1934 Communications Act, which would become the

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<sup>156</sup> *Id.* at 1599.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1600-1601.

<sup>159</sup> *Id.* at 1601.

<sup>160</sup> *Id.*

<sup>161</sup> *See* *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that because CompuServe was merely a distributor of information, it would not be appropriate to hold CompuServe liable for any defamatory statements unless it could be proven that CompuServe should have known of the content).

<sup>162</sup> *See* *Stratton Oakmont v. Prodigy Services Co.*, unpublished at 1995 WL 323710 (N.Y. Sup. 1995) (holding Prodigy to be a publisher of content on its "Money Talk" bulletin board for the purpose of this defamation lawsuit and therefore potentially liable).

Telecommunications Act of 1996.<sup>163</sup> The act, which contained a section known as the Communications Decency Act, was the first major overhaul of federal electronic communication law in more than six decades. In it, Congress addressed a variety of topics, but the most pertinent provisions to defamatory speech on the Internet are contained in Title V of the Telecommunications Act, known as the Communications Decency Act. Within Title V, Section 230, the Good Samaritan Act provisions immunize service providers from liability for torts committed by their users over the network. This provision, which addresses the heart of the *Prodigy* and *Cubby* cases, was quickly the target of litigation<sup>164</sup> and scholarship.

Attorney Paul Erlich argued that the courts' subsequent interpretations of congressional legislation contravenes the lawmakers' intent to immunize only a select portion of those communicating on the Internet.<sup>165</sup> Reading the statute broadly, judges have lumped both publishers – those who assemble, edit and print content – and distributors – those who merely sell or make available content – together under the cloak of immunity.<sup>166</sup> As a result, Internet Service Providers and other interactive services are no longer the target of lawsuits based on content created or distributed by third parties. Such a regime, Erlich argued, is not enough to protect against the dangers of defamatory speech.<sup>167</sup> After the Supreme Court ruled in *Zeran v. America Online* that Section 230 provided full immunity for interactive computer services, lower

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<sup>163</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>164</sup> See *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (upholding the constitutionality of Section 230 of the Communications Decency Act).

<sup>165</sup> See Paul Erlich, *Cyberlaw: Regulating Conduct on the Internet*, 17 BERKELEY TECH. L.J. 401 (2002).

<sup>166</sup> *Id.* at 401-402. “The effect of these rulings has been the emergence of a comprehensive immunity from suit for ISPs so long as the suits are based on content not authored by the ISP. Whether or not Congress intended this result, ISPs and other interactive computer services have used Section 230 as a complete defense against recent suits.” *Id.* at 402.

<sup>167</sup> *Id.* at 402.

courts began applying Section 230's protections in other areas of the law as well, including cases dealing with distributor negligence<sup>168</sup> and criminal sales of materials in violation of copyright laws.<sup>169</sup> Such broad interpretations have created a sweeping rule to limit liability for numerous types of speech on the Internet, including defamatory speech. Instead, Erlich argued, speech should be categorized and then regulated based on those categories because immunity may work to deter one type of speech but not another.<sup>170</sup> Erlich argued that the text of Section 230 supports the notion of distributor liability because of its explicit use of "speaker" and "publisher," which follow the traditional defamation law framework for liability.<sup>171</sup> A less dramatic change suggested by Erlich would be to retain the immunity for ISPs but reduce the difficulty associated with obtaining the identity of the anonymous posters of defamatory materials.<sup>172</sup> To prevent a chilling effect on speech, he would require that courts make a finding based on the defamatory nature of the speech,<sup>173</sup> much akin to the approach subsequently taken by some courts in their anonymous online defamation jurisprudence.

North Carolina law student Megan M. Sunkel proposed another solution to address ISP immunity that has been referenced by at least one court deciding an online defamation case.<sup>174</sup> In her article, Sunkel drew commonalities between the disclosure issues faced in online defamation

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<sup>168</sup> See *Doe v. America Online*, 783 So. 2d 1010 (Fla. 2001).

<sup>169</sup> See *Stoner v. Ebay*, 87 Cal. App. 4th 684 (Cal. Ct. App. 2001).

<sup>170</sup> Erlich, *supra* note 165, at 409-410.

<sup>171</sup> *Id.* at 409.

<sup>172</sup> *Id.* at 419.

<sup>173</sup> *Id.* "[A]nonymity would only be removed if statements were proven to be defamatory or otherwise unlawful. Since that type of speech (defamatory speech) is not protected by the First Amendment outside of the Internet, discouraging its existence on the Internet is not problematic. At the very least, a specific disincentive is preferable to the broad filtering distributor liability would promote." *Id.*

<sup>174</sup> Megan M. Sunkel, Note, *And the I(SP)s Have It ... But How Does One Get It*, 81 NO. CAR. L. REV. 1189 (2003) (cited in *McMann v. Doe*, 460 F. Supp. 2d 259, 265 (D. Mass. 2006)).

cases and those in reporter's privilege cases.<sup>175</sup> ISPs, she asserted by citing early case law in the area, are more like newspapers than common carriers such as telephone companies. Noting the ability of both newspapers and ISPs to exert editorial control, Sunkel argued that imposing liability on ISPs – like imposing liability on newspapers – would discourage the publication of inaccuracies and untruths.<sup>176</sup> Based on this notion, Sunkel argued that courts could reason that Internet speech is of less value than journalistic speech, whereby allowing the courts to more readily disclose the names of anonymous speakers.<sup>177</sup> Instead, she argued courts should weigh the right to anonymity and the chilling factor with the need of the plaintiff to access the identity of the anonymous speaker, in much the same way scholars and courts have suggested these competing interests be balanced in reporter's privilege cases.<sup>178</sup>

In his article, attorney Jonathon Band criticized the courts for their seemingly contradictory interpretations of the Communications Decency Act and the Digital Millennium Copyright Act.<sup>179</sup> While the courts have interpreted the CDA broadly, providing large-scale immunity for “interactive computer services,” they have construed the DMCA in a narrow fashion that exposes the same providers to liability in intellectual property lawsuits.<sup>180</sup> One of the results of such a judicial interpretation, he contended, was that courts are providing more

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<sup>175</sup> Sunkel, *supra* note 174, at 1213-1218.

<sup>176</sup> *Id.* at 1217.

<sup>177</sup> *Id.* at 1218.

<sup>178</sup> *Id.* at 1218. “The appropriate test is that a company, asking for identifying information from an online user's ISP, must prove that the information sought is relevant, goes to the heart of the company's claim, and is unavailable from any other source. This test requires a case-by-case determination that the plaintiff is, in good faith, bringing the subpoena only after exhausting other means of gaining the information itself.” *Id.*

<sup>179</sup> See Jonathon Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295 (2002).

<sup>180</sup> *Id.* at 295. “The divergence is disturbing because it suggests that the courts believe that copyrighted works deserve more protection than the individuals harmed by the torts falling within the scope of the CDA.” *Id.*

protection for intellectual property creators than they are for those who are tortuously injured by defamatory speech.<sup>181</sup> Along the same lines, he cautioned courts not to simply provide a “free pass” to ISPs, allowing those who simply turn a blind eye to copyright infringement to escape from liability under the DMCA.<sup>182</sup>

Like Band, Duke University law student Ryan King also criticized the public policy implications of the Communications Decency Act in his 2003 article.<sup>183</sup> King argued that the CDA’s immunization of service providers from publisher and distributor liability contravenes public policy. To correct this imbalance, King asserted the need for a broader interpretation of the “development” and “take down and put back” provisions to bring service providers under the same liability standards as traditional print content providers. Doing so, he posited, would provide a better method of protecting reputational injury by acknowledging the pervasive nature of the Internet community. Such an approach would also be akin to the approach taken in enforcement of the Digital Millennium Copyright Act.

Similarly, attorney Joshua Masur noted in 2000 that Judge Paul Friedman’s decision in *Blumenthal v. Drudge* that immunized AOL from liability for Matt Drudge’s comments crippled Internet libel law by preventing individuals from adequately preserving their reputations from online injury.<sup>184</sup> Masur argued that the decision in *Blumenthal* unnecessarily concluded that the CDA intended to protect all online service providers. Instead, he asserted the language was

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<sup>181</sup> *Id.* at 319.

<sup>182</sup> *Id.* “In contrast, if they do not become more careful, the courts may degrade the DMCA into a “one free pass” rule: An ISP would be immune from liability so long as it remained in a state of blissful ignorance, but once it received the first notice of infringing activity, it would be on notice concerning the possibility of future infringements.” *Id.*

<sup>183</sup> Ryan W. King, Note, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L & TECH. REV. 24.

<sup>184</sup> See Joshua M. Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge*, 40 JURIMETRICS J. 217 (2000).

designed to immunize content providers who chose not to police content on their sites.<sup>185</sup> The Blumenthal rule, by contrast, protected AOL despite AOL's active involvement in publication of *The Drudge Report*. Masur argued that the court's alternative would have been to find AOL acted as a content provider and not merely an online service provider.<sup>186</sup> Doing so would have allowed the court to treat AOL as a publisher, not a common carrier, under the law.<sup>187</sup> This categorization based on function would allow the courts to provide immunity in cases of omission but revoke immunity in cases of commission:

Functional line-drawing appears to be the only fair, effective, and accurate manner to interpret the statute. Differentiating a common carrier acting as such from one that acts as a republisher provides immunity where appropriate, yet maintains liability where immunity is inappropriate.<sup>188</sup>

Northwestern University law professor John L. Hines argued that current First Amendment law, as well as statutory immunity for service providers under Section 230 of the Communications Decency Act, inhibits a corporation's ability to protect itself from corporate cybersmear.<sup>189</sup> Recognizing the limited likelihood of changing those laws, Hines suggested there are other ways to address issues of corporate cybersmear that may be nearly as effective. Interestingly, one of the suggestions was speech-promoting and the other was speech-inhibiting. He first suggested allowing more conversation and exchange in the workplace to reduce employee hostility, a prime fuel for the purveying of corporate cybersmear.<sup>190</sup> But he also suggested some contractual

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<sup>185</sup> *Id.* at 218.

<sup>186</sup> *Id.* at 225.

<sup>187</sup> *Id.* at 226.

<sup>188</sup> *Id.* at 227.

<sup>189</sup> John L. Hines et al., *Anonymity, Immunity and Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97 (2003).

<sup>190</sup> *Id.* at 104-105.

obligations on employees to reduce the risk of derogatory speech about corporations, which would limit the amount of speech overall.<sup>191</sup>

## **Community**

One of the greatest challenges to the legal system is the way in which the Internet has changed the traditional definitions of community relied upon by the courts in their jurisprudence. Although scholars have examined this development in a variety of First Amendment areas, most pages on the subject have been dedicated to obscenity and defamation. The obvious reason for this is the prominence played by community in the definitional elements of both legal concepts.

In the tort of defamation, the importance of community lies in the determination of whether a statement injures someone's reputation as well as whether a person is a public figure. In fact, whether a statement is actually defamatory depends on whether it lowered a person's esteem in a given community. In her article *Defamation, Reputation and the Myth of Community*, Lidsky argued that to make such a determination in defamation, courts often construct a fictionalized community that does not really exist in society in the manner that the court has imagined it to exist.<sup>192</sup> She pointed to two types of cases in which these judicial fictions are particularly troublesome: cases where the values of the plaintiff's community contravene societal norms and cases where the values of the plaintiff's community are in a state of flux. To address these issues, Lidsky made several suggestions. First, she asserted that the abolition of presumed harm would redirect defamation, like other torts, in a manner that would compensate for actual harm as opposed to righting presumed wrongs.<sup>193</sup> Additionally, Lidsky posited that courts could

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<sup>191</sup> *Id.* at 106.

<sup>192</sup> *See* Lidsky, *supra* note 120, at 44.

<sup>193</sup> *Id.* *See also* Anderson, *supra* note 1 (criticizing reliance on presumed harm as opposed to compensating only for actual injury).

require a plaintiff to plead and prove relevant community, to better ensure that the plaintiff's reputation was actually harmed.<sup>194</sup> Both of these suggestions could have significant consequences for online defamation cases.

### **Plaintiff Status**

Similarly, another significant area affecting online defamation is the public person/private person dichotomy. Not only have the courts struggled to apply this concept in traditional defamation cases,<sup>195</sup> they have had difficulties categorizing plaintiffs when a case involves online speech.<sup>196</sup> In a 2005 article published in *Wired* magazine, Iowa law professor and libel scholar Randy Bezanson criticized a decision by Florida Circuit Court Judge Karen Cole, which held a plaintiff to be public figure based largely on Internet chatter about her legal dispute over her husband's medical state.<sup>197</sup> "(Someone doesn't) become a public figure just because a newspaper or some part of the media picks (a story) up and makes a big deal of it," he asserted, but "one might imagine that there's going to be a lot more public figure issues that arise, and

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<sup>194</sup> See Lidsky, *supra* note 120, at 45-46. "If the plaintiff's friends or family or social group holds values antithetical to those of the judge, the jury, or the dominant culture generally, the plaintiff should be allowed to prove that the defendant's communication was defamatory within the 'relevant community' (that is, the community relevant to him) even if not defamatory in American society generally. This pleading requirement would be loosely analogous to a 'cultural defense' in criminal law." *Id.*

<sup>195</sup> See *Atlanta Journal-Constitution v. Richard Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001) (holding that a security guard's public appearances made him a voluntary limited-purpose public figure for the purpose of his defamation action against a newspaper). "Even if the trial court erred in finding that Jewell was a voluntary limited-purpose public figure, the record contains clear and convincing evidence that, at the very least, Jewell was an involuntary limited-purpose public figure." *Id.* at 186.

<sup>196</sup> See *Thomas v. Patton*, 34 Media L. Rep. 1188 (Fla. Circ. Ct. 2005); Randy Dotinga, "Are You a Public Figure?" WIRED (Nov. 9, 2005), at <http://www.wired.com/news/politics/0,69511-0.html>.

<sup>197</sup> Dotinga, *supra* note 196. "Bezanson said the judge made a bad decision because Thomas didn't act to inject herself into a public controversy – one of the criteria for determining a public figure – but was simply trying to protect her rights." *Id.*

there may be a rise in the number of libel suits because the volume of talk has been greatly increased.”<sup>198</sup>

Scholars, too, have discussed the difficulty of such categorizations.<sup>199</sup> For example, in traditional print and broadcast defamation cases, the courts have ruled both ways in the case of college professors, with some holding they are public persons and others holding they are private persons.<sup>200</sup> Additionally, the complicated nature of the Internet community has increased the difficulty of such determinations, making the area of online defamation ripe for further study.

### **Research Questions**

Although current literature has attempted to answer many questions related to online defamation, some matters still remain untouched. The Internet raises complex issues in the areas of anonymous speech, jurisdiction and enforcement as well as difficulties ascertaining definitions of community, harm and plaintiff status. Pages of scholarship and court opinions have analyzed anonymity and jurisdictional issues, but very little work has been done in the areas of community, harm and plaintiff status. To date, few scholars have examined these concepts in the context of traditional print and broadcast defamation, and even fewer have looked at their role in

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<sup>198</sup> *Id.*

<sup>199</sup> See Andrew Turscak, *School Principals and New York Times: Ohio's Narrow Reading of Who is a Public Official or Public Figure*, 48 CLEV. ST. L. REV. 169 (2000); H.W. Stonecipher et al., *A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 ARK. L. REV. 303 (1993); Patricia Fetzer, *The Corporate Defamation Plaintiff as First Amendment 'Public Figure': Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982).

<sup>200</sup> In these cases, the courts have held professors to be public persons: *Klahr v. Winterble*, 418 P.2d 404 (Ariz. App. 1966), *Gallman v. Carnes*, 497 S.W.2d 47 (Ark. 1973), *Abdelsayed v Narumanchi*, 668 A.2d 378 (Conn. App. 1995), *Kelley v. Bonney*, 606 A.2d 693 (Conn. 1992), *Johnson v. Board of Junior College Dist. #508*, 334 N.E.2d 442 (Ill. 1st Dist. 1975), *Basarich v. Rodeghero*, 321 N.E.2d 739 (Ill. 3d Dist. 1974), *Davis v. Borskey*, 660 So.2d 17 (La. 1995), *Hicks v. Stone*, 425 So.2d 807 (La. App.1st Cir. 1982), *Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983), *Baxter v. Doe*, 868 So.2d 958 (La. App. 2d Cir. 2004), *Fortenbaugh v. New Jersey Press, Inc.*, 722 A.2d 568, (N.J. App. Div. 1999). In the following cases, the court held the plaintiffs to be private persons: *Foote v. Sarafyan*, 432 So.2d 877 (La. App. 4th Cir. 1982), *Staheli v Smith*, 548 So.2d 1299 (Miss. 1983).

online defamation jurisprudence. Relying on legal research as a methodological approach, this study will seek to answer these research questions:

- What are the significant issues for online defamation that have not been adequately addressed in the scholarly literature?
- How do the courts define the notions of community, harm and plaintiff status in defamation cases that do not involve online defamation?
- How do the courts define the notions of community, harm and plaintiff status in online defamation cases?
- What considerations are important when the courts try to define the notions of community, harm and plaintiff status in online defamation cases?
- What issues are important to consider when balancing reputation and the First Amendment?

### **Methodology**

A thorough analysis of these research questions requires a discussion of the role of the courts in addressing new media technologies such as the Internet as well as traditional print and broadcast defamation cases. In addition, parallels can be drawn from the scholarly literature in other areas of defamation law, including those dealing with injury to business reputation. To do this, the author will employ legal research methodology. Constitutional law, statutory law and common law will be analyzed in this study. The primary resources relied upon include the U.S. Constitution, federal statutes and federal court decisions. State court rulings, as well as some state statutes, will be used to supplement the federal materials. Secondary materials, including scholarly legal and social scientific research, also will serve as references.

Computerized legal-research services Lexis-Nexis and Westlaw were used to retrieve scholarly articles, court opinions and statutory laws. The author utilized specific search strings to obtain most of the research materials.

## Secondary Sources

To locate journal articles, the author utilized the Westlaw Journals and Law Review database, searching with the title strings TI(online & defamation), TI(cyber & defamation), TI(Internet & defamation), TI(community & defamation), TI(harm & defamation), TI(“anonymous speech”), TI(“cybertort”), TI(“public figure”), TI(“public official”), TI(“private person”) and TI(“anonymity”) to locate all articles with those words contained in their titles. The keyword search strings “online defamation” /p community, “online defamation” /p harm, “online defamation” /p injury, “online defamation” /p “injury to reputation,” “online defamation” /p “public figure,” “online defamation” /p “public official,” “online defamation” /p “private person” were used to locate all the articles with those two phrases contained within the same paragraph. The term “Internet” was substituted for online in all of the above searches and the word “libel” was substituted for defamation. In most instances, the author disregarded Case Notes and law student Commentary articles that have not contributed significantly to the discussion of online defamation. Several student works were utilized because they had been cited by courts in recent case decisions or had covered an aspect of the literature that other scholars had not addressed.

Westlaw’s News database was also utilized to uncover popular press articles about ratings Web sites and online defamation. Using the ALL NEWS database, the author entered multiple search strings mentioned above. “Ratemyprofessor” as a search string turned up a number of articles mentioning the Web site. The term “online defamation” was used with some success as well.

The author also explored the Social Science Research Network online to find working papers in the topic area. This was done by searching the Legal Research Network arm of the Social Science Research Network Web site, [www.ssrn.org](http://www.ssrn.org). The author entered a title keyword

search to obtain all working papers with the term “defamation” in the title. A few papers, including a working paper that became the Lidsky and Cotter article, were uncovered.

Finally, a search of theses and dissertations was conducted. Using the ProQuest theses and dissertation online database, the author ran several searches. Strings for these searches included Internet AND defamation as well as the searches mentioned above. Basic searches for defamation and libel were also conducted in ProQuest to turn up relevant articles. None of the articles dealt directly with the issues examined in this study.

When no relevant hits were returned during a search to locate terms within the same sentence or paragraph, the researcher broadened the search to include documents where the key phrases were located anywhere within the same document. Additionally, specific citations were retrieved based on footnotes located within the initial articles. Finally, the researcher utilized citations in scholarly articles as references to primary sources, including state court cases and other materials.

### **Primary Sources**

To locate primary sources, the research began with case law. Using the ALL FEDS database, the author searched for opinions from all levels of the federal courts. The search strings “online defamation” /p injury, “online defamation” /p harm, “online defamation” /p community, “online defamation” /p anonymity, “online defamation” /p “private figure,” “online defamation” /p “public figure,” “online defamation” /p jurisdiction were used to locate any federal case with those terms in the same paragraph. “Cyberdefamation” was also substituted for “online defamation” in each of the search strings as were “online libel,” “Internet libel” and “Internet defamation.” The same approach was taken using the ALL STATES database of cases. Additional specific citations were also retrieved after the author Shepardized major U.S. Supreme Court libel rulings, including *New York Times v. Sullivan*, *Curtis Publishing v. Butts*,

*Hutchison v. Proxmire* and *Gertz v. Welch*. Additional lower court rulings were also located using this methodology. Finally, some cases were located using citations from secondary sources.

### **Dissertation Outline**

Chapter 2 of the dissertation, titled *The Internet as a Medium of Mass Communication*, discusses the development of the Internet. It provides an overview of the history of the Internet, including its adoption as a mass medium. It also addresses legal complications created by Internet speech, including those of anonymity, jurisdiction and immunity for Internet Service Providers.

Chapter 3, titled *The Internet and First Amendment Theory*, discusses the role of the Internet in the exchange of ideas. It begins with an overview of the marketplace theory, from its European origins to its modern-day application in U.S. courts. This section examines both the speech-promoting aspects of marketplace theory as well as the access component of marketplace theory that can inhibit speech. The chapter also examines Alexander Meiklejohn's self-governance theory, Vincent Blasi's watchdog conception of the First Amendment and Thomas Emerson's self-fulfillment theory. All of these theories, along with the marketplace of ideas justification for the First Amendment, have been previously used by the courts to develop First Amendment jurisprudence. In addition, they can be used as guiding pillars to suggest a proper framework for the regulation of online defamation.

Chapter 4 of the dissertation, titled *Defining Community*, examines the definition of community in online defamation jurisprudence. By using defamation precedent before and after the rise of Internet communications, this chapter evaluates current conceptions of community.

Chapter 5 of the dissertation, titled *Defining Plaintiff Status*, examines the public person/private person dichotomy in online defamation jurisprudence. By using defamation

precedent before and after the rise of Internet communications, this chapter evaluates current conceptions of plaintiff status.

Chapter 6 of the dissertation, titled Defining Harm, examines the definition of harm in online defamation jurisprudence. By using defamation precedent before and after the rise of Internet communications, this chapter evaluates current conceptions of harm.

Chapter 7, the dissertation's Conclusion, serves to summarize the findings of Chapters 2, 3, 4, 5 and 6. In addition, it examines the proper framework for the regulation of defamatory speech on the Internet, including the proper role of the courts in developing the Internet as the modern-day marketplace of ideas and the role of First Amendment theory in developing defamation constructs. Areas for future research are also included in this chapter.

## CHAPTER 2 THE INTERNET AS A MEDIUM OF MASS COMMUNICATION

What began in the 1960s as a Massachusetts Institute of Technology research project on packet switching, or the ability to transfer small bundles of information from one computer to another,<sup>1</sup> has morphed into a worldwide tool that allows millions of users to send text, video and audio signals in “real-time.”<sup>2</sup> This tool is known as the Internet. Technically speaking, though, the Internet is merely the system used for such communication. It is:

a collection of high-speed communication cables and dedicated computers, known as routers, that control the flow of information over those high-speed cables. Together, the cables and routers constituted an object known as the ‘backbone,’ and there is a narrow technical sense in which the Internet consists of the backbone and nothing more. Everything else is a more or less local network, which may have facilities for wide area access but is not ‘the Internet.’<sup>3</sup>

What most people think of as the “Internet,” instead refers to the entire system that allows the communication process to occur via a series of networks.<sup>4</sup> America Online, CompuServe and Prodigy are not the “Internet,” but are instead Internet Service Providers (ISPs) that allow users to connect to the backbone of this system of networks.<sup>5</sup> Netscape Communicator, Internet Explorer and Mozilla Firefox are not the “Internet,” but are instead Internet browsers that allow users to visualize the information they access from this system of networks.<sup>6</sup> To know what the “Internet” is requires an understanding of how it came about and how it currently operates. This chapter discusses the history of the Internet, from its inception as a government-funded network

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<sup>1</sup> The Internet Society. *All About the Internet: History of the Internet 1*, at <http://www.isoc.org/internet/history/brief.shtml#Introduction> (last visited Sept. 2, 2006).

<sup>2</sup> See MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 20-30 (2d ed. 2005).

<sup>3</sup> See KEVIN J. CONNOLLY, *LAW OF INTERNET SECURITY AND PRIVACY* 11 (2003).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.* at 12.

to its modern-day, highly unregulated form as a medium of mass communication. It also addresses some of the benefits and consequences of having a highly unregulated medium of mass communication, looking specifically at the implications of anonymous speech and the jurisdictional issues that occur in litigation arising out of Internet communications.

### **History of the Internet**

Like most major technological advancements, the Internet was not created in one quick discovery, but was developed through changes and adaptations of technology over time. The development of the Internet can be traced back to the creation of networking, which allowed computers that had previously worked in seclusion to communicate with other computers.<sup>7</sup> Thus, the Internet got its start from a series of small networks much like the networks that link a computer to a printer through a series of wires and cords. These networks allowed multiple computers to interface, which provided the ability to transfer information between users and share software among the machines.<sup>8</sup> This creation of small networks would eventually lead to much larger networks, and eventually the Internet as we know it today.

### **Early Computer Networks**

The first step to creating the Internet would require that one computer be able to communicate with another computer. The creation of Local Area Networks (LANs) and the use of coaxial cable<sup>9</sup> or telephone lines allowed groups of computers in the government to communicate.<sup>10</sup> Much of the early research on networking occurred in the government and

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<sup>7</sup> COLLINS, *supra* note 2, at 9.

<sup>8</sup> *Id.*

<sup>9</sup> Coaxial cable is “a transmission line that consists of a tube of electrically conducting material surrounding a central conductor held in place by insulators and that is used to transmit telegraph, telephone, and television signals.” *See* Merriam Webster Dictionary Online, at [www.m-w.com/dictionary](http://www.m-w.com/dictionary).

<sup>10</sup> COLLINS, *supra* note 2, at 9.

academic sectors to develop a means of instantly communicating data despite geographical distance.<sup>11</sup> To bridge these distances, LANs were only marginally helpful as they were constrained by the spatial limitations of stringing together cords and wires to connect one computer to another in small networks based on proximity of location.<sup>12</sup> LANs were also limited by the fact that multiple data transfers could not occur at the same time because of the wires. To make the technology useful, researchers had to develop a way for computers to communicate with one another across longer distances and increase the usefulness of central servers to store and transmit multiple packets of information simultaneously.

To combat the constraints of LANs, and increase the efficiency of data transfer, researchers developed a less-localized system in which a dedicated computer serves as the host for a group of other computers to access directly instead of through a chain of connections. This setup, known as a Wide Area Network (WAN), paved the way for the creation of the Internet by allowing a computer to contact the dedicated server through a long-distance connection such as a telephone or cable line.<sup>13</sup> In a WAN, the dedicated server is capable of not only receiving information from the attached individual computers but also of distributing information to each one of the individual computers in the network.<sup>14</sup>

The difference between a LAN and a WAN can be visualized using the analogy of a wheel, with the hub representing the dedicated server and the spokes leading out to each individual computer in the network. Individual computers in a LAN would communicate with one another by passing messages around the rim of the wheel with no center spoke, leaving only one route

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

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

for a message to travel. Messages transmitted in a WAN, however, can take multiple paths to their destination computer. This wheel-and-spoke setup, which allowed for multiple transmission routes through senders and receivers, would lay the foundation for the research project that largely influenced the development of the Internet.

## **ARPANET**

It would not take long before the potential of such networking advances would spur the government to action. Realizing the value of networking technology to link together computers within the federal government, the Department of Defense developed the Advanced Research Projects Agency (ARPA), which created its own network known as ARPANET.<sup>15</sup> Created in 1957, ARPA was a direct response to Sputnik and the perceived threat of Soviet communication technology.<sup>16</sup> ARPANET was designed to link together existing LANs and WANs to allow packet-switching through satellite and radio transmission technology instead of the circuit-switching used in telephone communications.<sup>17</sup> ARPANET, one network that connected multiple sites, was the beginning of today's Internet, made up of many interconnected networks.<sup>18</sup> Two computers on separate networks could communicate so long as the networks were connected. Using the wheel analogy, any computer on the rim of wheel A can communicate with any computer on the rim of wheel B as long as wheel A and wheel B are connected in some fashion, usually through the hub. This advancement allowed the size of networks to increase exponentially because a new connection that is made between two hubs has the potential to

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<sup>15</sup> See The Internet Society, *supra* note 1.

<sup>16</sup> See BRIAN J. WINSTON, *MEDIA TECHNOLOGY AND SOCIETY A HISTORY: FROM THE TELEGRAPH TO THE INTERNET* 325 (1998).

<sup>17</sup> See COLLINS, *supra* note 2, at 10.

<sup>18</sup> See JANET ABBATE, *INVENTING THE INTERNET* 113 (1999).

connect multiple computers that previously would have to have been connected to one another individually.

Eventually, this technology was developed into a global system of networks that could communicate even if one segment of the interconnected route was blocked and unable to communicate.<sup>19</sup> ARPANET provided for multiple routes of transmission between a desired starting and ending point, making technology that would be extremely useful if portions of a communication network became inoperable.<sup>20</sup> Continuing the wheel analogy, if wheel A is connected to wheels B and C, and wheels B and C are connected to wheels D and E, wheel A could contact wheel E even if its connection with either wheel B or C was broken. The benefit would allow information to be routed around broken segments in a transmission route, allowing the information to still reach its destination.

ARPANET's structure, which allowed multiple packets of data to transverse the same paths, allowed many speakers to send and receive information simultaneously.<sup>21</sup> The technology flourished, with a few university and government networks quickly being interconnected. In 1973, ARPANET had expanded to include computers from outside the United States.<sup>22</sup> Around the same time, computer scientists developed the first electronic mailbox program allowing users to easily send electronic mail messages, as opposed to large data files, to one another via ARPANET.<sup>23</sup> With the creation of e-mail, users could respond without creating a new file to send and could even edit the message and re-send it. Eventually the technology would lead to

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<sup>19</sup> COLLINS, *supra* note 2, at 10.

<sup>20</sup> *Id.*

<sup>21</sup> See KEVIN HILLSTROM, *DEFINING MOMENTS: THE INTERNET REVOLUTION* 9 (2005).

<sup>22</sup> COLLINS, *supra* note 2, at 11.

<sup>23</sup> See WINSTON, *supra* note 16, at 330.

Telnet, or remote login programs that allowed users to be physically present in location A while accessing a server in location B via telephone lines.<sup>24</sup> Seeking to improve their communication technology to compete with telephone and other forms of communication, the researchers even developed Emoticons, or a system of characters used to show expression in e-mails, such as [:-)].<sup>25</sup> The government-backed ARPANET was not without competition, however, as universities who had been shut out of ARPANET began to develop their own networks.

### **The Internet Goes Public**

In 1979, a group of university-based computer science departments that were not linked to ARPANET met to discuss alternatives to the government-backed network.<sup>26</sup> They eventually convinced the National Science Foundation to fund development of the CSNET, the Computer Science Research Network, which would connect universities with members of the private sector, non-profits and even government agencies.<sup>27</sup> Less than five years later, more than 70 sites were connected to CSNET, which was credited with opening the Internet up to any computer science institution – government, academic, corporate or non-profit.<sup>28</sup> One of the key benefits to CSNET was the ability to use a Telnet connection to provide dialup service for schools that could not afford a dedicated connection to the network.<sup>29</sup> For the average user, CSNET provided a more cost-effective approach to networking.<sup>30</sup> ARPANET required expensive hardware and

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<sup>24</sup> The Internet Society, *supra* note 1.

<sup>25</sup> WINSTON, *supra* note 16, at 330.

<sup>26</sup> *Id.* at 332.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* See also ABBATE, *supra* note 18, at 184-186.

<sup>29</sup> ABBATE, *supra* note 18, at 184-185.

<sup>30</sup> WINSTON, *supra* note 16, at 332.

software to connect while CSNET required a telephone line.<sup>31</sup> The military eventually split off the defense portion of ARPANET,<sup>32</sup> and in 1987 CSNET was connected to the remains of ARPANET's research network and other regional networks.<sup>33</sup>

The Internet lacked visual appeal, though, and an application would be necessary to market the text-only technology to the consuming public.<sup>34</sup> By the late 1980s, online services such as CompuServe and Prodigy were being developed to allow members of the public access to these emerging computer networks while providing a graphical interface that appealed to consumers.<sup>35</sup> Private-sector technologies such as CompuServe and Prodigy would eventually allow end-users in homes across the United States to connect to the Internet from their personal computers.

In addition to the creation of a graphical interface, users needed a way to locate information easily on the Internet. As a result, the World Wide Web, which would use hypertext to link files in a non-linear fashion, was born.<sup>36</sup> As the Web burgeoned in popularity, a market was created for browsers, such as Netscape Communicator and Internet Explorer, which allowed users to find information based on an address. Search engines, such as Lycos, Altavista and Google, also sprang up to allow users to find information for which they had no Web address.<sup>37</sup>

New technologies can be both exciting and frightening, in part because of the unknowns associated with technological advancement. As was the case with the introduction of other new mass media, including the telegraph, telephone, radio and broadcast television, the Internet was

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<sup>31</sup> *Id.*

<sup>32</sup> ABBATE, *supra* note 18, at 185.

<sup>33</sup> WINSTON, *supra* note 16, at 332.

<sup>34</sup> ABBATE, *supra* note 18, at 213.

<sup>35</sup> WINSTON, *supra* note 16, at 333.

<sup>36</sup> ABBATE, *supra* note 18, at 215.

<sup>37</sup> *Id.* at 217.

originally the domain of the military and the government.<sup>38</sup> The Internet spread into the public domain in the mid-1990s, initially gaining prominence at universities, research centers and within government in much the same way as the media that preceded it.<sup>39</sup> In the United States, browsers such as Netscape Communicator – and eventually Internet Explorer – brought the World Wide Web, which transforms the informational packets sent through the Internet into a visual representation,<sup>40</sup> onto America’s computers and into its homes. The Internet’s popularity grew with amazing speed, from almost 26 million users in December 1995 to more than 1.043 billion in June 2006.<sup>41</sup>

### **Benefits of the Internet**

Today, users worldwide rely on the Internet for a variety of tasks. Many users rely on the Internet for transactional activities, including online banking (41 percent), donating money to charity (18 percent) and gambling (4 percent).<sup>42</sup> However, differences in user behavior between the genders tend to increase as the behavior becomes more closely related to communication-oriented tasks, such as e-mail, instant messaging and blogging.<sup>43</sup> Although men once made up

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<sup>38</sup> See generally Ben Segal, *A Short History of Internet Protocols at CERN* (1995), at <http://www.netvalley.com/intval1.html> (last visited Sept. 4, 2006).

<sup>39</sup> COLLINS, *supra* note 2, at 12-13.

<sup>40</sup> Defined by Merriam Webster Dictionary Online as “a part of the Internet accessed through a graphical user interface and containing documents often connected by hyperlinks,” the World Wide Web (WWW) is a graphical interface that allows users to link back and forth between information located on the Internet through a Web browser that reads computer code and displays a Web page. It is based on four key concepts: hypertext, resource identifiers, markup language and a client server model of computing. Essentially, users type a resource locator (commonly called a URL) into their Web browser, which then connects their computers to a server that contains the information the users desire. This pulls up a series or code that contains markup language, which tells the Web browser how to display the particular information that is designated by the resource locator. See Merriam Webster Dictionary Online, at [www.m-w.com/dictionary](http://www.m-w.com/dictionary) (last visited July 17, 2007).

<sup>41</sup> See World Internet Usage and Population Statistics, at <http://www.internetworldstats.com/stats.htm> (last visited Sept. 5, 2006).

<sup>42</sup> See Deborah Fallows, *How Women and Men Use the Internet* 11 (2005), at [http://www.pewinternet.org/pdfs/PIP\\_Women\\_and\\_Men\\_online.pdf](http://www.pewinternet.org/pdfs/PIP_Women_and_Men_online.pdf) (last visited Sept. 5, 2006).

<sup>43</sup> *Id.*

the majority of the Internet-consuming population, users are now about equally split between the genders.<sup>44</sup>

Interestingly, according to a 2005 Pew Internet and American Life research study, many users also rely on the Internet for information-related tasks. Male Web surfers are likely to get news, access political information and rate a person/product/service through an online rating system, while women on the Internet are more inclined to use e-mail, check support group Web sites and obtain religious information.<sup>45</sup> Increasingly, women are more likely to use the Internet for its communicative features, such as e-mail and instant messaging, than their male counterparts.<sup>46</sup> Men, however, tend to participate in larger interest groups based on the Internet, including fantasy sports leagues or discussion groups.<sup>47</sup> In each case, users have embraced the Internet's ability to connect communicators across various geographic boundaries based on shared interests – with both men and women engaging in activities ripe for defamatory communications.

Many users view and utilize the Internet as an information resource. More than 90 percent of users surveyed by the Pew Internet and American Life Project in September 2005 reported having used an Internet search engine.<sup>48</sup> In January 2005, similar research found that 59 percent of men and 55 percent of women had used the Internet to do research for educational purposes.<sup>49</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Nearly one-third of respondents to the September 2005 survey had used the Internet to obtain information about a person.<sup>50</sup>

In addition to consuming information, America's Internet users are also creating information. Nearly one-quarter of men in the September 2005 survey reported participating in chatrooms or discussion groups versus one-fifth of the female respondents.<sup>51</sup> Women also trail men when it comes to rating people, products and services using online ranking systems, with more than one-third of the males reporting such activity compared to 28 percent of females.<sup>52</sup> One manner in which users can contribute content to the Web comes in the form of Weblogs, commonly referred to as blogs, which allow their users to post text, audio and video information on journal-style Web pages with little technical knowledge. A recent Pew study found that about 12 million Americans keep a blog.<sup>53</sup> Of the bloggers surveyed, more than half were first-time publishers, meaning that had not previously publicly displayed their creations.<sup>54</sup> More than a quarter of the bloggers surveyed reported that influencing the way people think was a major reason behind their blogging.<sup>55</sup> Additionally, 29 percent cited motivating others to action as a major reason to blog.<sup>56</sup> While roughly one-fourth of all Internet users have shared their stories, photos, art or other content online, more than three-fourths of the bloggers surveyed have created

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Amanda Lenhart, *Bloggers i* (2006), at <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (last visited Sept. 6, 2006).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at iii.

<sup>56</sup> *Id.*

content specifically to post on their blogs.<sup>57</sup> Similarly, the number of American who reported reading blogs has also increased dramatically from 32 million at the end of 2004 to 57 million Americans in July 2006.<sup>58</sup> This suggests that Internet creation and consumption of that content have begun to play a role in the American marketplace of ideas.

### **Consequences of the Internet**

Unlike other mass mediums, the Internet does not belong to any one person, company or governing agency. Instead, the medium is a series of networks that connect the informational and communicative resources of government entities, public corporations and private people. This creates numerous legal issues with which the courts continue to struggle, including anonymous speakers on the Internet, jurisdiction for cases involving online activities and definitional constructs for torts that occur in cyberspace. Many of the legal issues – including anonymity and jurisdiction – stem from the ability of speakers to publish their messages anonymously to a large, geographically distant audience.

The Supreme Court has not yet established a clear rule to determine when a plaintiff can compel the identity of a potential defendant or in what forum state a plaintiff can constitutionally sue a defendant. Instead, courts and attorneys have been guided by a series of lower court precedent when sorting through the earliest types of Internet cases to come before the court. After the courts established some preliminary guidelines to address Internet cases that raised issues related to anonymity and jurisdiction, two issues that crop up in the early stages of litigation, they then became free to deal with the larger substantive elements of the tort of defamation – including community, plaintiff status and harm. Thus, once precedent established

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

<sup>58</sup> *Id.* at i.

whom plaintiffs could sue and in which court, the focus of online defamation litigation began to shift to substantive law issues, such as how to define key aspects of the tort when it is committed online.

### **Anonymity Issues**

Anonymous speech has a long history in the United States, dating back to the formation of the country when it was not uncommon for pamphleteers to spread their messages without attribution or with the use of a pseudonym.<sup>59</sup> Like the pamphlets of the colonial revolutionaries, the Internet allows an anonymous speaker to present his message to an audience under a cloak of secrecy. This often presents difficulties for plaintiffs who attempt to sue an anonymous defendant based on a wrong transgressed on the Internet, and the courts initially struggled to determine when and how they would compel the disclosure of an anonymous speaker's identity. Unlike traditional print and broadcast defamation cases, where the source of message is likely easily identifiable, the Internet provides more opportunity for anonymous and pseudonymous speech, which may promote communication seemingly without consequence.<sup>60</sup> Thus, a plaintiff defamed by an anonymous speaker online has the additional burden of uncovering the speaker's identity in order to proceed with a defamation action.

### **A right to speak anonymously?**

Determining whether to reveal an anonymous speaker's identity is not a simple legal question. In part, the difficulty of the courts to decide such questions can be traced to the

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<sup>59</sup> For example, Roger Sherman wrote under the names "A Countryman" and "Citizen of New Hampshire." See 16 THE DOCUMENTARY RATIFICATION OF THE CONSTITUTION 290 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

<sup>60</sup> "The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that 'anything goes,' and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world." See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 863 (2000).

convoluted jurisprudence in the area of anonymous speech. No single court case has definitively established the right to speak anonymously, with the Supreme Court deciding several cases on another constitutional ground.<sup>61</sup> In *McIntyre v. Ohio Elections Commission*,<sup>62</sup> Justice John Paul Stevens, writing for the Court tiptoed around the issue of the right to speak anonymously, noting “[a]ccordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”<sup>63</sup>

More recently, in *Watchtower Bible & Tract Society of New York v. Village of Stratton*,<sup>64</sup> Justice Stevens stopped short of establishing a right to anonymous speech. Stevens noted the Court had taken the case to answer the question of whether an ordinance requiring canvassers to obtain a permit prior to engaging in door-to-door advocacy and mandating the display of that permit upon demand “violates the First Amendment protection accorded to anonymous pamphleteering or discourse.”<sup>65</sup> The Court’s opinion focuses not on the anonymous nature of the speech but instead on the sweeping language of the regulation, citing the ordinance’s lack of tailoring for its downfall.<sup>66</sup> Given the Supreme Court’s hesitation to firmly establish a right to

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<sup>61</sup> See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) (holding that an order requiring the organization to reveal the names and other information about its members infringed on the freedom of association).

<sup>62</sup> 514 U.S. 334 (1995) (striking down an Ohio law prohibiting the distribution of any anonymous campaign literature as a violation of the First Amendment).

<sup>63</sup> *McIntyre*, 514 U.S. at 342.

<sup>64</sup> 536 U.S. 150 (2002) (striking down an ordinance requiring canvassers to obtain a permit prior to engaging in door-to-door advocacy and mandating the display of that permit upon demand).

<sup>65</sup> *Id.* at 160.

<sup>66</sup> *Id.* at 165-166. “The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.” *Id.*

speak anonymously, it is not surprising the lower courts have had a difficult time establishing a uniform approach for when to compel disclosure of an anonymous speaker's identity.

### **Anonymous speech online**

Anonymous speech on the Internet has likely been around as long as the Internet. However, the implication of anonymous speech by John Doe defendants is a relatively recent addition to online defamation law.<sup>67</sup> Initially, most online defamation cases in the early 1990s were litigated between a plaintiff and an Internet Service Provider, the company responsible for providing access to the Internet.<sup>68</sup> However, Congress passed the Communications Decency Act as a part of the Telecommunications Act of 1996, immunizing ISPs from legal liability for defamatory content and changing the dynamics of online defamation cases. With no corporate defendant to sue, plaintiffs quickly made John Doe the defendant of choice in online defamation actions.<sup>69</sup>

Before the Communications Decency Act passed, the first online defamation case between a plaintiff and an Internet Service Provider involved an online forum where users could post comments and read content about specific topics. In *Cubby, Inc. v. CompuServe, Inc.*,<sup>70</sup> the plaintiffs, doing business as Cubby Inc., sued CompuServe for defamation, business disparagement and unfair competition based on content published in one of the 150 special interest forums that CompuServe maintained for its subscribers.<sup>71</sup> The Journalism Forum,

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<sup>67</sup> Prior to Congress' enactment of Section 230 of the Communications Decency Act, it made more sense from a litigational perspective to sue the Internet Service Providers, who are likely to have much deeper pockets. For a discussion of this, see Lidsky, *supra* note 60, at 868-873.

<sup>68</sup> See *infra*.

<sup>69</sup> See *infra*.

<sup>70</sup> *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991)

<sup>71</sup> *Id.* at 137.

operated by Cameron Communications Inc. for CompuServe, contained a daily newsletter known as Rumorville USA.<sup>72</sup> CompuServe retained no editorial control over Journalism Forum or Rumorville USA, instead contracting with Cameron to “manage, review, create, delete, edit and otherwise control the contents” of the Journalism Forum “in accordance with editorial and technical standards and conventions of style as established by CompuServe.”<sup>73</sup> Rumorville was provided to the Journalism Forum based on a sub-contract between Cameron and Dan Fitzpatrick Associates, and CompuServe entered into no financial, contractual or editorial relations with Dan Fitzpatrick Associates. In fact, CompuServe had no editorial control over Rumorville before it was uploaded onto CompuServe’s computers.<sup>74</sup> Cubby Inc., which intended to compete with the Rumorville newsletter, developed a software program called Skuttlebut to collect and disseminate news and chatter about the journalism industry.<sup>75</sup> In its lawsuit, Cubby alleged that Rumorville defamed Cubby in three ways: by saying Skuttlebut’s staff used information from Rumorville obtained “through some back door,” by saying a Skuttlebut employee was “bounced” from his previous job; and by calling Skuttlebut a “new start-up scam.”<sup>76</sup>

Although the U.S. District Court for the Southern District of New York never reached the case on its merits, instead granting CompuServe’s motion for summary judgment based on procedural grounds,<sup>77</sup> several of the issues addressed by the court set the stage for further Internet defamation decisions. First, the court found CompuServe to be a mere “distributor” of

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<sup>72</sup> *Id.*

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

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 138.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 144.

information, similar to a bookstore, in this case, based on its hands-off editorial approach with Rumorville.<sup>78</sup> In doing so, the court concluded it would not be appropriate to hold CompuServe liable for any defamatory statements unless it could be proven that CompuServe, like a publisher, should have known of the content. Thus the court immunized CompuServe by labeling it a distributor as opposed to a publisher, likening them more to booksellers than to newspaper editors and publishers:<sup>79</sup>

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.<sup>80</sup>

Finding CompuServe to be a distributor, the court dismissed the claim of vicarious liability through which the plaintiffs sought to have CompuServe held responsible for any torts committed by Cameron Communications.<sup>81</sup> Because Dan Fitzgerald Associates was an independent contractor of Cameron Communications, the plaintiffs would have needed to show a relationship in which CompuServe directed Cameron or Dan Fitzgerald Associates to act in a way that injured Cubby and Skuttlebut.<sup>82</sup> The court found no indication of this type of arrangement; instead, it noted that CompuServe delegated all of the publisher-type responsibility

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<sup>78</sup> *Id.* at 139.

<sup>79</sup> *Id.* “The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment.” *Id.*

<sup>80</sup> *Id.* at 140-141.

<sup>81</sup> *Id.* at 141.

<sup>82</sup> *Id.* at 143.

to Cameron. Thus, the court refused to allow the vicarious liability claim.<sup>83</sup> The decision in *Cubby* would influence online defamation cases for only a short time before another court issued a conflicting ruling.

Just four years later in 1995, a state trial court in New York determined in *Stratton Oakmont v. Prodigy*<sup>84</sup> that Internet Service Provider Prodigy was a publisher of content on its “Money Talk” bulletin board for the purpose of its defamation lawsuit.<sup>85</sup> This ruling contradicted the *CompuServe* decision, in which the court ruled CompuServe was a distributor, and opened the door for Internet companies to be held liable.<sup>86</sup> The *Prodigy* court found that Prodigy’s bulletin board leaders, who were charged with scrutinizing content on the bulletin boards, could be held to have acted as an agent for Prodigy for the purpose of vicarious liability, again contradicting the *CompuServe* decision.<sup>87</sup>

The court made its decision based, in large part, on Prodigy’s policy statements. One of the ways in which the company tried to differentiate itself from the competition, including CompuServe, was to promote a values-oriented, family-friendly environment. In doing so, Prodigy likened itself to a newspaper, which lent credence to the finding that it acted like a publisher.<sup>88</sup> The second reason the court found Prodigy to be more like a publisher than a

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<sup>83</sup> *Id.* “DFA is therefore largely independent of CompuServe in its publication of Rumorville, and the tenuous relationship between DFA and CompuServe is, at most, that of an independent contractor of an independent contractor.” *Id.*

<sup>84</sup> See *Stratton Oakmont v. Prodigy Services Co.*, unpublished at 1995 WL 323710 (N.Y. Sup. 1995).

<sup>85</sup> *Id.*

<sup>86</sup> *Cf. Cubby*, 776 F. Supp. at 141.

<sup>87</sup> See *Stratton Oakmont*, unpublished at 1995 WL 323710.

<sup>88</sup> “We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.” Exhibit J, cited in *Stratton Oakmont*.

distributor was because of its software-screening system and guidelines that bulletin board leaders were instructed to follow when editing the postings.<sup>89</sup> By telling bulletin board leaders to screen for offensiveness and bad taste, Prodigy stepped into the same shoes as a newspaper editor.<sup>90</sup> In finding that bulletin board leaders acted as agents for Prodigy, the court likened them to an editorial board established at a newspaper:

In contrast [to CompuServe], Prodigy has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that Prodigy's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for the legal liability that attaches to such censorship.<sup>91</sup>

In making such a decision, the court took care to note that Prodigy was an exception to the *Cubby* rule.<sup>92</sup> Similarly, the court emphasized that it believed computer bulletin boards should be regulated like bookstores and libraries.<sup>93</sup> However, the court also noted that when companies take affirmative actions, as Prodigy had in this case, they should not be allowed to rely on the precedent established in *Cubby*.<sup>94</sup>

### **The Communications Decency Act**

In the midst of developing jurisprudence in the Internet arena, Congress undertook a massive legislative re-working of the 1934 Communications Act, which would become the Telecommunications Act of 1996.<sup>95</sup> The Telecommunications Act, which contained a section

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

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

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

<sup>95</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

known as the Communications Decency Act, was the first major overhaul of federal communication law in more than six decades. In it, Congress addressed a variety of topics, including the deregulation of the telecommunications industries to promote competition and the creation and funding of universal service.

One year later, in 1997, the U.S. Supreme Court would hear its first challenge to the CDA. In *Reno v. ACLU*,<sup>96</sup> the American Civil Liberties Union challenged a section of the law that prohibited the transmission of obscene or indecent expression to minors using the Internet. In holding the provision unconstitutional, Justice John Paul Stevens wrote:

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as “invasive” as radio or television.<sup>97</sup>

In addition to establishing that the Court should not automatically regulate the Internet in the same manner as the media that had preceded, the Court also made mention of the unique characteristics of the Internet, which served as the Court’s rationale for the Internet’s individual treatment as a unique medium of communication.<sup>98</sup> The Internet, Justice Stevens wrote, bring the power of mass communication to the individual:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.<sup>99</sup>

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<sup>96</sup> 521 U.S. 844 (1997) (holding sections of the CDA prohibiting transmission of obscene or indecent communications using a telecommunications device to minors was an unconstitutional content-based restrictions on speech that was overbroad).

<sup>97</sup> *Id.* at 868-69.

<sup>98</sup> *Id.* at 870.

<sup>99</sup> *Id.*

At the end of the Court's opinion, Justice Stevens ruled that the Court, without more specific showings about the exposure of children to harmful material, could not hold the CDA provision to be constitutional because it unduly burdened First Amendment rights:

The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.<sup>100</sup>

The *Reno* case was not the only case to challenge the constitutionality of the CDA's various provisions. And soon after, another of the CDA's mandates, the one most pertinent to defamatory speech on the Internet, would be scrutinized by the federal courts.<sup>101</sup> Within Title V of the CDA, Section 230, or the Good Samaritan Act provision, immunizes service providers from liability for torts committed by users over the service providers' networks. Essentially, it prevents service providers from being punished for the bad acts of their users. This provision, which addresses the heart of the *Prodigy* and *Cubby* cases, was quickly the target of litigation.

### **The CDA and ISP Immunity**

Shortly after Congress passed the law immunizing ISPs, litigation in the federal courts commenced. The case of *Zeran v. America Online* required the Fourth Circuit to determine whether the Communications Decency Act barred a negligence action by the plaintiff against America Online (hereinafter AOL) for failure to promptly remove defamatory statements by an unidentified third party poster.<sup>102</sup> Additionally, Zeran claimed AOL refused to issue retractions

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<sup>100</sup> *Id.* at 885.

<sup>101</sup> See *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), *cert. denied* 524 U.S. 937 (1998).

<sup>102</sup> *Id.*

for the statements and failed to adequately screen for future defamatory statements.<sup>103</sup> The Fourth Circuit, classifying AOL as an interactive computer service that allows Internet connectivity in addition to providing content, found that Section 230 of the CDA shielded AOL from liability for the defamatory postings.<sup>104</sup>

The postings at issue included advertisements for “Naughty Oklahoma T-shirts,” which displayed crude messages about the 1995 Oklahoma City federal building bombing.<sup>105</sup> The advertisement instructed those interested to call Zeran and listed his home/business telephone number, at which he received an array of hateful messages and even death threats.<sup>106</sup> Despite Zeran’s calls to AOL and its repeated assurances the postings would be removed, an anonymous poster continued to re-publish the messages.<sup>107</sup>

As an affirmative defense to Zeran’s suit, AOL argued that Section 230 excused it from liability for the third-party poster’s conduct. In relevant part, Section 230 states: “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.”<sup>108</sup> The court agreed with AOL, holding that Congress, by enacting this section of the CDA, prevented the courts from being able to hold interactive computer services liable:

Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider

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<sup>103</sup> *Id.* at 328.

<sup>104</sup> *Id.* at 329-330. “Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.” *Id.* at 329.

<sup>105</sup> *Id.* at 329.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 47 U.S.C. § 230 (c)(1).

liable for its exercise of a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content, are barred.<sup>109</sup>

In making such a determination, Congress, the court said, was obviously trying to protect freedom of expression by preventing government intrusion into speech activities on the Internet.<sup>110</sup> To rectify the harms created by the postings, the court noted that Congress had not barred action against the original third-party posters of the information.<sup>111</sup> Section 230, the court noted, was Congress' direct legislative response to the *Stratton Oakmont* decision, which ruled Prodigy could be subject to liability for defamatory content.<sup>112</sup>

The *Zeran* ruling was not without its detractors. The U.S. District Court for the District of Columbia considered *Blumenthal v. Drudge*<sup>113</sup> shortly after *Zeran* was decided. The case pitted well-known Clinton adviser Sidney Blumenthal against Internet publisher Matt Drudge after Drudge reported Blumenthal abused his wife.<sup>114</sup> The court followed the *Zeran* holding, finding no liability on the part of The Drudge Report. But it also noted its disagreement in dicta:

AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. ... Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least ... to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.<sup>115</sup>

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<sup>109</sup> *Zeran*, 129 F.3d at 331.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, at 332.

<sup>113</sup> 992 F. Supp. 44 (Dist. D.C. 1998).

<sup>114</sup> *Id.* at 51-52.

<sup>115</sup> *Id.*

The *Blumenthal* court was not the only one to express discontent with the *Zeran* ruling. More recently, a California appellate court declined to follow *Zeran*, only to be overruled on appeal. In *Grace v. eBay*, the California court held that Section 230 provided no immunity for distributors.<sup>116</sup> The court noted that it did not believe the use of the term “publisher” was intended to cover any time a defamatory statement was published, thereby abolishing common law liability for distributors:<sup>117</sup>

The broad immunity provided under *Zeran*, however, would eliminate potential liability for providers and users even if they made no effort to control objectionable content, and therefore would neither promote the development of technologies to accomplish that task nor remove disincentives to that development as Congress intended.<sup>118</sup>

In the wake of the CDA, *Zeran* and *Blumenthal*, plaintiffs who wanted to sue for online defamation were left with only one place to turn for compensation for the injury to their reputation: the person posting the comment. As a result, a number of lawsuits progressed through the both the federal trial courts and state court systems in the late 1990s and early 2000s, often where plaintiffs had named a John Doe defendant accused of anonymously posting defamatory comments.<sup>119</sup> As these cases progressed, the courts had to balance the defendants’ anonymous speech rights with the plaintiffs’ right to protect their reputations. Thus, the first issue to be addressed was when disclosure of an anonymous speaker’s identity is allowed.

The U.S. Supreme Court has not addressed the nuances of revealing a speaker’s identity to those pursuing a lawsuit based on wrongs carried out over the Internet. Because of this,

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<sup>116</sup> 16 Cal. Rptr. 3d 192, 200 (Cal. App. 2004).

<sup>117</sup> *Id.* at 201. “There is no indication, however, that Congress intended to preclude liability where the provider or user knew or had reason to know that the matter was defamatory, that is, common law distributor liability.” *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., *Melvin v. Doe*, 2000 WL 33311704, 29 Media L. Rep. 1065 (Pa.Com.Pl. 2000); *SPX Corp. v. Doe*, 253 F. Supp.2d 974 (N.D. Ohio 2003).

several cases and approaches have bubbled up in state and federal courts across the country.<sup>120</sup>

Although these lower courts may take different approaches, their decisions often have one key similarity: the need to balance the First Amendment right to speak anonymously with the need to redress wrongs perpetrated on the Internet. Thus, the cases often find the court concerned with both the potential chilling effect on anonymous speech as well as the potential reputational injury flowing from such speech.

*Columbia v. Seescandy.com*<sup>121</sup>

In 1999, the *Seescandy.com* case was one of the first requiring a federal court to determine whether to allow the disclosure of an anonymous defendant's identity in order to allow a lawsuit to commence regarding wrongs perpetrated on the Internet. In the case, Columbia Insurance Company sued a Web site (Seescandy.com) behalf of well-known confectioner See's Candy Shops.<sup>122</sup> Columbia sought to discover the identity of the defendant Web site producers, whom Columbia alleged licensed domain names including seescandy.com and seescandys.com in violation of the trademark held by See's Candy Shops.<sup>123</sup> In the opinion, Judge D. Lowell Jensen discussed the growing number of cases in which torts, including defamation, were being carried out anonymously over the Internet.<sup>124</sup> Additionally, the opinion created a framework to determine whether to allow the disclosure of an anonymous defendant's identity.

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<sup>120</sup> *See infra*.

<sup>121</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>122</sup> *Seescandy.com*, 185 F.R.D., at 575.

<sup>123</sup> *Id.* at 575.

<sup>124</sup> *Id.* at 578. "With the rise of the Internet has come the ability to commit certain tortuous acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor." *Id.*

Before detailing the disclosure test, Judge Jensen discussed the value of anonymous and pseudonymous speech on the Internet, which he said should be allowed so long as the speaker does not violate the law.<sup>125</sup> Allowing such speech encourages lively debate and free communication while also providing anonymous Internet users with an opportunity to obtain information that they might otherwise not seek out due to embarrassment.<sup>126</sup> If the law were created in a way that left anonymous speakers fearful of being haled into court and having their identities revealed, then desirable speech would likely be constrained.<sup>127</sup>

Responding to that concern, Judge Jensen’s framework applied some limitations to plaintiffs who sought to uncover the identity of a defendant. First, a plaintiff must provide enough information to the court so that a judge may determine whether the court will have jurisdiction over the defendant whose identity is sought.<sup>128</sup> This step is designed to ensure that plaintiffs filing suit in federal court would meet the requirements necessary to actually maintain a lawsuit in the federal courts – such as the constitutional requirements of answering a federal question or having diversity jurisdiction while meeting the minimum dollar amount in controversy.<sup>129</sup> Second, a plaintiff must inform the court of the steps already taken to obtain the defendant’s identity.<sup>130</sup> This step is designed to ensure that plaintiffs have come to the court in good faith as a last resort to discover a defendant’s identity. Third, the plaintiff must demonstrate

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* “People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.” *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 579.

the case would not be thrown out upon a motion to dismiss the lawsuit.<sup>131</sup> This step is designed to prevent a plaintiff from filing a barebones pleading and requires instead that a plaintiff establish that “some act giving rise to civil liability” has taken place.<sup>132</sup> Finally, Judge Jensen’s framework required a plaintiff to file a request for discovery with the court that outlines the manner in which the plaintiff might be able to obtain the identity of the defendant.<sup>133</sup> This step is designed to prevent a plaintiff from engaging in a fishing expedition that is unlikely to discover the identity of a defendant while harassing those potentially in possession of information about a defendant’s identity. Overall, Judge Jensen’s framework attempted to create an environment in which a worthy plaintiff can legally discover the identity of an anonymous defendant while ensuring that plaintiffs are not allowed to unduly harass anonymous speakers.

*In re subpoena duces tecum to America Online*<sup>134</sup>

One year after *Seescandy.com*, a Virginia trial court was asked to decide whether AOL could be compelled to disclose the identity of several of its subscribers. The Virginia court, working together with an Indiana trial court, had issued a subpoena duces tecum requiring AOL to produce documents leading to the identification of several subscribers being sued in Indiana by a publicly traded company.<sup>135</sup> The company filed suit in Indiana for allegedly defamatory postings made by the subscribers in an AOL chatroom.<sup>136</sup> AOL challenged the subpoena, citing

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<sup>131</sup> *Id.* “The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant.” *Id.* at 579-80.

<sup>132</sup> *Id.* at 580.

<sup>133</sup> *Id.*

<sup>134</sup> 52 Va. Cir. 26 (Va. Cir. Ct. 2000), 2000 WL 1210372.

<sup>135</sup> *In re subpoena*, 52 Va. Cir., at 1.

<sup>136</sup> *Id.*

the First Amendment and its subscribers' right to speak anonymously, and the Virginia court answered by laying out a test similar to that in *Seescandy.com* to determine whether to require disclosure of the subscribers' identities.

The Virginia court was aware of the *Seescandy.com* decision and took some of Judge Jensen's reasoning to heart.<sup>137</sup> Not surprisingly then, the Virginia opinion focuses on some of the same issues highlighted by Judge Jensen's framework. The first requirement mentioned by the Virginia court is the notion that there must be a showing that a "true" cause of action, not merely one that is "perceived," exists.<sup>138</sup> This draws a parallel to the third prong of the *Seescandy.com* framework. The other prong of the Virginia test is designed to ensure plaintiffs truly need the information to pursue a tort claim, which protects anonymous speakers from having their identities needlessly revealed.<sup>139</sup> Much of this language can be traced to the fourth prong of the *Seescandy.com* framework. Although the two courts outline their respective frameworks somewhat differently – *Seescandy.com* in a five-part approach and the Virginia court in a two-prong framework – it is quite clear that some of the same concerns were addressed in each case. *Dendrite International v. John Doe*<sup>140</sup>

One year later, the appellate division of the New Jersey Superior Court would be asked to address the same question the Virginia court attempted to answer. This time, *Dendrite*

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<sup>137</sup> In fact, the Virginia opinion mentions *Seescandy.com* in a footnote. *See id.* at 5, n. 11.

<sup>138</sup> *Id.* at 8. "Nonetheless, before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made." *Id.*

<sup>139</sup> *Id.* "A court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim." *Id.*

<sup>140</sup> *Dendrite International, Inc. v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

International was the corporation and Yahoo was the Internet Service Provider. While its defamation claim was pending, Dendrite asked the court to compel Yahoo to provide the names of several John Doe defendants.<sup>141</sup> In doing so, it raised the question of when it was proper to require disclosure of the anonymous defendants' names.

The *Dendrite* court established a four-part test that plaintiffs must meet in order for a court to mandate disclosure of an anonymous defendant's name. First, the plaintiff must seek to notify the defendant of the cause of action and the trial court must allow the defendant time to respond in opposition to any pleadings of which they receive notice.<sup>142</sup> In detailing this step, the court indicated the plaintiff should post notification on the offending bulletin board or site to provide proper notice.<sup>143</sup> The second step required that the plaintiff plead the exact statements that are at the heart of the litigation.<sup>144</sup> The third step required that the plaintiff's complaint set forth a prima facie case that could withstand a motion to dismiss – meaning the plaintiff must provide some evidence of each element of the tort.<sup>145</sup> Finally, the court must then balance the strength of the prima facie case with the anonymous defendant's First Amendment rights before mandating disclosure of the defendant's identity.<sup>146</sup> The court, concerned that revealing a poster's anonymity without cause would chill speech, wanted to protect anonymous speakers by putting some onus on plaintiffs.

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<sup>141</sup> *Id.* at 760.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* “The plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.” *Id.*

<sup>146</sup> *Id.* at 760-61.

The *Dendrite* court incorporated many of the ideas contained in the earlier decisions. However, it also represents the most developed balancing test for several reasons. First, the court took steps to require a specific attempt by the plaintiff to notify the defendant and provides explicit guidance on how to do so. Second, the court required the prima facie showing by the plaintiff, a step that was implied but not explicitly mandated by the Virginia court or in *Seescandy.com*. Finally, the *Dendrite* court made specific mention in the analysis of balancing the First Amendment rights with the strength of the plaintiff's case. Thus, the *Dendrite* court seemed to build upon the earlier opinions to craft a more refined one.

*Cahill v. Doe*<sup>147</sup>

In a 2005 case, the Delaware Supreme Court adapted the test established by the *Dendrite* court, using some portions while rejecting others. *Cahill v. Doe* involved a local elected official who was suing an anonymous John Doe defendant for a defamatory posting on a local news blog.<sup>148</sup> At the same time the court adopted the *Dendrite* summary judgment standard, it rejected the earlier tests established in *Seescandy.com* and *AOL*. Neither a 'good faith' nor a 'motion to dismiss' standard provides adequate protection to anonymous speakers, according to the court.<sup>149</sup> A summary judgment standard, like the one established in *Dendrite*, was the only standard that the court believed would adequately protect First Amendment rights of anonymous speakers<sup>150</sup>:

We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.<sup>151</sup>

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<sup>147</sup> 881 A.2d 451 (Del. 2005).

<sup>148</sup> *Cahill*, 881 A.2d, at 454.

<sup>149</sup> *Id.* at 457.

<sup>150</sup> *Id.* at 460.

<sup>151</sup> *Id.* at 461.

The *Cahill* court did not wholesale adopt the *Dendrite* standard. Instead, the *Cahill* court modified the standard by adopting the first and third prongs of the test, while abandoning the second and fourth prongs.<sup>152</sup> It was not that the court did not see value in all four parts of the test; the *Cahill* court believed that steps two and four were adequately represented in the other prongs of the test. For example, step two of the *Dendrite* standard requires a plaintiff to provide the exact defamatory statements, which the *Cahill* court asserted was a part of producing a pleading that would withstand summary judgment.<sup>153</sup> Similarly, a fourth step enunciating the balance of the First Amendment rights was also unnecessary in the view of the *Cahill* court, which asserted that the summary judgment standard was protective enough to serve as an adequate balance of rights.<sup>154</sup>

Even after four cases, the standard for allowing disclosure of an anonymous defendant's identity continues to be in a state of flux. Although some of the elements of the early cases are similar, the courts continue to point out flaws in the standards and make modifications and refinements to the tests. For example, in *McMann v. Doe*,<sup>155</sup> the U.S. District Court for the District of Massachusetts seemed to follow the *Cahill* standard even though it pointed out the flaws of the summary judgment approach taken in *Cahill*, including the difficulty of providing specific facts instead of allegations to assert a tort claim. The *McMann* court noted that no plaintiff would be able to show actual malice on the part of an anonymous defendant, ultimately

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<sup>152</sup> *Id.* “Accordingly, we adopt a modified Dendrite standard consisting only of Dendrite requirements one and three: the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard.” *Id.*

<sup>153</sup> *Id.* “To satisfy the summary judgment standard a plaintiff will necessarily quote the defamatory statements in his complaint.” *Id.*

<sup>154</sup> *Id.* “The fourth requirement adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis.” *Id.*

<sup>155</sup> *See McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006).

a pitfall to his case under a summary judgment approach.<sup>156</sup> Similarly, requiring the detailed factual allegations needed to withstand summary judgment without allowing adequate time for discovery also creates hardships for plaintiffs, who would have to meet the standard of clear and convincing evidence to prevail.<sup>157</sup>

Despite pointing out the flaws in the *Cahill* approach, the *McMann* court noted that some screening process was necessary to protect anonymous speakers online and that the case at hand did not meet the summary judgment standard. In fact, the court noted that the plaintiff's case was so weak that he had failed to even state a claim for defamation.<sup>158</sup> Given that the issues surrounding anonymous online speakers are being addressed simultaneously in both state and lower federal courts, it will likely take a federal appeals court ruling to provide some overarching organization to the standard required for disclosure of an anonymous defendant's identity.

### **Jurisdictional Issues**

Once a plaintiff has determined whom it is he wants to sue, he must also determine the proper court in which to file suit against the defendant. Although traditional rules of civil procedure chart a relatively certain venue for the filing of most civil actions, Internet defamation claims are particularly complex.<sup>159</sup> It is often the case in Internet defamation that the defamed plaintiff seeks to sue in his home jurisdiction, which may create a hardship for defendants who

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<sup>156</sup> *Id.* at 267. "This presents a problem, as the requirement of proving actual malice is the mechanism by which the Supreme Court has balanced First Amendment protections in defamation cases. Under this approach, a public figure could unmask anonymous critics without meeting an essential step in the prima facie case, a showing of actual malice. At the same time, requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet." *Id.*

<sup>157</sup> *Id.* "Normally, bare assertions in an affidavit are not adequate to defeat summary judgment, as the plaintiff must adduce specific facts. At the same time, prior to discovery a court cannot reasonably expect a plaintiff to produce evidence that could rise to the required level of clear and convincing evidence." *Id.*

<sup>158</sup> *Id.* at 268.

<sup>159</sup> See Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473 (2004).

live elsewhere.<sup>160</sup> In other aspects of law, this quandary is settled through the use of the “minimum contacts” principle, enunciated by the U.S. Supreme Court in 1945, and designed to ensure fairness to defendants who are haled into court.<sup>161</sup> In its current form, the test requires that when a defendant is not present in a jurisdiction, he must have minimum contacts with the forum state, such as receiving the benefit of doing business in the state, having utilized the protections of the forum state’s laws or establishing another substantial connection to the state.<sup>162</sup> A unilateral act by the plaintiff alone cannot be used to establish sufficient minimum contacts for jurisdiction over a defendant.<sup>163</sup>

Although the case law in the area of personal jurisdiction is fairly well developed, the cases do not involve a new technology such as the Internet. Thus, much of the personal jurisdiction law used by courts in Internet defamation cases is a modification of the law established in traditional print and broadcast defamation jurisdiction cases. The U.S. Supreme Court has decided two companion cases, which serve as guideposts to determine jurisdiction in Internet defamation cases.<sup>164</sup>

In 1987, the Supreme Court addressed two libel cases in which the parties resided in different states. In both cases, the U.S. Supreme Court upheld jurisdiction in the forum state chosen by the plaintiffs. The decision was not based on the “minimum contacts” test, but the

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<sup>160</sup> *Cahill*, 881 A.2d, at 473. “Those who find themselves defending libel actions brought in other states often move to dismiss on the ground that the court lacks personal jurisdiction.” *Id.*

<sup>161</sup> *See Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (holding that due process of law requires that a person possess certain minimum contacts with the forum in which he is being sued so that his being sued does not offend the traditional notions of fairness and justice).

<sup>162</sup> *See Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 108 (1987).

<sup>163</sup> *Id.*

<sup>164</sup> *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (holding that a publisher's regular circulation of magazines in the forum state was sufficient to support jurisdiction in an action based on the contents of that magazine); *Calder v. Jones*, 465 U.S. 784 (1984) (holding that an individual’s intentional conduct in one state, when calculated to cause harm in another, can be the basis for jurisdiction in the state in which the harm occurred).

court still examined the defendants' conduct to decide if jurisdiction was constitutional.<sup>165</sup> In *Keeton v. Hustler*, the Court held that the magazine's intentional circulation of magazines within the boundaries of New Hampshire created a sufficient relationship "among the defendant, the forum, and the litigation,"<sup>166</sup> as required for due process.<sup>167</sup> There, the plaintiff sued *Hustler* magazine for defamation in New Hampshire despite her status as a New York resident because of New Hampshire's lengthy statute of limitations in defamation cases: six years.<sup>168</sup> However, the Court found the necessary connection to exercise personal jurisdiction over *Hustler*, in part, because the Court deemed it fair to require *Hustler* to defend a lawsuit aimed to compensate the plaintiff for harm to reputational injury in multiple states.<sup>169</sup> The Court noted that *Hustler* "chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor or other commercial partner."<sup>170</sup>

*Keeton's* companion case, *Calder v. Jones*, addressed a similar question as it pertained to an individual defendant instead of a corporation such as *Hustler*.<sup>171</sup> In *Calder*, a professional entertainer from California brought suit in California against two writers from Florida, claiming that she had been defamed based on an article they had written that impugned her professionalism.<sup>172</sup> The defendant writers were working for the Florida-based *National*

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<sup>165</sup> *Keeton*, 465 U.S. at 780-781; *Calder*, 465 U.S. at 788-789.

<sup>166</sup> *Keeton*, 465 U.S. at 774 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

<sup>167</sup> *Keeton*, 465 U.S. at 774.

<sup>168</sup> *Id.* at 772-73.

<sup>169</sup> *Id.* at 777-78.

<sup>170</sup> *Id.* at 779.

<sup>171</sup> *Calder*, 465 U.S. at 783.

<sup>172</sup> *Id.* at 784.

*Enquirer*.<sup>173</sup> The Supreme Court ruled in favor of the plaintiff, holding that jurisdiction in California was proper based on based on the harm that resulted in California as a result of the defendants' conduct in Florida.<sup>174</sup> "In sum, California was the focal point both of the story and of the harm suffered."<sup>175</sup> The Court mentioned that the story was based upon California sources and that the injury to reputation occurred in California.<sup>176</sup>

The writers claimed they should not be held responsible for the circulation of the story within California because they were not the distributors and had not targeted the article toward California.<sup>177</sup> However, the Court found their actions were targeted toward California based on their level of responsibility for an article they knew would negatively affect the plaintiff.<sup>178</sup> Thus, the Court concluded the defendants could "reasonably anticipate being haled into court there"<sup>179</sup> based on intentional conduct in one state calculated to injure someone in another state.<sup>180</sup>

*Keeton* and *Calder* provide insightful guidance for jurisdictional analysis in defamation cases involving parties who reside in different states. However, they do not take into consideration the geographical interconnectivity and worldwide reach of the Internet in an age of new technology. Because there are no Supreme Court or federal appellate cases directly addressing jurisdiction in Internet defamation cases to date, scholars, attorneys and jurists must

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 788-89.

<sup>175</sup> *Id.* at 789.

<sup>176</sup> *Id.* at 788.

<sup>177</sup> *Id.* at 789.

<sup>178</sup> *Id.* at 789-90.

<sup>179</sup> *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 286, 297 (1980)).

<sup>180</sup> *Calder*, 465 U.S. at 791.

rely on lower federal court and state court decisions to piece together a jurisdictional analysis in such a situation.

One of the most frequently cited Internet jurisdiction cases from the federal courts dates back to 1997. In *Zippo Manufacturing v. Zippo Dot Com*, the maker of a well-known brand of lighters sued a computer news service that had registered several domain names that contained the word “zippo” despite the lighter company’s trademark.<sup>181</sup> The news service brought a motion before the court seeking to have the case dismissed or transferred, claiming Pennsylvania courts did not have jurisdiction over it because it is a California corporation.<sup>182</sup> The U.S. District Court for the Western District of Pennsylvania established a three-part test to determine whether Internet contacts were substantial enough to establish personal jurisdiction over a defendant.<sup>183</sup> The test looks at (1) whether the defendant had minimum contacts with the jurisdiction, (2) whether the lawsuit at hand arose as a result of the defendant’s minimum contact with the jurisdiction and (3) whether the exercise of personal jurisdiction over the defendant could be considered reasonable.<sup>184</sup>

The first prong of the *Zippo* test pairs nicely with the traditional minimum contacts test established by the Supreme Court in the *International Shoe* line of cases. Simply put, *Zippo* asserted that the defendant must have undertaken these contacts in a volitional manner for jurisdiction to be proper.<sup>185</sup> Quoting several cases, the *Zippo* court noted that the contacts must

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<sup>181</sup> 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>182</sup> *Zippo*, 952 F. Supp., at 1121.

<sup>183</sup> *Id.* at 1124. “The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.*

<sup>184</sup> *Id.* at 1122-23.

<sup>185</sup> *Id.* at 1123.

be initiated by the defendant and must evidence the notion that the defendant could reasonably expect to be haled into court for such actions.<sup>186</sup> The second prong of the test then required that it be those volitional contacts, not some other basis, under which the lawsuit is being brought. The third prong of the *Zippo* test required that exercise of jurisdiction be reasonable, a requirement the court drew from the Supreme Court's decision in *World Wide Volkswagen Corp. v. Woodson*.<sup>187</sup> There, the Supreme Court ruled that jurisdiction over the defendant was proper if the defendant should have reasonably foreseen that his conduct could result in him being haled into court.<sup>188</sup> To be fair, the court must consider the burden on the defendant compared to the benefit of trying a case in a particular jurisdiction to determine if it would be acceptable to exercise jurisdiction.

### **Conclusion**

The Internet is a worldwide tool that allows millions of users to send text, video and audio signals in "real-time." Unlike other mass mediums, though, the Internet does not belong to any one person, company or governmental agency. Because it is a series of networks that connect the resources of governments, corporations and citizens, the Internet provides a series of new challenges for U.S. courts hearing cases involving tortuous conduct perpetrated online. The courts have begun to address two of these issues: anonymity of speakers and jurisdictional disputes.

Initially, plaintiffs who were defamed online attempted to sue Internet Service Providers. However, after conflicting court opinions, Congress legislated immunity for ISPs through the

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<sup>186</sup> *Id.* (citing *Int'l Shoe*, 326 U.S. at 310; *World Wide Volkswagen*, 444 U.S. at 286; *Keeton*, 465 U.S. at 770; and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

<sup>187</sup> 444 U.S. at 286 (holding that the constitution requires more than just mere fortuitous circumstances to allow the exercise of jurisdiction under a state jurisdictional statute aimed at non-residents).

<sup>188</sup> *World Wide Volkswagen Corp.*, 444 U.S., at 297.

Communications Decency Act in 1996. Once plaintiffs could no longer succeed in defamation actions against ISPs, they were forced to target the person who initially sent the message over the Internet.

The U.S. Supreme Court has never explicitly said that the First Amendment guarantees a right to speak anonymously. As a result, courts hearing online defamation cases involving John Doe defendants have had to craft their own tests to determine when disclosure of an anonymous speaker's identity is permissible. Often, these courts weigh two competing interests: an individual's right to protect his reputation from injury and the public's interest in promoting speech on important matters.

Lower federal courts and state courts have developed a variety of tests to use in anonymous speech cases. In general these tests contain the same basic framework. They require an attempt by the plaintiff to notify the defendant, a detailed description of the cause of action and a balancing of the interest in promoting speech and protecting reputation. The courts do differ on whether the plaintiff should be required to make a prima facie showing or rise to the higher standard required to survive a motion for summary judgment. Because these decisions have been made by lower federal courts and state courts, it will likely take a federal appellate court decision before a uniform standard evolves.

Once a plaintiff has ascertained the identity of a defendant, the next step is to determine where the defendant can fairly be sued. This determination of jurisdiction in online defamation cases has also perplexed courts. As is the case with anonymity, a number of lower federal courts and state courts have developed tests to determine when jurisdiction over a defendant is constitutional.

To formulate these tests, the lower courts have looked to two key U.S. Supreme Court cases: *Keeton v. Hustler* and *Calder v. Jones*. In those cases, the Supreme Court ruled that a defendant must have some connection with the state in which they are being sued. This connection – doing business or using the courts in the state, for example – must provide the defendants with enough notice that they could be called into that state’s courts to be held accountable for their actions. The courts often refer to this aspect of the test as foreseeability.

In addition to the foreseeability prong established in *Keeton* and *Calder*, courts dealing with online defamation cases have also looked to other Internet cases for guidance. The *Zippo Manufacturing* case established a three-part test to determine whether Internet contacts are sufficient to allow jurisdiction over a defendant. The first prong looks at foreseeability and mimics the *Keeton* and *Calder* tests. The second prong requires that the defendant’s Internet contacts with the forum state, not some other basis, form the basis of the lawsuit. Finally, the *Zippo* test, relying on other Supreme Court jurisdiction jurisprudence, requires that the exercise of jurisdiction be reasonable. This inquiry requires the court to balance the burden on the defendant with the benefits of trying the case in the forum state.

Even though the lower federal courts and state courts have managed to flesh out tests for anonymity and jurisdictional issues, they are only beginning to address other significant issues in online defamation cases. Courts have just started to discuss the proper definitions of community, plaintiff status and harm as they apply to online defamation cases. Thus far, they seem to be applying the same principles used to establish precedent for anonymity and jurisdiction issues: looking to analogous areas of the law, including traditional print and broadcast defamation cases.

### CHAPTER 3 THE INTERNET AND FIRST AMENDMENT THEORY

The Internet as we know it – e-mail, instant messaging, Weblogs and the like – has drastically changed the face of modern communication.<sup>1</sup> Some of its most marked modifications include both the form and delivery of a speaker’s message.<sup>2</sup> As of March 2006, the Internet had a reported 1.02 billion users, or 15 percent of the world’s population.<sup>3</sup> In North America, the population penetration levels were significantly higher, with more than 68 percent of the population on the information superhighway.<sup>4</sup> That can be compared with the 51.6 percent of Americans who read a daily newspaper,<sup>5</sup> making it easy to see the increasingly pervasive presence the Internet plays in society’s expressive activities.<sup>6</sup>

First Amendment theory plays a large role in protecting expressive activities conducted over the Internet. In some regard, the Internet has helped advance a variety of justifications for free expression. For example, the Internet’s blogs and forums are the cyber-version of London’s Hyde Park, giving impassioned speakers the ability to have their messages heard in the marketplace of ideas. The posting of court records and government documents online has only

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<sup>1</sup> “(The Internet) facilitates communication in any combination of writing, sounds, and pictures. It knows no geographical boundaries: any Internet user can communicate globally, with a potentially limitless audience.” See MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 3 (2d ed. 2005).

<sup>2</sup> “The Internet is, at its core, a medium of instantaneous, long-distance communication. It makes communicating with a thousand, or million, people no more difficult than communicating with a single person.” *Id.*

<sup>3</sup> See World Internet Usage and Population Statistics, <http://www.internetworldstats.com/stats.hmt> (last visited July 25, 2007).

<sup>4</sup> *Id.* A recent study by the Pew Internet and American Life Project released in April 2006 found that 73 percent of American adults are online, compared to only 66 percent in January 2005. See MSNBC, April 26, 2006, <http://www.msnbc.msn.com/id/12502178/>.

<sup>5</sup> See 2005 Newspaper Readers by the Numbers. Newspaper Association of America: The Source. <http://www.naa.org/theforce/4.asp> (last visited June 1, 2006). Since 1998, daily newspaper readership in the United States has declined about 7 percent while the number of Americans going online for their news has skyrocketed.

<sup>6</sup> A study released by the Pew Internet and American Life Project estimates that by the end of 2005, 50 million Americans were going online for news. See John Horrigan, *Online News: For Many Home Broadband Users, The Internet is a Primary News Source*, March 22, 2006, [http://www.pewinternet.org/PPF/r/178/report\\_display.asp](http://www.pewinternet.org/PPF/r/178/report_display.asp).

increased the ability of citizens and the press alike to investigate the activities of their elected representatives, further solidifying the importance of the checking value. Along the same lines, citizens can use the Internet to participate in their government as well, creating Web sites in support of issues or e-mailing to start a grassroots movement. Although the courts will likely rely on no single First Amendment theory to protect speech on the Internet, the combination of marketplace of ideas, checking value, self-governance and self-fulfillment theories certainly provide a large base from which to choose.

### **The Marketplace of Ideas from Milton to Modern Day**

The marketplace of ideas concept originated in the writings of John Milton<sup>7</sup> and John Stuart Mill<sup>8</sup> and has become the First Amendment theory cited most frequently by the U.S. Supreme Court. The theory, as it has developed, essentially posits that in a market of competing ideas, the notions of truth, or their closest approximations, shall rise to the surface through a robust exchange of ideas. Rooted in the work of numerous philosophers, the concept took shape in Europe for more than 200 years before making its way into American jurisprudence.<sup>9</sup>

#### **John Milton**

During the 17<sup>th</sup> century, in the wake of the development of the printing press, a religious revolution within the English monarchy and the Renaissance, an English writer began to philosophize about libertarian ideals and the freedom of expression. As the son of a wealthy scrivener, John Milton was highly educated, with most of his studying completed in Oxford,

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<sup>7</sup> See JOHN MILTON, *AEROPAGITICA* (J. Suffolk ed., 1968) (1644).

<sup>8</sup> See JOHN STUART MILL, *ON LIBERTY* (D. Spitz ed., 1975) (1859).

<sup>9</sup> See generally LEONARD LEVY, *THE EMERGENCE OF A FREE PRESS* (1985).

England.<sup>10</sup> After resolving to be a poet and writer instead of a minister, Milton began authoring works expressing his dissatisfaction with the Church of England, which was inextricably linked to the country's governance as well.<sup>11</sup> It would be after returning from a trip to Italy that Milton began to admire the reformers' attempts to transform the Church, leading him to pen *Of Reformation in England* in 1641 and *The Reason of Church Government Urged Against Prelaty* in 1642.<sup>12</sup>

A failed marriage and the desire for divorce led him into the business of pamphleteering on controversial topics. A treatise expressing his dissatisfaction with Parliament's censoring ways would soon follow.<sup>13</sup> In the essay *Aeropagitica*, Milton sought to convince the English Parliament that requiring the licensure of all publications and presses was unconscionable.<sup>14</sup> Milton, a Protestant, desired to have his words,<sup>15</sup> considered heretical by many, distributed publicly free of restraint. As a direct response to the Licensing Order of 1643,<sup>16</sup> *Aeropagitica* decried the reintroduction of pre-press censorship as akin to the days of the Star Chamber.

It is through *Aeropagitica* and other writings, along with Milton's attempts to persuade a Puritan government to accept his ideas, that he expressed his belief that the test of truth is its

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<sup>10</sup> John Milton, THE COLUMBIA ENCYCLOPEDIA para. 2 (6th ed. 2005), at <http://www.bartleby.com/65/mi/Milton-J.html> (last visited August 24, 2006).

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

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> See MILTON, *supra* note 7. "Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worst, in a free and open encounter." *Id.*

<sup>15</sup> Milton disagreed with many of the beliefs of the Anglican church, which was interwoven into the English government via the monarchy. Most of what he wrote contained his ill content with the church's belief structure. See COLUMBIA ENCYCLOPEDIA, *supra* note 10.

<sup>16</sup> The Milton Reading Room, (Thomas H. Luxon ed., 2006) <http://www.dartmouth.edu/~milton> (last visited August 24, 2006).

survival in the market. The importance lies in bringing all ideas to the surface because uplifting some while demeaning others stifles the discourse through which all ideas should be evaluated.

It is that process, Milton asserted, which would separate the good ideas from the bad:

Read any books whatever come to thy hands, for thou art sufficient both to judge aright, and to examine each matter. ... Prove all things, hold fast that which is good. ... Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate.<sup>17</sup>

Throughout *Aeropagitica*, Milton asserts the wrongs of pre-publication censorship, belittling a system that prevents works from being printed. Instead, he justifies a system through which blasphemous and libelous materials would be subject to subsequent punishment after a trial.<sup>18</sup>

### **John Stuart Mill**

More than 200 years later, another English philosopher expanded upon Milton's libertarian perspective, advocating the existence of unpopular sentiment as an important aspect of self-governance.<sup>19</sup> For a society to truly be free, John Stuart Mill argued, it must be capable of allowing all ideas – even those it finds most abhorrent – to be expressed equally in the marketplace. In his essay *On Liberty*, Mill posits that all expression, both that which is true and that which is false, has value in a society seeking to govern itself:

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>20</sup>

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<sup>17</sup> See MILTON, *supra* note 7.

<sup>18</sup> See The Milton Reading Room, *supra* note 16.

<sup>19</sup> See MILL, *supra* note 8.

<sup>20</sup> *Id.*

Like Milton, Mill was concerned with the ability of the majority to silence the will of the minority through the limitation of expression. Primarily, both applied their perspectives to argue for the right of expression by those who did not possess a stronghold in government. Mill addressed this type of subversion in two forms: a direct attempt to silence the majority through legislation or judicial opinion and an indirect attempt that is carried out via societal pressure.<sup>21</sup> It is these “acts of public authority” and “collective oppression” that he argued citizens must work diligently to combat in order to achieve true self-governance.

Milton and Mill’s formulation of the marketplace of ideas traversed the Atlantic Ocean and appeared for the first time in a U.S. Supreme Court opinion in the early 1900s. It was Justice Oliver Wendell Holmes’ dissent in a case about subversive pamphleteering that laid the foundation for the marketplace of ideas theory of free expression in the nation’s First Amendment jurisprudence.<sup>22</sup> Since that time, the Supreme Court has continued to regularly utilize marketplace theory in cases involving both print and broadcast media.

### **Justice Oliver Wendell Holmes**

In *Abrams v. United States*, the majority of the Supreme Court upheld the conviction of Jacob Abrams and his fellow pamphleteers under the Espionage Act, holding that an act of printing materials found to be scurrilous during a time when the United States was at war was not protected under the free speech guarantees of the First Amendment.<sup>23</sup> Abrams and the others, who were all born in Russia, distributed literature that expressed their anti-government

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<sup>21</sup> *Id.*

<sup>22</sup> See generally *Abrams v. United States*, 205 U.S. 616 (1919) (Holmes, J., dissenting).

<sup>23</sup> *Id.* at 617.

sentiments and outlined socialistic principles of societal control.<sup>24</sup> The Court, in sustaining Abrams' conviction, reasoned that language in the pamphlets, which intended to incite, provoke and encourage resistance to the war effort, should not be protected expression. It based its decision on the belief that the circulars were aimed to contravene the war effort by encouraging workers in ammunition factories and other war industries to halt production.<sup>25</sup> Justice John H. Clarke, in writing for the Court, noted that there were times where the government would need to show more than just a mere attempt to incite.<sup>26</sup> But, he reasoned, because of the country's active involvement in a war effort, such a demanding showing of a clear and present danger was not required in the *Abrams* case.<sup>27</sup>

Justice Oliver Wendell Holmes, on the other hand, took a much different view of the speech. In his dissent, with which Justice Louis Brandeis concurred, Holmes plainly stated: "no argument seems to be necessary to show that these [pamphlets] in no way attack the form of government of the United States."<sup>28</sup> Holmes clearly recognized the ability of the government to regulate speech under the First Amendment, and even acknowledged that such authority must be

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<sup>24</sup> The Court discusses the contents of one particular pamphlet, citing this passage: "The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM." *Id.* at 620.

<sup>25</sup> *Id.* at 623-624. "A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or language intended to bring the form of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count." *Id.*

<sup>26</sup> *Id.* at 624.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 627.

given greater deference in times of conflict than in peacetime.<sup>29</sup> In the case of Abrams' pamphlets, however, he found no intent to overthrow the government and no real imminent harm arising out of their publication.<sup>30</sup> In evaluating this case, Holmes rejected the bad tendency test employed by the majority<sup>31</sup> of the Court in favor of his more protective clear and present danger standard.<sup>32</sup>

Instead of denigrating Abrams' message, Holmes found the protected expression of such speech to be valuable because of its potential to sway the opinion of the American populace.<sup>33</sup> By making such a statement, Holmes asserted that the common law crime of seditious libel no longer existed and that speakers should not be punished for speech simply because the

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<sup>29</sup> *Id.* at 627-628. "The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same." *Id.*

<sup>30</sup> *Id.* at 628. "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.*

<sup>31</sup> Justice John Clarke enunciated the essence of the bad tendency test by saying, "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce 'bullets, bayonets, cannon' and other munitions of war, the use of which would cause the 'murder' of Germans and Russians." *Id.* at 621.

<sup>32</sup> Justice Holmes would prefer to examine the likelihood that the speech will spurn the feared conduct. "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt." *Id.* at 628.

<sup>33</sup> *Id.* at 630. "It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.*

government finds it distasteful.<sup>34</sup> More importantly, he asserted that a free exchange of ideas – essentially a marketplace – would result in the strongest evaluation for the truth of ideas.<sup>35</sup> Thus, the best way to establish the veracity of a statement is to allow the consuming public the ability to scrutinize it instead of initially prohibiting its expression.<sup>36</sup>

### **The Making of an American Marketplace**

Although the marketplace of ideas concept appeared in the early 1900s Supreme Court jurisprudence, it would not be until decades later that the Court began to fully explicate the theory.<sup>37</sup> Even then, the marketplace of ideas as a justification for free expression fell in and out of favor as the composition of the Court shifted. But throughout the nearly 90 years that the theory has been mentioned in American jurisprudence, the justices who have relied on the marketplace metaphor gradually applied it to nearly all realms of speech, from the most-protected political expression to the less-revered commercial speech.

The term “marketplace of ideas” first appeared in a concurrence by Justice William Brennan in the 1960s. Writing in concurrence with the majority in *Lamont v. Postmaster General of the United States*, Brennan discussed the effects of a statute allowing the retention

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<sup>34</sup> *Id.* at 630-631. “I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law abridging the freedom of speech.’ Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.” *Id.*

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

<sup>36</sup> *Id.* “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.” *Id.*

<sup>37</sup> See generally W. Wat Hopkins, *The Supreme Court and the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996). “Use of the marketplace of ideas metaphor by justices has increased dramatically, particularly in the 1970s, and continues to increase.” *Id.*

and destruction of open mail that contained communist political propaganda and originated in foreign countries.<sup>38</sup> In his opinion, Brennan agreed with the majority, noting that the statute was content-based and, therefore, highly suspect.<sup>39</sup> In support of his decision to strike down the regulation, Brennan wrote that the marketplace of ideas would be a meaningless metaphor if the First Amendment provided only for unfettered access by speakers without a concomitant right of receipt for listeners.<sup>40</sup> Thus, Brennan recognized a recipient-based principle similar to the principles enunciated in *Abrams*: Expression gains value not based upon its content but upon its acceptance in society. In *Lamont*, the very demand for unfettered access to such mail, Brennan's argument asserted, was indicative of its value in the marketplace. Similarly, the argument would follow that the very desire of a party to limit access to the speech is indicative of the powerful nature of the message.

More than 40 years passed between Holmes' dissent in *Abrams* and a majority of the Court's willingness to consider the marketplace rationale. Although Brennan's arguments in *Lamont* were not persuasive enough to gain a majority of the court, they seem to have resonated with some members of the court. Only in 1967 did Justice Brennan, who had authored the concurrence in *Lamont* two years earlier, find a majority of the Court<sup>41</sup> willing to sign onto the marketplace theory, first in an educational speech case.<sup>42</sup> In *Keyishian v. Board of Regents*,

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<sup>38</sup> See *Lamont v. Postmaster General of the United States*, 351 U.S. 301 (1965) (Brennan, J., concurring).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 308. "I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.*

<sup>41</sup> The marketplace justification had been earlier raised by in a plurality opinion by Chief Justice Earl Warren and a concurrence in result by Justice Felix Frankfurter in *Sweezy v. State of New Hampshire*. See 354 U.S. 234 (1957).

<sup>42</sup> See *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967) (holding that a New York statute making treasonable or seditious words or acts grounds for removal from public school system or state employment was unconstitutionally vague and violated First Amendment).

which prohibited a state university in New York from firing teachers based on their expression of subversive views, Brennan argued that educational facilities quintessentially function as miniature markets where dialogue is supposed to lead the participants toward the truth.<sup>43</sup> To justify his opinion, Brennan quoted a passage from *Sweezy v. State of New Hampshire*<sup>44</sup> surmising that students and teachers must always be free to inquire into new and even unpopular sentiments in order to promote discovery.<sup>45</sup> In *Keyishian*, the Court recognized, for the first time, a functioning marketplace within the educational system.

In 1972, Justice Lewis Powell subsequently reiterated the role of the marketplace in education when writing for the Court in *Healy v. James*.<sup>46</sup> In that case, administrators at Central Connecticut State College had denied the petition of a student group seeking to become a recognized student organization.<sup>47</sup> The group, Students for a Democratic Society, filed suit claiming the denial of the application abridged their First Amendment rights by limiting access to campus resources, including places to meet and the student newspaper.<sup>48</sup> The Supreme Court ruled that the college's denial of recognition, based in part on the affiliation of the local student

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<sup>43</sup> *Keyishian*, 385 U.S. at 603. "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Id.*

<sup>44</sup> *Sweezy*, 354 U.S. at 234.

<sup>45</sup> *Keyishian*, 385 U.S., at 603 (*quoting* *Sweezy*, 354 U.S. at 250). "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

<sup>46</sup> *See* 408 U.S. 169 (1972). "The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Id.* at 180-181.

<sup>47</sup> *Id.* at 171.

<sup>48</sup> *Id.* at 170-1.

group with a national group, was a violation of the students' First Amendment associational rights. Doing so, the Court remanded the case for a determination of whether a constitutional reason for the denial could be proven by the college, which bore the burden of justifying its denial once the students complied with the filing requirements that had been established by the university.<sup>49</sup> In both *Keyishian* and *Healy*, the majority relied on the marketplace rationale to supplement its reasoning for protecting speech in an educational setting.<sup>50</sup> Since 1972, various decisions have recognized the importance of the marketplace in numerous other expressive contexts.<sup>51</sup>

### **Criticisms of the Marketplace Metaphor**

However, some justices and scholars have been quite critical of the Court's reliance upon the marketplace metaphor, insisting that the premises upon which the theory of free expression is based are themselves flawed.<sup>52</sup> In 1967, only two years after Justice Brennan penned his concurrence in *Lamont*, law professor Jerome A. Barron issued a critique of the marketplace metaphor in his *Harvard Law Review* article titled "Access to the Press – A New First Amendment Right."<sup>53</sup> Barron suggested that the Supreme Court's precedent in *Times v. Sullivan* may actually harm First Amendment expressive rights. By protecting the media from libels suits,

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<sup>49</sup> *Id.* at 186-187. "Students for a Democratic Society, as conceded by the College and the lower courts, is loosely organized, having various factions and promoting a number of diverse social and political views only some of which call for unlawful action. Not only did petitioners proclaim their complete independence from this organization, but they also indicated that they shared only some of the beliefs its leaders have expressed. On this record it is clear that the relationship was not an adequate ground for the denial of recognition." *Id.*

<sup>50</sup> *See, e.g.,* *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 512 (1969). Justice Abe Fortas' majority opinion again makes reference to the accurateness of the marketplace metaphor for the educational environment. *Id.*

<sup>51</sup> *See infra.*

<sup>52</sup> *See, e.g.,* Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). "The Justices of the United States Supreme Court are not innocently unaware of these contemporary social realities, but they have nevertheless failed to give the 'marketplace of ideas' theory of the first amendment the burial it merits." *Id.* at 1647.

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

the Court had essentially removed the ability of a certain class of people – public officials, in this case – to fight back, he argued.<sup>54</sup> Barron asserted that our romantic ideals of the First Amendment have prevented courts and legal scholars from examining the “availability to various interest groups of access to means of communication.”<sup>55</sup> Instead, our system has focused on preventing government intervention into the press because we believe that would cut into the desirable “free flow of information” so frequently mentioned in court opinions.<sup>56</sup>

The greater malady, Barron argued, was that powerful speakers would drown out the less powerful based on a greater ability to access mass communicative tools.<sup>57</sup> Relying on Alexander Meiklejohn’s belief that it does not matter how many people get to speak, but instead that all viewpoints are represented,<sup>58</sup> Barron suggested that courts should focus on securing access to the media for those perspectives.<sup>59</sup> Gone are the days when the government is the most likely censor of controversial ideas, Barron argued. Instead, he said “Big Media” – the newspapers, television stations, radio stations and other outlets – are now in a prime position to control access based on their market power.<sup>60</sup> In place of the traditional First Amendment protections, Barron suggested

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<sup>54</sup> *Id.* at 1658. If financial immunization by the Supreme Court is necessary to ensure a courageous press, the public officials who fall prey to such judicially reinforced lions should at least have the right to respond or to demand retraction in the pages of the newspapers which have published charges against them.” *Id.*

<sup>55</sup> *Id.* at 1642.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1643. “This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper.” *Id.*

<sup>58</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 25-28 (1960).

<sup>59</sup> Barron, *supra* note 52, at 1654. “If those media are unavailable, can the minds of “hearers” be reached effectively? Creating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.” *Id.*

<sup>60</sup> *Id.* at 1655.

a “right to be heard.”<sup>61</sup> As a result of Barron’s belief that all points of view should be represented in the marketplace,<sup>62</sup> he concluded the Constitution necessitated this right of access to the marketplace.<sup>63</sup> Such a right of access to the media was necessary,<sup>64</sup> in Barron’s view, to encourage the robust debate necessary in the marketplace of ideas because the mass communication media are controlled by only a few.<sup>65</sup>

To create such a right, Barron discussed several mechanisms that could be implemented within the framework of the existing mass communication media at that time. For example, he suggested a viewpoint-neutral right of access to newspapers through the use of both letters to the editor and advertising.<sup>66</sup> Barron noted that case law at the time he was writing could be read in a manner that would not prohibit such a right. In addition, he posited that one could argue that newspapers, often operating in monopolistic market conditions, become quasi-public entities.<sup>67</sup> As such, they become an extension of the government and could be prevented from limiting public access to their pages.<sup>68</sup> Although Barron’s suggestions were never fully heeded, the

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<sup>61</sup> *Id.* at 1656.

<sup>62</sup> *Id.* at 1653-1654. “Constitutional opinions that are particularly solicitous of the interests of mass media – radio, television, and mass circulation newspaper – devote little thought to the difficulties of securing access to those media. If those media are unavailable, can the minds of “hearers” be reached effectively? Creating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.” *Id.*

<sup>63</sup> *Id.* at 1666-1668.

<sup>64</sup> “With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance.” *Id.* at 1678.

<sup>65</sup> *Id.* at 1667.

<sup>66</sup> *Id.* at 1669.

<sup>67</sup> *Id.* at 1670.

<sup>68</sup> *Id.*

Supreme Court did apply his logic in at least one major First Amendment case decided not long after his article was published.<sup>69</sup>

### **The Court implements a right of access**

Not long after Barron launched his assault on the marketplace metaphor in his 1967 *Harvard Law Review* article, the Supreme Court relied upon the very marketplace metaphor it had earlier used to justify freedom of expression in one context to compel other expression in another. In *Red Lion Broadcasting Company v. Federal Communications Commission*,<sup>70</sup> the Court mandated access to broadcast outlets speakers in much the same way Barron had described. Justice Byron White found broadcasting to represent an excellent marketplace model in an oft-quoted passage from *Red Lion*.<sup>71</sup> For the first time, the Court's opinion relied on the marketplace rationale as one of the cornerstones of its decision. The majority ruled that Federal Communication Commission's fairness policies enhanced the public's ability to speak without unconstitutionally infringing upon broadcasters' First Amendment rights. The Court noted "it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."<sup>72</sup> *Red Lion*, then, was a major victory for Barron's access-based marketplace model, at least in the broadcast realm.

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<sup>69</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>70</sup> See *id.*

<sup>71</sup> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

<sup>72</sup> *Id.*

## Returning to recipient-based marketplace models

Although a right-of-access argument carried the day in *Red Lion*, the Court was quick to return to its recipient-focused reliance on the marketplace and hesitant to apply a right of access to the print media. Paralleling the early marketplace jurisprudence, Justice Harry A. Blackmun, writing for the Court in 1972 in *Kleindienst v. Mandel*,<sup>73</sup> discussed the recipient-based rationale established by Justice Brennan in *Lamont*. In dicta, Justice Blackmun wrote that a marketplace requires both the ability to provide and receive information in order to properly function.<sup>74</sup>

Although the Court did not decide the case based on solely a First Amendment argument, Justice Blackmun wrote:

While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests – a balance we find unnecessary here in light of the discussion that follows ... we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.<sup>75</sup>

The Supreme Court has also addressed some economic limitations of the marketplace of ideas. In *Miami Herald Publishing Company v. Tornillo*, the Court noted that a true marketplace of ideas may have existed when members of the public could access many mediums to communicate at low cost.<sup>76</sup> Justice Warren Burger, writing for the Court, reasoned that the decrease in the suitability of books and pamphlets, and the increased reliance on electronic

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<sup>73</sup> In the case, the Court was asked to compel the attorney general to issue a temporary visa to a foreign scholar who had been invited to the U.S. to participate in academic conferences and discussions.

<sup>74</sup> See *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (holding that attorney general had validly exercised plenary power delegated to the Executive and the courts would not second guess his decision or weigh it against the First Amendment interests of those seeking entry of alien to personally communicate with him or engage in academic exchange).

<sup>75</sup> *Id.* at 765.

<sup>76</sup> See 418 U.S. 241 (1974) (holding that a Florida right to reply statute was an unconstitutional infringement on a publisher's editorial discretion and therefore violated his First Amendment right to free expression).

media, had altered the marketplace and created economic conditions that were not present in years past:

Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.<sup>77</sup>

Noting the increased inability of citizens to participate in the marketplace, the Court mentioned the disappearance of competing metropolitan daily newspapers, the federal antitrust exemption for newspapers<sup>78</sup> and an increase in corporate ownership of the media.<sup>79</sup>

Once the Court became more comfortable relying on the marketplace metaphor, the justification crept into cases involving other types of First Amendment speech, including commercial speech. Full-fledged reliance on the marketplace rationale in the commercial speech context arose in a pair of cases in the mid-1970s.<sup>80</sup> Both cases provided increased protection for commercial speech. In *Bigelow v. Virginia*, the Court struck down a Virginia statute that criminalized the circulation of any publication promoting or encouraging the procurement of abortion services.<sup>81</sup> One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court struck down a Virginia statute making it a violation of

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<sup>77</sup> *Tornillo*, 418 U.S. at 248.

<sup>78</sup> See generally Newspaper Preservation Act, 43 U.S.C. § 1801 (1970); Amy Kristin Sanders, *Market Definition, Merger Review, and Media Monopolization: Congressional Approval of the Corporate Voice Through the Newspaper Preservation Act*, 59 FED. COMM. L.J. 403 (2007).

<sup>79</sup> *Tornillo*, 418 U.S., at 251. “The First Amendment interest of the public in being informed is said to be in peril because the marketplace of ideas is today a monopoly controlled by the owners of the market.” *Id.*

<sup>80</sup> See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that speech is not stripped of First Amendment protection merely because it appears in form of a paid commercial advertisement); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 728 (1976) (holding that statutory bans on advertising prescription drug prices violated the First and Fourteenth Amendments and could not be justified on the basis of the state's interest in maintaining the professionalism of its licensed pharmacists).

<sup>81</sup> *Bigelow*, 421 U.S. at 809.

professional conduct for pharmacists to advertise the prices of prescription drugs.<sup>82</sup> In both instances, the Court relied upon the marketplace of ideas to justify allowing the expression. The Bigelow majority reasoned:

To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.<sup>83</sup>

This dicta, which appeared in support of the majority decision in *Bigelow*, appeared again in *Virginia Pharmacy Board*,<sup>84</sup> where the majority attempted to provide further protection for commercial speech. Its inclusion signified a growing acceptance of the marketplace rationale in a commercial speech context.

Although acceptance of the marketplace theory of free expression seemed to follow a logical path – from political speech in *Abrams*, to social speech in the education cases, and commercial speech in *Va. Pharmacy Board* – its inclusion in First Amendment jurisprudence was not without opposition. Even though a majority of the Court had accepted the marketplace rationale during the 1970s, the appointment of Justice William Rehnquist ensured that the battle to preserve the marketplace would continue. Rehnquist had dissented in *Bigelow* and *Va. Pharmacy Board*, laying the foundation for a career of criticizing the marketplace metaphor.<sup>85</sup> Even before Justice Rehnquist’s appointment to the Court, some justices had posited that the marketplace rationale was not always the perfect fit to protect expression.<sup>86</sup>

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<sup>82</sup> *Virginia Pharm. Bd.*, 425 U.S. at 728.

<sup>83</sup> *Bigelow*, 421 U.S. at 826.

<sup>84</sup> *Virginia Pharm. Bd.*, 425 U.S. at 760.

<sup>85</sup> *See infra*.

<sup>86</sup> *See generally* *Time Inc. v. Hill*, 385 U.S. 374 (1967) (holding that the First and Fourteenth Amendment require that defendant magazine publisher was entitled to instruction that verdict of liability in action brought under New

## Malaise with the Marketplace

Not surprisingly, the marketplace concept has not been accepted by all members of the Court as a justification for free expression. And even those who have supported the notion at times have asserted at other points that the failure of the market in certain respects justified government intervention in expression through regulation.<sup>87</sup> Only two years after Justice William Brennan relied on the marketplace theory in a sender/receiver context, Justice John Marshall Harlan, concurring in part in the Court's 1970 *Time, Inc. v. Hill* decision, observed that the marketplace rationale failed to support a conclusion that a publisher must publish private facts with actual malice before a private person can recover in tort.<sup>88</sup> In essence, Justice Harlan believed that the market would not provide adequate protection for the private person who was harmed by publication of private facts:

To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is 'occasioned by the particular charges in controversy' and the matter is not one in which the public has an 'independent interest.'<sup>89</sup>

Hill provides just one example of a context in which a justice has refused to apply the marketplace theory, instead asserting other justifications of free expression to grant speakers First Amendment protection.<sup>90</sup>

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York right of privacy statute, wherein it was alleged that magazine falsely reported that play portrayed experience suffered at hands of escaped convicts by plaintiff and his family, could be predicated only on finding of knowing or reckless falsity in publication of article.)

<sup>87</sup> *Id.* at 406 (Harlan, J., concurring in part). "The marketplace of ideas, where it functions, still remains the best testing ground for truth." *Id.*

<sup>88</sup> *Id.* at 407. "First, we cannot avoid recognizing that we have entered an area where the marketplace of ideas does not function and where conclusions premised on the existence of that exchange are apt to be suspect." *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Interestingly, in one of the quintessential First Amendment cases of the Twentieth Century, the Supreme Court chose not to mention the marketplace of ideas rationale. In deciding *New York Times v. Sullivan*, Justice Brennan and the majority held that public officials and public figures would have to prove actual malice to recover damages

Similarly, shortly after the Court's use of the marketplace metaphor in the educational setting in the late 1960s and early 1970s,<sup>91</sup> it recognized a flaw in the marketplace theory.<sup>92</sup> As law professor Stanley Ingber pointed out, the marketplace theory assumes its participants have the knowledge and means necessary to assist in the acquisition of truth.<sup>93</sup> In *San Antonio Independent School District v. Rodriguez*, Justice Powell writing for the majority in a case about education funding, noted "the marketplace of ideas is an empty forum for those lacking basic communicative tools."<sup>94</sup> In making this assertion, Justice Powell concluded that for an exchange of ideas to occur, participants must come to the marketplace willing to engage in informed debate because that is the essence of how a diversity of ideas is shared.<sup>95</sup> While recognizing the necessity of education to the marketplace of ideas, the Court stopped short of strictly scrutinizing the State of Texas' educational spending, which varied significantly among districts.<sup>96</sup>

First Amendment scholars, including C. Edwin Baker, Fred Schauer and Ingber, have suggested that the primary assumption on which the marketplace metaphor is founded – that truth can be both discovered and verified – is flawed.<sup>97</sup> Ingber asserted that truth, as an objective

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in a defamation case. However, the Court said nothing explicitly about the mixed political speech/commercial speech in the case nor did it mention the marketplace as functioning to serve that interest. This could, in part, be attributed to the year in which the case was decided, which was several years before the education speech cases. *See* 376 U.S. 254 (1964).

<sup>91</sup> *See infra*, discussing *Keyishian* and *Healy*.

<sup>92</sup> *See generally* *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that a system which assured basic education for every child in the state and permitted participation in and significant control of each district's schools at local level bore a rational relationship to legitimate state purpose and did not violate equal protection clause of the Fourteenth Amendment).

<sup>93</sup> *See* Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth," 1984 DUKE L.J. 1, 15.

<sup>94</sup> *San Antonio Ind. School Dist.*, 411 U.S., at 35.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 40.

<sup>97</sup> *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-34 (1982); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982).

concept, is nonexistent because if truth were objective, it would not be colored by a person's experiences in life, socioeconomic status or other subjective factors.<sup>98</sup> Any truth that emerges, Baker said, does so through the existing structures, which reinforce power over intellect.<sup>99</sup> Calling the First Amendment institutionalized, Baker noted it is not equipped to promote "fundamental, progressive change."<sup>100</sup> which serves to reinforce majoritarian perspectives and the status quo while diminishing the value of opposing viewpoints.<sup>101</sup>

Another problem with the acquisition of truth in the marketplace lies in the irrationality of the truth seekers in the market.<sup>102</sup> Ingber noted that a functioning marketplace rests on the assumption that ideas are evaluated not on the manner in which they are presented but on the merit of their substance.<sup>103</sup> As such, the marketplace breaks down when information seekers either cannot, or do not, distinguish between ideas with depth and shallow ideas that are merely dressed up in a nice presentation.<sup>104</sup> Critical consumption through education, as Justice Brennan noted in his dissent in *San Antonio*, then becomes a core requirement for the marketplace to function.<sup>105</sup>

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<sup>98</sup> Ingber, *supra* note 93, at 15.

<sup>99</sup> Baker, *supra* note 97, at 330.

<sup>100</sup> *Id.* at 330.

<sup>101</sup> *Id.* at 342. "Given that the value of the marketplace is basically instrumental, the marketplace theory provides little reason to protect conduct that is not welfare maximizing or even to protect communications more than is necessary for promoting the general welfare." *Id.*

<sup>102</sup> Ingber, *supra* note 93, at 15.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> "[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. See post, at 1336-1339. This being so, any classification affecting education must be subjected to strict judicial scrutiny," *San Antonio*, 411 U.S., at 63. (Brennan, J., dissenting).

## The Modern American Market: Rehnquist's Legacy

From nearly his first opinion as a member of the Court, Justice William Rehnquist vocally opposed reliance on the marketplace metaphor in a variety of contexts. As a junior justice, he wrote adamant dissents in both *Bigelow* and *Virginia Pharmacy Board*, where the majority established that commercial speech would receive limited First Amendment protection.<sup>106</sup> In both cases, he made clear a belief that even the marketplace rationale should not overcome the ability of the government to regulate speech that is of a purely commercial nature:

The logical consequences of the Court's decision in [Virginia Board], a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage.<sup>107</sup>

Subsequently, Justice Rehnquist's jurisprudence continued to criticize the Court's reliance on the marketplace rationale in commercial contexts<sup>108</sup> and expanded his focus to target corporate speech that might contain mixed commercial and political messages.<sup>109</sup>

Justice Rehnquist made his views quite clear in his biting dissent in *Central Hudson Gas and Electric Corporation v. Public Service Commission*,<sup>110</sup> the landmark commercial speech case that established a 4-part test to determine whether commercial speech should receive First

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<sup>106</sup> *Bigelow*, 421 U.S. at 826.

<sup>107</sup> *Virginia Pharm. Bd.*, 425 U.S. at 781.

<sup>108</sup> See *Central Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n*, 427 U.S. 557 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>109</sup> *First Nat'l Bank of Boston*, 435 U.S., at 765. (holding there was no support in the Constitution for the proposition that expression of views on issues of public importance loses First Amendment protection simply because its source is a corporation that cannot prove that the issues materially affect the corporation's business).

<sup>110</sup> *Central Hudson*, 427 U.S. at 592.

Amendment protection. There, he posited that the marketplace metaphor provides little guidance in legal determinations of whether to protect expression:

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a marketplace of ideas. There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.<sup>111</sup>

Throughout the 1970s and early 1980s, while the Court as a whole seemed to embrace a broader vision for the marketplace of ideas through its application in social and commercial speech contexts, Justice Rehnquist continued to assert that the marketplace rationale was not the correct path to justifying protected expression. Instead, Justice Rehnquist vocalized his dissatisfaction with reliance on a concept he believed to be flawed.<sup>112</sup>

Despite Rehnquist's opposition, other members of the Court remained adamant about their belief in the role of the marketplace. For example, long-time marketplace advocate Justice John Paul Stevens, with whom Justices Brennan and Powell concurred, wrote in *Minnesota State Board for Community Colleges v. Knight*:

But the First Amendment does guarantee an open marketplace of ideas – where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account.<sup>113</sup>

However, in 1984, Rehnquist was appointed Chief Justice. In the years that followed, the Court's view of free expression began to shift. Although the majority ruled in favor of publisher

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<sup>111</sup> *Id.* “Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas.” *Id.*

<sup>112</sup> *See, e.g.*, U.S. v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995).

<sup>113</sup> 495 U.S. 371 (1984) (holding unconstitutional a Minnesota statute requiring public employers to engage in official exchanges of views only with their professional employees' exclusive representatives on policy questions relating to employment but outside scope of mandatory bargaining).

Larry Flynt, Chief Justice Rehnquist's opinion in *Hustler Magazine v. Falwell*<sup>114</sup> signaled a shift in the Court's First Amendment jurisprudence.<sup>115</sup> Writing for the Court in 1988, he clearly indicated that reference to the marketplace metaphor would no longer sway the Court in all First Amendment cases:

False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter-speech, however persuasive or effective.<sup>116</sup>

In that same term, Chief Justice Rehnquist joined Justice Sandra Day O'Connor in an opinion where she stated "traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation."<sup>117</sup>

With Justice O'Connor recognizing the limitations of the marketplace rationale, Chief Justice Rehnquist had found an ally on the court. Fewer than 10 years later in 1995, Justices Antonin Scalia and Clarence Thomas joined Rehnquist's dissent in *U.S. v. National Treasury Employees Union*, where the Chief Justice argued for the constitutionality of a subsection of Ethics in Government Act prohibiting the receipt of honoraria by government employees.<sup>118</sup> In

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<sup>114</sup> 485 U.S. 46 (1988) (holding that that First and Fourteenth Amendments prohibited public figure from recovering damages for tort of intentional infliction of emotional distress).

<sup>115</sup> *See id.*

<sup>116</sup> *Hustler*, 485 U.S. at 52.

<sup>117</sup> *See Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988) (holding that State could not, consistent with First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems). *Id.* at 483 (O'Connor, J., dissenting).

<sup>118</sup> *See Treasury Employees*, 513 U.S. at 491. (Rehnquist, C.J., dissenting). "As a result, the ban does not raise the specter of Government control over the marketplace of ideas." *Id.*

his opinion, he asserted that content-neutral restrictions on speech do not jeopardize the marketplace because they do not discriminate based on viewpoint.<sup>119</sup>

Chief Justice Rehnquist shortly thereafter joined in a biting dissent written by Justice Scalia that criticized, and even mocked, the majority's use of the marketplace metaphor in *McIntyre v. Ohio Elections Commission*.<sup>120</sup> In *McIntyre*, the majority struck down an Ohio statute that banned the dissemination of anonymous election pamphlets.<sup>121</sup> The majority, recognizing the equivalent value of both anonymous and non-anonymous speakers in the market, found the First Amendment prohibited such a restriction:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.<sup>122</sup>

Scalia and Rehnquist countered:

Preferring the views of the English utilitarian philosopher John Stuart Mill to the considered judgment of the American people's elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.<sup>123</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *McIntyre*, 514 U.S. at 334 (Scalia, J., dissenting).

<sup>121</sup> *Id.* at 341-342.

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

<sup>123</sup> *Id.* at 371.

As the Chief Justice, sitting with conservatives Thomas and Scalia, Rehnquist's arguments began to take hold.<sup>124</sup> However, the Supreme Court's advocates of the marketplace rationale have relied on the metaphor to win several First Amendment victories while sitting as members of the Rehnquist Court. The most recent example occurred in the late 1990s when the Supreme Court struck down sections of the Communications Decency Act. While writing for the majority, which held that certain provisions of the act were content-based and unconstitutional as applied to Internet communication, Justice Stevens noted:

The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.<sup>125</sup>

During Rehnquist's nearly two decades as chief justice, successful reliance on the marketplace of ideas as justification for free expression waned.<sup>126</sup> Although certain members of the Court continue to rely on the philosophy originated in the work of Milton and Mill, it has become more difficult for a majority of the Court to accept this rationale.

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<sup>124</sup> See *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in part, and dissenting in part).

<sup>125</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications device to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, were content-based blanket restrictions on speech, and, as such, could not be properly analyzed on First Amendment challenge as a form of time, place, and manner regulation).

<sup>126</sup> Since 1997, the only Court opinions that mention the marketplace rationale are *McConnell*, 540 U.S. 93 (2003) (upholding the provisions of the Bipartisan Campaign Reform Act) and *Hicks*, 539 U.S. 113 (2003) (holding that a housing development policy on pamphleteering prohibited substantial amount of protected speech in relation to its many legitimate applications).

## Recognition of the Internet in the Marketplace

Expression of ideas to members of the public has long played a key role in society's discourse – from Isocrates' citizen orator in ancient Greece<sup>127</sup> to the Internet chatrooms of the 1990s and the blogosphere today.<sup>128</sup> Contrary to A.J. Liebling's oft-quoted belief that freedom of the press exists only for those who own one,<sup>129</sup> modern forms of mass communication have made it increasingly easy for the average person to share expression with a large audience.<sup>130</sup> One of the strongest counterarguments to the marketplace critics is the growing ability of everyday citizens to get their messages heard via the Internet.<sup>131</sup> At least one scholar has posited that the Internet offers the best chance at a truly functioning marketplace of ideas.<sup>132</sup>

## The Internet and Other First Amendment Theories

The marketplace of ideas justification for free speech ties closely to several other theories of free expression, including Alexander Meiklejohn's self-governance theory, Vincent Blasi's checking value and Thomas Emerson's self-fulfillment theory. The Supreme Court has relied on aspects of all four of these First Amendment theories to protect expression.

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<sup>127</sup> For a discussion of Isocrates and the role of the citizen orator, *see generally* ISOCRATES. THE RHETORICAL TRADITION. (Patricia Bizzell & Bruce Herzberg, eds. 2d ed. 2001).

<sup>128</sup> *See* Chris Nolan, *Blogs Power Stretches Far Beyond Politics*. E-WEEK, Jan. 5, 2005, <http://www.eweek.com/article2/0,1759,1748637,00.asp> (last visited Sept. 1, 2006).

<sup>129</sup> A.J. Liebling, THE NEW YORKER, May 14, 1960.

<sup>130</sup> COLLINS, *supra* note 1, at 3. "As the Internet makes instantaneous global communication available to so many people, it has the potential to create new communities united by common interest, rather than geography. It is a medium which celebrates and encourages free speech and the exchange of ideas." *Id.*

<sup>131</sup> *Reno*, 521 U.S. at 870.

<sup>132</sup> *See* Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 316-17 (2005).

## Alexander Meiklejohn and Self-Governance

Alexander Meiklejohn drew upon the history of the ancient Greeks as well as English philosopher John Locke's notions of government, when he wrote that free speech is justified by its relationship to self-governance.<sup>133</sup> In this type of self-governing society, Meiklejohn argues that citizens play the role of both the governors and the governed.<sup>134</sup> As such, the people can resort to force to compel one another to follow the laws that have been established by the self-governing society.<sup>135</sup> This is because all members of the self-governing society have had the opportunity to participate in the rule-making – a theory that operates similarly to John Locke's Social Contract.<sup>136</sup>

It was participation in the governing process that was the crux of Meiklejohn's argument for free speech. Thus, the town hall meeting analogy upon which he drew plays a prominent role in his explanation of the theory of self-governance.<sup>137</sup> Using the town meeting as an example, Meiklejohn asserted that freedom of speech requires not that every person be allowed to speak, but instead that every point of view is allowed to be spoken.<sup>138</sup>

Meiklejohn drew a distinction between free speech and freedom of speech, noting that the First Amendment was concerned not with the rights of individuals but instead with the power of

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<sup>133</sup> See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

<sup>134</sup> MEIKLEJOHN, FREE SPEECH, *supra* note 133, at 6.

<sup>135</sup> *Id.* at 8.

<sup>136</sup> *Id.* at 9. "At the bottom of every plan of self-government is the basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be binding on all citizens whether they agree with them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them." *Id.*

<sup>137</sup> *Id.* at 22.

<sup>138</sup> *Id.* at 25-26. "The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have the opportunity to do so." *Id.* at 25.

the citizenry to rule itself. Freedom of speech, what is guaranteed by the First Amendment, provides the means through which the governed can obtain the information needed to make informed choices about their governance. “The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ . . .” In distinguishing between free speech and freedom of speech, then, Meiklejohn asserted the right to limit debate in ways that best serve the voting body by ensuring the voters are as informed as possible.<sup>139</sup> Thus, their participation would be enhanced by free speech. As a result, Meiklejohn concerned himself with the protection of political speech, which he once referred to as “hostile criticism,”<sup>140</sup> as opposed to commercial speech. In emphasizing this view, Meiklejohn even wrote about his belief that commerce has a corrupting influence on politics.<sup>141</sup>

### **The Supreme Court and Self-Governance**

Alexander Meiklejohn’s writings on self-governance would influence one of the Supreme Court’s landmark First Amendment cases, *New York Times v. Sullivan*. As Justice Brennan noted in his 1965 lecture at Brown University,<sup>142</sup> with *New York Times v. Sullivan* and *Louisiana v. Garrison*, the Supreme Court embraced a vision of the First Amendment that paralleled the writings of Meiklejohn.<sup>143</sup> In doing so, the justices have in their opinions documented their belief that the “central meaning” of the First Amendment is to protect expression aimed at furthering a self-governing society.<sup>144</sup> Speaking of the *Sullivan* decision, Brennan said, “For speech

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<sup>139</sup> *Id.* at 22-25.

<sup>140</sup> MEIKLEJOHN, FREE SPEECH, *supra* note 133, at 10.

<sup>141</sup> MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 133, at 73-74.

<sup>142</sup> See William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>143</sup> *Id.* at 19.

<sup>144</sup> See *infra*.

concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>145</sup> Since *Sullivan*, numerous justices have cited Meiklejohn’s writings in their opinions to further assert his self-governance theory to protect free expression.<sup>146</sup>

The Court’s enunciation of the self-governance theory to protect free expression comes across quite clearly in *New York Times v. Sullivan*.<sup>147</sup> In the case, which pitted one of the nation’s largest newspaper publishers against the city commissioner of Montgomery, Alabama, the Court held that public officials could not succeed on a defamation claim without proving the defamatory statements had been printed with actual malice.<sup>148</sup> In doing so, one of the chief reasons cited by Justice Brennan was the First Amendment’s mandate that there be protection for public criticism of the government and its officials:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>149</sup>

In writing for the Court, Justice Brennan enunciated the protection of self-governance to be the “central meaning” of the First Amendment. Brennan looked back to the writings of Madison and Jefferson to elicit the principles on which the nation’s government had been founded. In doing so, he emphasized that the right to public discussion about government was entrenched in the nation’s history, putting to rest any notion that the Sedition Acts or other laws punishing

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<sup>145</sup> Brennan, *supra* note 142, at 18.

<sup>146</sup> See, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Virginia Pharm. Bd.*, 425 U.S., at 748.

<sup>147</sup> *Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>148</sup> *Id.* at 283. “We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.” *Id.*

<sup>149</sup> *Id.* at 270.

sedition libel could be held constitutional under the First Amendment.<sup>150</sup> Brennan's "central meaning," as he defined it, served to establish a core of speech that would be recognized by the Court as worthy of receiving protection because it is speech:

without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.' This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected.<sup>151</sup>

Thus, the Court could rest its decision in *Sullivan* on this notion that speech by citizens about their government must be constitutionally protected under the First Amendment unless it had been printed with actual malice.

In the same term as *Sullivan*, the Court reheard argument in a criminal defamation case lingering from the 1963 Term, *Garrison v. Louisiana*.<sup>152</sup> In the case, a Louisiana district attorney was criminally prosecuted for statements he made about a group of judges. Applying the standards announced in *Sullivan*, Justice Brennan concluded that the constitutional requirement of actual malice stretched to criminal prosecutions for libel as well.<sup>153</sup> Noting that Garrison's comments were directed toward the judges' suitability for service, Brennan noted that the speech was just the type protected by the "central meaning" of the First Amendment:

The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might

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<sup>150</sup> *Id.* at 274. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional." *See also* Brennan, *supra* note 142, at 16. "The Court did not simply, in the face of an awkward history, definitively put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue to "the central meaning of the First Amendment." *Id.*

<sup>151</sup> Brennan, *supra* note 142, at 16.

<sup>152</sup> 379 U.S. at 64.

<sup>153</sup> *Id.* at 77. "Applying the principles of the New York Times case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials." *Id.*

touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.<sup>154</sup>

Invoking the standard established in *Sullivan* as well as the self-governance theory, the Court extended protection from criminal prosecution to speakers whose defamatory criticism of public officials was made without actual malice.

Brennan's belief in the importance of free expression as a component of self-governance would re-appear in the Court's writings 10 years later as part of a dissent written by Justices Louis Powell, John Marshall and Brennan.<sup>155</sup> The three justices dissented from the Court's opinion in *Saxbe v. Washington Post Co.*, in which the majority held the First Amendment did not require prisons to allow members of the media to interview specific prisoners in a face-to-face setting.<sup>156</sup> In their dissent, the justices asserted that members of the press have become an essential component of self-governance, gathering the information necessary for the public to make informed decisions.<sup>157</sup> Thus, allowing members of the media to interview prisoners provides members of the public with information they could not obtain themselves, but which is necessary to evaluating the way in which we govern ourselves. "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities."<sup>158</sup>

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<sup>154</sup> *Id.* at 77.

<sup>155</sup> *See Saxbe*, 417 U.S. at 843 (holding members of the press do not have a First Amendment right to face-to-face interviews with specific prison inmates).

<sup>156</sup> *Id.* at 862.

<sup>157</sup> *Id.* at 862. "For most citizens the prospect [sic] of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment." *Id.*

<sup>158</sup> *Id.*

In *Saxbe*, the dissenting justices focus on the First Amendment right to receive information as a part of their use of self-governance theory, an argument that would continue to develop in the Court's discussion of self-governance as a justification for free expression. The justices cited the line of cases in which the Court recognized the right to receive information<sup>159</sup> as well as Meiklejohn's writings<sup>160</sup> to support their assertion.<sup>161</sup> Self-governance, then, would begin to play a role in the Court's other speech jurisprudence. In particular, justices even invoked self-governance in cases where it could be said consumers needed information to make informed health, safety and welfare decisions – expression on social issues that could be likened to core political speech.<sup>162</sup>

Although Meiklejohn's writings invoked self-governance to protect core political speech using the First Amendment, Justice Harry Blackmun found the justification quite useful in one of the Court's earliest commercial speech cases. In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>163</sup> the Court struck down a Virginia statute that prohibited advertising the prices of prescription medicines. In ruling that the state law violated the First Amendment's free expression protections, Justice Blackmun likened a citizen's ability to make informed consumer choices to their decision to make informed political choices:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent

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<sup>159</sup> See, e.g., *Mandel*, 408 U.S. at 762; *Red Lion*, 395 U.S. at 390; *Lamont*, 381 U.S. at 301; *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

<sup>160</sup> MEIKLEJOHN, *supra* note 133, at 26. "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government." *Id.*

<sup>161</sup> *Saxbe*, 417 U.S. at 863.

<sup>162</sup> *Virginia Pharm. Bd.*, 425 U.S., at 748.

<sup>163</sup> *Id.*

political debate. ... Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.<sup>164</sup>

Blackmun noted that a consumer's choice affects the fashion in which the market operates and the industry is regulated. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal."<sup>165</sup> Knowing Meiklejohn's writings would not support the protection of commercial speech for commerce's sake, Blackmun invoked his larger reference to the social issues surrounding the advertising of prescription prices by relying on economic and health, safety and welfare arguments to find First Amendment protection for the advertisement of prescription prices.<sup>166</sup>

In 1980, Justice Brennan again invoked Meiklejohn's self-governance theory in his concurring opinion in *Richmond Newspapers v. Virginia*.<sup>167</sup> Writing for himself and Justice Marshall, Brennan reasoned that the First Amendment was not merely protecting free expression for the sake of expression, but instead that the First Amendment itself played a structural role in ensuring our government represented the views and interests of the people.<sup>168</sup> Observing this, he continues by quoting a popular passage from the Court's decision in *Sullivan*, that "debate on

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<sup>164</sup> *Id.* at 763-764.

<sup>165</sup> *Id.* at 764.

<sup>166</sup> *Id.*

<sup>167</sup> 448 U.S. 555, 586 (1980) (holding that unless a judge make specific findings of fact that an overriding interest exists, criminal trials must be open to the public).

<sup>168</sup> *Id.* "The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Id.* at 587-588.

public issues should be uninhibited, robust, and wide-open.”<sup>169</sup> However, ancillary to the commitment to public discussion is the belief that such discourse occur between informed citizens.<sup>170</sup> Allowing public participation in criminal trials provides that opportunity, Brennan argued, allowing citizens to observe government in action.

After Justice Brennan left the Court, Meiklejohn’s self-governance theory was adopted by a new advocate in Justice Stephen Breyer. Writing 10 years after Brennan’s *Richmond Newspapers* concurrence, Breyer and Justice Ruth Bader Ginsburg reiterated the Court’s commitment to public participation and open public discussion in their concurrence in *Nixon v. Shrink Missouri Government PAC*.<sup>171</sup> In arguing that the statute furthered self-governance under the First Amendment, Breyer wrote that limiting campaign contributions protected the integrity of the election and a representative government.<sup>172</sup> Doing so, Breyer argued, actually encourages public participation by requiring candidates to seek a broader base of public support. This, in turn, means more voices will likely be introduced into the electoral process, furthering Meiklejohn’s goal of informed self-governance.<sup>173</sup> Although self-governance has not been cited in a Supreme Court First Amendment case since *Nixon*, Justice Breyer has returned to Meiklejohn’s premise in other areas. In 2004, Breyer cited Meiklejohn for the proposition that an informed public plays an important role in a participatory government in *Vieth v. Jubelirer*,

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<sup>169</sup> *Id.* at 587 (quoting *Sullivan*, 376 U.S. at 274).

<sup>170</sup> *Id.*

<sup>171</sup> 528 U.S. 377, 401 (2000) (holding that a Missouri statute limiting campaign contributions for various state offices was sufficiently tailored to serve its purposes and survived First Amendment scrutiny).

<sup>172</sup> *Id.* “Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.” *Id.*

<sup>173</sup> *Id.*

where he dissented from the Court's decision that a Pennsylvania claim of gerrymandering was a nonjusticiable political question.<sup>174</sup>

### **Vincent Blasi and the Checking Value**

Nearly as old as the roots of self-governance and marketplace theory, the watchdog theory as a justification for freedom of expression can be traced back to the writings of Colonial America. Popularized as the “checking value” of the First Amendment by legal scholar Vincent Blasi, this theory holds that free expression serves as a counterweight to an oppressive government.<sup>175</sup> In his article, Blasi discusses the historical underpinning of the checking value as a justification for free expression. In addition, he outlines how the checking value promotes the traditional First Amendment values of individual autonomy, diversity and self-government. Finally, he applies the checking value as a First Amendment justification in three key contexts: defamation, newsgathering and access to the media. In conclusion, Blasi contends that the checking value has both the historical legitimacy and analytic fortitude to be considered a key component of First Amendment theory.

Much like the marketplace of ideas, the watchdog theory, or checking value, can be traced back to the English philosophers. The notion that the people must have some power over the government emerges as a central characteristic of John Locke's *Second Treatise on Civil Government*.<sup>176</sup> There, Locke wrote that it is the right of citizens to overthrow a government that misuses the public trust.<sup>177</sup> Thus, the watchdog rule of the public was born in the late 1600s and would eventually be called upon by other great thinkers to extend to the press as well.

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<sup>174</sup> See 541 U.S. 267, 356 (2004) (Breyer, J., dissenting).

<sup>175</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521.

<sup>176</sup> See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT*, ch. 13-19 (C.B. Macpherson ed. 1980).

<sup>177</sup> *Id.*

Many of these ideas traversed the Atlantic Ocean with the American colonists who were looking to form a colonial government. As the framers were contemplating the protections necessary in a constitution, many drew from the writings of “Cato,” John Wilkes, “Father of Candor” and “Junius,”<sup>178</sup> which evoked the watchdog themes prominent in Locke’s writings. Wilkes, for example, writes:

The liberty of the press is the birth-right of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country. . . . A wicked and corrupt administration must naturally dread this appeal to the world; and will be for keeping all the means of information equally from the prince, parliament and people.<sup>179</sup>

Cato, too, emphasized freedom of speech as a key to true liberty. In the essay *Of Freedom of Speech*, Cato discusses the checking value in one of its most famous references, saying “Freedom of Speech is the great Bulwark of Liberty; they prosper and Die together.”<sup>180</sup> Father of Candor’s references to the watchdog concept come in an essay discussing the villainous nature of seditious libel, in which he accepts the notion of punishment for libels attacking private persons but condemns punishment of defamatory speech against public officials.<sup>181</sup> The ability to criticize those in power, he suggested, is required for people to have liberty and freedom.<sup>182</sup>

Blasi does not view the checking value as the only relevant First Amendment theory. Along with the role of the press as a watchdog, he asserted the courts should examine other

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<sup>178</sup> See generally LEVY, *supra* note 9, at 89-119 (1985).

<sup>179</sup> John Wilkes, *The North Briton*, No.1, at 1-2 (June 5, 1762).

<sup>180</sup> CATO, OF FREEDOM OF SPEECH, *reprinted in* LEONARD LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON: EARLY AMERICAN LIBERTARIAN THEORIES 12 (1966).

<sup>181</sup> FATHER OF CANDOR, AN ENQUIRY INTO THE DOCTRINE LATELY PROPAGATED CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS, 30-31 (DaCapo Press 1970).

<sup>182</sup> *Id.* at 32. “The liberty of exposing and opposing a bad administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit that can be derived from the liberty of the press.” *Id.*

theories, including self-governance and the marketplace of ideas, as part of their approach to deciding First Amendment cases:

The challenge for the Court in this area [First Amendment theory] is to develop a more comprehensive theory of the speech, assembly and press clauses which give adequate expression to those newly implicated values.<sup>183</sup>

As a part of that comprehensive theory, in which the Court had previously turned to self-governance and marketplace theory, Blasi suggested the addition of the checking value.

### **The Supreme Court and the Checking Value**

The Supreme Court does not discuss the checking value with the same frequency that it mentions the marketplace of ideas or self-governance. But the notion that the press must serve as a watchdog on government power can still be found in several of the Court's opinions, albeit not with the fervor envisioned by Blasi. Most recently, the justices have made reference to role of the media as a government watchdog in the context of deciding cases involving numerous other issues. Interestingly, the justices often write with the implication that such a power is presumed on the part of the press. For example, in *Leathers v. Medlock*,<sup>184</sup> Justice Sandra Day O'Connor, while writing for the Court to uphold the constitutionality of Arkansas' sales tax as applied to cable television, opines that "the tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity." Similarly, in *Smith v. Daily Mail*, Justice William Rehnquist in his concurrence makes a statement presupposing the role of the press as a watchdog "It is difficult to understand how publication of the youth's name is in any way necessary to performance of the media's "watchdog" role."<sup>185</sup>

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<sup>183</sup> Blasi, *supra* note 175, at 525.

<sup>184</sup> See 499 U.S. 439, 447 (1991).

<sup>185</sup> See 443 U.S. 97, 109 (1979).

Language presupposing the press' role as a government watchdog can likely be attributed to strong language in earlier landmark First Amendment cases: *Branzburg v. Hayes* and *New York Times v. United States*. These two cases, decided in back-to-back terms, evidenced several justices' views that the press serves as a government watchdog. In his 1972 landmark dissent in *Branzburg v. Hayes*,<sup>186</sup> Justice Potter Stewart made abundantly clear his belief in the watchdog theory as a justification for free expression. While writing in favor of a First Amendment right for reporters to protect their confidential sources, Stewart reasoned:

As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.<sup>187</sup>

Stewart goes further in his dissent, noting that the Court's decision will largely hamper the ability of journalists to serve a public watchdog by drying up sources within the government who may provide valuable information on abuses of power:

A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.<sup>188</sup>

Only one term earlier in 1971, Justice Hugo Black emphasized his belief in the watchdog theory as a part of his concurrence in the Supreme Court's decision in the Pentagon Papers case.<sup>189</sup> In that case, the U.S. Supreme Court held that the government had failed to meet the heavy burden necessary to justify enjoining the *New York Times* from publishing classified

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<sup>186</sup> See 408 U.S. 665 (1972) (holding that the First Amendment does not protect reporters from judicial subpoenas requiring the disclosure of the identity of a confidential source).

<sup>187</sup> See 408 U.S. 665, 727 (1972) (Stewart, J., dissenting).

<sup>188</sup> *Id.* at 731.

<sup>189</sup> See *New York Times v. U.S.*, 403 U.S. 733 (1971).

historical documents about the Vietnam War. In his concurrence, Black wrote that “the Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.”<sup>190</sup> In discussing the role of the press, Black ties the newspapers’ action back to those intended by the framers of the Constitution, thus implying that the notion of such a checking power dates back to the construction of the First Amendment.<sup>191</sup>

### **Thomas Emerson’s Self-Fulfillment Theory**

Both the marketplace of ideas and the watchdog concept justify free expression by focusing on the larger societal benefits of free expression. The marketplace rationale focuses on the collective benefits of the ideas entering into the market and Blasi’s checking value espouses the benefits of allowing the press to serve as a check on government authority through the use of free expression. In contrast, self-fulfillment theory relies upon a more individualized focus to justify free expression. Self-fulfillment derives from the benefits of free expression for society to the benefits of free expression for the individual engaged in such expression.

First Amendment scholar Thomas I. Emerson posited that self-fulfillment, like the checking value, is not the sole rationale for free expression.<sup>192</sup> Self-fulfillment, he notes, works in conjunction with three other rationales for free expression.<sup>193</sup> Those rationales, as Emerson explains them, include: attainment of truth, participation in decision-making and balance

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<sup>190</sup> *New York Times*, 403 U.S., at 717 (1971) (Black, J., concurring).

<sup>191</sup> *Id.* at 717. “In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.” *Id.*

<sup>192</sup> See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963).

<sup>193</sup> *Id.* at 878.

between stability and change.<sup>194</sup> Thus, in his general theory of the First Amendment, Emerson accounts for both collective and individual justifications for free expression.

Self-fulfillment, which Emerson listed first in his discussion, focuses solely on the right of the individual. To justify self-fulfillment, Emerson noted that man has the unique capacity to reason, which includes the ability to use his mind, think and communicate.<sup>195</sup> Through these powers, Emerson asserts that it is only natural that man attempts to find meaning and understand his role in the world. Thus, Emerson described self-fulfillment theory as justifying freedom of expression based on the notion that such expression is necessary for proper development and character.<sup>196</sup> In exercising the right to speak, Emerson asserted people will form their own set of values and beliefs. Freedom of expression, he explained, leads to the realization that a person's mind must be free to develop and search for the truth.<sup>197</sup> Thus, limiting a person's ability to explore ideas and uncover truths denigrates a person's dignity.<sup>198</sup> In addition to the ability to reason, Emerson turned to the role of an individual in society as a second anchor for his self-fulfillment theory. Because man is a social creature, Emerson posited, it is only natural that he attempts to construct shared meanings and common culture with others in his society.<sup>199</sup> To do so, he must communicate his set of values and beliefs. As a result of this justification, Emerson

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<sup>194</sup> *Id.* at 879-886.

<sup>195</sup> *Id.* at 879.

<sup>196</sup> See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1971).

<sup>197</sup> *Id.* "The proper end of man is the realization of his character and potentialities as a human being." *Id.*

<sup>198</sup> *Id.* "To cut off his search for truth, or his expression of it, is to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others." *Id.*

<sup>199</sup> See Emerson, *supra* note 192, at 880.

asserts that “freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society.”<sup>200</sup>

### **The Supreme Court and Self-Fulfillment**

The Supreme Court has mentioned self-fulfillment theory on a limited basis in its First Amendment jurisprudence. The first discussion came in the majority opinion in *Police Department of City of Chicago v. Moseley*.<sup>201</sup> In deciding a 1972 case involving a picketing ordinance, Justice John Marshall examined the value of an individual’s ability to express himself in society. While noting that content-based restrictions on individual speech are particularly pernicious, Marshall reasoned:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.<sup>202</sup>

The Court went on to strike down the city ordinance, which prohibited all picketing within 150 feet of a school, except peaceful picketing of schools in a labor dispute.<sup>203</sup> Deciding the ordinance was content-based, the Court ruled that it made an impermissible distinction between types of peaceful demonstrations.<sup>204</sup>

Six years later, Justice Byron White further enunciated the *Moseley* view of the self-fulfillment theory as serving a distinct role in First Amendment theory. In his dissent in *First*

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<sup>200</sup> *Id.*

<sup>201</sup> See 408 U.S. 92 (1972) (holding unconstitutional a city ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute because it makes an impermissible distinction between types of peaceful demonstrations).

<sup>202</sup> *Id.* at 96.

<sup>203</sup> *Id.* at 102.

<sup>204</sup> *Id.*

*National Bank of Boston v. Bellotti*,<sup>205</sup> White argued against protection for corporate speech, reasoning that the very self-fulfillment used to provide protection for an individual speaker cut against providing protection for corporate speakers. In his dissent, White writes:

Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profit-making corporations are not “an integral part of the development of ideas, of mental exploration and of the affirmation of self.” They do not represent a manifestation of individual freedom or choice.<sup>206</sup>

Individuals, under self-fulfillment theory, are protected speakers, White argues, because of their desire to create common understandings to advance their own views on social or political issues.<sup>207</sup>

### **Conclusion**

First Amendment theory plays a large role in protecting expressive activities, including those conducted over the Internet. In some regard, the Internet has helped advance a variety of justifications for free expression by providing a mass medium that is accessible to a large percentage of the population. As courts begin to address Internet First Amendment cases, it is likely they will look to First Amendment theory in much the same way they have in First Amendment cases prior to the development of the Internet. In those cases, the courts have not relied solely on one First Amendment theory to protect speech but instead have turned to several theories, including marketplace of ideas, checking value, self-governance and self-fulfillment.

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<sup>205</sup> See 435 U.S. 765 (1978) (holding unconstitutional a state statute that prohibited corporations from making contributions or expenditures to influence the outcome of a referendum vote on questions that don't affect the corporation).

<sup>206</sup> *First Nat'l Bank of Boston*, 435 U.S. at 804-805.

<sup>207</sup> *Id.* at 805. “Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion.” *Id.*

Drawn from the John Milton's *Aeropagitica* and John Stuart Mill's *On Liberty*, marketplace of ideas has become the First Amendment theory most relied upon by the U.S. Supreme Court. The theory, as it has developed, essentially posits that in a market of competing ideas, the notions of truth, or their closest approximations, shall rise to the surface through a robust exchange of ideas. In 1909, Justice Oliver Wendell Holmes' laid the foundation for the marketplace of ideas theory of free expression in the nation's First Amendment jurisprudence in his dissent in a case about subversive pamphleteering.<sup>208</sup> Since then, the Court has turned to the marketplace of ideas several times, including mentioning it in the landmark Internet case *Reno v. ACLU*. There, the Court observed a "dramatic expansion of this new marketplace of ideas" When referring to the Internet.<sup>209</sup>

The marketplace of ideas justification for free speech ties closely to several other theories of free expression, including Alexander Meiklejohn's self-governance theory, Vincent Blasi's checking value and Thomas Emerson's self-fulfillment theory.

In their *New York Times v. Sullivan* and *Louisiana v. Garrison*, the Supreme Court embraced a vision of the First Amendment drew upon Meiklejohn's self-governance theory. In doing so, the justices wrote the "central meaning" of the First Amendment is to protect expression aimed at furthering a self-governing society. Emphasizing participation in governance, Meiklejohn asserted in his book *Free Speech and Its Relation to Self-Government* that freedom of speech requires not that every person be allowed to speak, but instead that every point of view is allowed to be spoken. Since *Sullivan*, numerous justices have cited Meiklejohn's

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<sup>208</sup> See generally *Abrams*, 205 U.S., at 616 (Holmes, J., dissenting).

<sup>209</sup> *Reno*, 521 U.S. at 885.

writings in their opinions to further assert his self-governance theory to protect free expression in cases involving political speech, social speech and even commercial speech.

Although it has not received the same recognition as marketplace of ideas or self-governance, Blasi's checking value theory, which holds that free expression serves as a counterweight to an oppressive government, has been mentioned by the Court in First Amendment cases. Advocated by Justice Black and Justice Stewart, the notion that the media serves as the public's watchdog by checking on the government, has not been fully explored by the Court.

Emerson's self-fulfillment theory has also played a limited role in the Court's First Amendment jurisprudence. In *Police Department of City of Chicago v. Moseley*, Justice Marshall enunciated Emerson's theory, writing that expression promotes the development of politics and culture while allow speakers to grow as individuals. But, self-fulfillment theory has also been used by jurists, including Justice White in *First National Bank of Boston*, to assert that corporate speakers should not have the same levels of First Amendment protection as individuals because they do not derive this self-fulfillment from free expression.

Given the broad theoretical base on which the Supreme Court has established its First Amendment jurisprudence, it will almost certainly continue to rely on these theories in any future Internet cases. *Reno v. ACLU* provides one example of the Court already extending these First Amendment theories into its Internet jurisprudence.

## CHAPTER 4 DEFINING COMMUNITY

The concept of community plays an important role in defamation litigation. Courts may use a plaintiff's community to make several determinations critical to the litigation. First, the evaluation of the plaintiff's community may be used to determine whether a statement actually contained a defamatory communication.<sup>1</sup> Second, courts may look to the plaintiff's community to determine his status as a plaintiff, thereby deciding what level of fault must be proven before the plaintiff can succeed in the litigation.<sup>2</sup> For example, if a person is determined to be a public figure based on his status in the community, she will be required to prove actual malice to succeed in her defamation claim. Finally, courts may again turn to the definition of community to determine if the plaintiff's reputation was injured in a given community the courts are willing to recognize. In any sense, the courts must determine the make-up of the plaintiff's community before such important decisions can be made. This chapter looks at what factors the courts have used to define community in both traditional print and broadcast defamation cases as well as online defamation cases.

### **The Courts Look at Community: Print and Broadcast Defamation**

Although the U.S. Supreme Court has addressed the definition of community on several occasions, its jurisprudence provides overarching themes, instead of bright-line rules, to serve as guidance for the lower federal courts. The notions of community discussed by the Supreme Court are merely a starting point from which the lower courts have begun their analyses. In their opinions, the courts have mentioned community in a variety of contexts, including as part of the

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<sup>1</sup> *See, e.g.* Gooden v. Town of Clarkton, N.C., 1990 WL 21198 (4th Cir. 1990).

<sup>2</sup> *See, e.g.* Gertz v. Welch, 418 U.S. 323, 351-352 (1974).

determination of defamatory meaning, as a facet of the test to determine plaintiff status, and as part of the evaluation of harm.

### **U.S. Supreme Court**

The U.S. Supreme Court's discussion of community in defamation actions dates back to an era before defamation law had been constitutionalized by the landmark *Times v. Sullivan*<sup>3</sup> decision. Justice Oliver Wendell Holmes, writing for the Court in 1909 in *Peck v. Tribune Co.*,<sup>4</sup> addressed the notion of community as part of the Court's determination of defamatory meaning. In the case, an Illinois nurse sued over a whisky advertisement appearing in the Chicago *Sunday Tribune* that used her likeness to endorse the alcohol.<sup>5</sup> The Supreme Court, in deciding the case, had to determine whether the statement was indeed libelous. As part of this analysis, Justice Holmes discussed the role of community in the determination of defamatory meaning.

Justice Holmes' description of community in *Peck* used language that would continue to be used in numerous cases to come. In the opinion, he wrote "If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote."<sup>6</sup> Justice Holmes further clarified this language, writing that a defamatory statement need not be "known by all the world."<sup>7</sup> As an example, he used the defamation of a doctor, who could bring suit for a defamatory statement that affected his reputation in the eyes of the medical community alone, even though others may not view him

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<sup>3</sup> See *Times v. Sullivan*, 376 U.S. 254, 264 (1964).

<sup>4</sup> 214 U.S. 185 (1909) (reversing a directed verdict for a defamation).

<sup>5</sup> *Id.* at 188.

<sup>6</sup> *Id.* at 190.

<sup>7</sup> *Id.* at 190.

with contempt.<sup>8</sup> In discussing the number of people in a community that would constitute “an important and respectable part,” Holmes wrote that a defamation “known by a large number” that causes “an appreciable fraction” of that community to change their views is enough for liability.<sup>9</sup> This language, discussing the “important and respectable” part of a community,<sup>10</sup> would continue to color courts’ opinions about what statements could be held defamatory.

In contrast to Justice Holmes’ description on community, a second prominent notion of community based on the Restatement of Torts would eventually appear in Supreme Court jurisprudence. Four decades later, the Supreme Court heard two consolidated cases in which the petitioners, the Joint Anti-Fascist Refugee Committee and others, sought an injunction to prevent the U.S. Attorney General from producing a list of organizations deemed to be communist.<sup>11</sup> Writing for the Court, Justice Harold Burton opined that designation as a communist organization in public records could be harmful to an organization’s reputation.<sup>12</sup> Further, he wrote that such a label could end an organization’s ability to operate and harm its reputations in the eyes of its community.<sup>13</sup> Finally, Justice Burton turned to the Restatement of Torts, which defined defamatory communication as one that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or

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<sup>8</sup> *Id.* “Thus, if a doctor were represented as advertising, the fact that it would affect his standing with other of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride.” *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

<sup>12</sup> *Id.* at 139.

<sup>13</sup> *Id.* at 139. “Their effect is to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation.” *Id.*

dealing with him.”<sup>14</sup> The Restatement language, too, would be used frequently to describe community in the context of defamation litigation.

The next major discussion of community among members of the Supreme Court came 23 years later in an opinion penned by Justice Lewis Powell in *Gertz v. Welch*. In that case, the discussion of community took place as the Court attempted to determine the status of attorney Elmer Gertz.<sup>15</sup> Toward the end of the opinion, Justice Powell addressed whether Gertz would be properly classified as a public figure and subjected to a fault standard greater than negligence.<sup>16</sup> To make that determination, the Court noted that Gertz had:

long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects.<sup>17</sup>

Despite these activities, the Court reasoned that he remained a private person.<sup>18</sup> The court noted that none of the potential jurors knew of Gertz and that no proof had been offered to suggest that others in the local community would have thought of him as a public person.<sup>19</sup> In its discussion of Gertz’ prominence in his community, the Court examined his role in Chicago despite the fact that the defamatory statement was published in a magazine of national circulation.<sup>20</sup>

Two years after *Gertz*, the Supreme Court would again examine community as it pertained to determining a plaintiff’s status. In *Time v. Firestone*, the Supreme Court had to determine whether Mary Alice Firestone, ex-wife of the son of the prominent tire manufacturer, had

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<sup>14</sup> See RESTATEMENT OF TORTS § 559 (1938).

<sup>15</sup> *Gertz*, 418 U.S. at 351-352.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 351.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 352.

<sup>20</sup> *Id.* at 327, 351-352.

achieved public figure status for the purpose of her defamation suit against *Time* magazine.<sup>21</sup> Justice Rehnquist, writing for the Court, noted that although Ms. Firestone might have achieved a role of prominence in Palm Beach society, she had no pervasive public role nationally.<sup>22</sup> Even holding several press conferences during the divorce proceedings with her husband was not enough to support a finding that Ms. Firestone was a public figure, Justice Rehnquist reasoned.<sup>23</sup> Once again, the Court noted in a defamation case involving a national publication that even prominence in a local community would not be enough to consider the plaintiff a public figure.

Writing for the Court as chief justice, William Rehnquist also mentioned community in *Milkovich v. Lorain Journal Co.*<sup>24</sup> In the case, which pitted a high school wrestling coach against a local Ohio newspaper, the Court was asked to determine whether the Constitution protected statements of opinion, insulating their speakers from liability for defamation. In discussing the reasoning behind his decision that statements of opinion that contain no provably false assertions of fact are protected speech, Justice Rehnquist discussed the role of community in the development of defamation law.<sup>25</sup> At common law, Rehnquist noted, a plaintiff need only prove that a statement was defamatory, meaning that it was false and would subject him to “hatred, contempt, or ridicule.”<sup>26</sup> Thus, it seemed under common law that no regard was given to whether the statement was fact or opinion. However, the constitutionalization of defamation law with

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<sup>21</sup> *Time v. Firestone*, 424 U.S. 448, 453-454 (1976).

<sup>22</sup> *Id.* at 453.

<sup>23</sup> *Id.* at 455.

<sup>24</sup> *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (holding that statements of opinion that contain no provably false assertions of fact are not actionable in defamation).

<sup>25</sup> *Id.* at 12-13.

<sup>26</sup> *Id.* at 12-13 (*quoting* RESTATEMENT OF TORTS § 558 (1938)).

*Times v. Sullivan* and its progeny increased the requirements that plaintiffs must plead and prove to succeed in a defamation lawsuit.

Even under the *Restatement (Second) of Torts*, which was drafted in 1977, Rehnquist noted no distinction was made regarding opinion statements.<sup>27</sup> The Restatement did, however, update the language used to address community and the notion of what constitutes a defamatory statement to say:

[E]xpression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.<sup>28</sup>

Later in a footnote in the *Milkovich* decision, Rehnquist rejected the notion that defamatory meaning may be different in a small community versus a larger one.<sup>29</sup> Rejecting the assertion by amici Dow Jones that the Court should observe the statement in light of its “small town” nature, Rehnquist adopted another framework in which to define the community. The statement, he implied through his analysis, must be considered in light of the entire Cleveland metro area given that the involved high schools are a part of the Cleveland standard consolidated statistical area.<sup>30</sup> Like the broadened language of the *Restatement (Second) of Torts*, Rehnquist’s footnote in *Milkovich* implied an understanding of the changing nature of modern-day communities.

### **Federal Appellate Courts**

In the seven decades following the U.S. Supreme Court’s 1909 decision in *Peck*, the federal appellate courts would hear few cases discussing community. The first case to deal with

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<sup>27</sup> *Id.* “The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory.... This position was maintained even though the truth or falsity of an opinion – as distinguished from a statement of fact – is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation.” RESTATEMENT (SECOND) OF TORTS § 566, cmt. a (1977).

<sup>28</sup> See RESTATEMENT (SECOND) OF TORTS § 566 (1977).

<sup>29</sup> *Milkovich*, 497 U.S. at 22, n.9.

<sup>30</sup> *Id.*

the subject arose in 1926 in the Third Circuit<sup>31</sup> and the next case 40 years later in the D.C. Circuit.<sup>32</sup> Beginning in the 1980s and continuing into the 2006-2007 term, the federal appellate courts have decided a flurry of cases in which they have had to address the meaning of community. Throughout these opinions, the courts often started from the *Peck* discussion of the size of the community.

The Third Circuit was the first federal appellate court to address the issue of community size in its 1926 decision in *Francis v. People of Virgin Islands*.<sup>33</sup> In *Francis*, the court heard an appeal from a criminal libel and contempt of court case brought against the editor of one of the island newspapers who had written about a police official.<sup>34</sup> In discussing whether the trial judge had erred in finding Francis guilty of criminal libel, the appellate court found the evidence as to the identification of the plaintiff and the defamatory nature of the statement to be weak.<sup>35</sup> As a part of its opinion, the court points out that although the community was “small” (a town of 10,000 people), there was no evidence to support the claim that the public perceived injury to the reputation of the police official because members of the public did not connect the purportedly defamatory statements as being published about the police official.<sup>36</sup> Even though the *Francis* court made no specific findings about community, two findings can be inferred from its opinion. First, the court examined the source of the statements as a gauge for how to begin defining

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<sup>31</sup> See *Francis v. People of Virgin Islands*, 11 F.2d 860 (3d. Cir. 1926).

<sup>32</sup> See *Afro-American Publ’g Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966).

<sup>33</sup> *Francis*, 11 F.2d at 860.

<sup>34</sup> *Id.* at 862.

<sup>35</sup> *Id.* “In this instance the article accuses no one by name; nor does it contain anything by which to identify the person to whom it refers. Though the community is small (10,000) and the police force correspondingly small, there was nothing to show that the public thought the publication was directed to Mathias until he went before the Government Attorney and saying, ‘I am the person,’ published the fact himself.” *Id.*

<sup>36</sup> *Id.*

community. Second, after identifying the newspaper as the publishing entity, the court examined the newspaper's audience – a town of 10,000 people – to define community in the context of the libel case.

Four decades after the Third Circuit's *Francis* decision, the D.C. Circuit was called upon in 1966 to address the issue of community. In *Afro-American Publishing Co. v. Jaffe*,<sup>37</sup> a white newspaper vendor sued the publisher of a black newspaper for defamation after the newspaper published an article implying the vendor was a bigot because he stopped selling the black newspaper. The court addressed community both in terms of defamatory meaning and injury to reputation, citing both cases and legal scholars as support for its position. The opinion seemed to indicate that the court may allow the plaintiff to assert either a geographic community based on the publication's location or a professional community based on the plaintiff's occupation.<sup>38</sup> Further, the court noted, the plaintiff was not required to prove that everyone in the asserted community holds the plaintiff in lower regard.<sup>39</sup> As justification for the view that not every member of the community hold the plaintiff in lower regard, the court relied on the language from the Restatement, which said a defamatory statement was one that "tends to lower plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or plaintiff's associates."<sup>40</sup> The court noted, when adopting this standard, that it was a broad one, more easily proven than one requiring a plaintiff to show the statement caused him "contempt, ridicule or disgrace" in his community.<sup>41</sup>

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<sup>37</sup> *Jaffe*, 366 F.2d at 649.

<sup>38</sup> *Id.* at 658. "Of course the plaintiff need not show tendency to prejudice him in the eyes of everyone in the community or all his associates." *Id.* at 658, n. 10.

<sup>39</sup> *Id.* at 659, n. 10.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 659.

According to the *Jaffe* court, the article must be taken as a whole as it would be read by the average reader in the publication’s target community, not by the community as a whole.<sup>42</sup>

Applying this standard, the court concluded that the average reader in the publication’s target community – what the court referred to as the “average reader in the community concerned” – could have believed as a result of the publication that the plaintiff was a racially biased bigot.<sup>43</sup>

The *Francis* standard, it seemed, would have looked at the entire geographic community instead of the publication’s target community, which could be considerably smaller.

The D.C. Circuit again addressed the notion of community 30 years later when it decided *Tavoulaareas v. Piro*, which pitted an oil company president and his son against a reporter and the *Washington Post* in a defamation action.<sup>44</sup> Returning to its 1966 decision in *Jaffe*, the court utilized similar reasoning to evaluate whether the statements made in the newspaper contained a defamatory meaning within the community.<sup>45</sup> To determine whether the communication was defamatory, the statements “must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.”<sup>46</sup> Although both the majority and the dissent agree on how to determine defamatory meaning within the community, the dissenting opinion more clearly discusses the process. In making its determination, the court relied on the reach of the publication to determine the community.<sup>47</sup> Although the court initially referred to how the “general public” interpreted the statements, it later talked about how the “Post’s readers”

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<sup>42</sup> *Id.* at 659. “What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest.”

<sup>43</sup> *Id.*

<sup>44</sup> 817 F.2d 762 (D.C. Cir. 1987).

<sup>45</sup> *Id.* at 780.

<sup>46</sup> *Id.* at 817 (*quoting* Wash. Post Co. v. Chaloner, 205 U.S. 290, 293 (1919)).

<sup>47</sup> *Id.* at 819.

may have believed the statements.<sup>48</sup> Thus, using readership as a proxy for community, the court concluded that statements were capable of defamatory meaning within the community. However, the plaintiffs lost the case on other grounds.<sup>49</sup>

Many of the federal appellate courts have followed the lead of the D.C. Circuit to determine community in defamation actions. One year later in 1988, the Sixth Circuit would adopt the D.C. Circuit's position in *Jaffe* as well, taking into consideration the publication's community to determine defamatory meaning.<sup>50</sup> In 1990, the Fourth Circuit rejected a plaintiff's defamation claim, noting that within his geographic community, the town of Clarkton, N.C., it was well-known that he was homosexual.<sup>51</sup> The court found that the information was already known within his community:

[The defendant] offered testimony, largely uncontradicted, that plaintiff's reputation in the Clarkton community was that he was a homosexual. This testimony by several witnesses [was] to the effect that it was common knowledge that plaintiff was a homosexual.<sup>52</sup>

Because it was known within the community in which he resided that he was a homosexual, the statements could not injure his reputation in that geographic area.<sup>53</sup> From 1966 until the 1990s, the geographic approach – using the community within which the purportedly defamatory statements were distributed – was the majority approach to defining the boundaries of community.

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<sup>48</sup> *Id.* at 819.

<sup>49</sup> The court found the plaintiff, a public figure, could not make the requisite showing of actual malice. *Id.* at 797-798.

<sup>50</sup> See *Connaughton v. Harte Hanks Communication*, 842 F.2d 825, 840 (6th Cir. 1988).

<sup>51</sup> See *Gooden*, 1990 WL 29198.

<sup>52</sup> *Id.* at \*4.

<sup>53</sup> *Id.* at 5. “Since the district court found evidence, largely uncontradicted, that Gooden had a reputation in the community for being a homosexual, the record does not support a cause of action for defamation.” *Id.*

The geographic method worked well for courts when publication was contained within one geographic area. However, as communication began to cross geographic boundaries more frequently, courts began to develop more flexible approaches to determining community. In 1994, the Seventh Circuit faced a situation in which defamatory statements had been simultaneously published in three states – Illinois, Indiana and Iowa.<sup>54</sup> The case, involving a union official who sued the union president/business manager for defamation, required the selection of community as a part of the court’s choice-of-law decision.<sup>55</sup> The plaintiff, a union official, requested that the community be Indiana, where he lived and worked, alleging his reputation was most severely injured in that location.<sup>56</sup> The defendant, a union president and business manager, desired Illinois to be the community, citing the fact that the allegedly defamatory communications were written, printed and distributed from the Illinois offices of Local 150 in Countryside.<sup>57</sup> In selecting Indiana substantive law to control the defamation action, the court focused on the nature of defamation as being a tort designed to remedy injury to reputation.<sup>58</sup> As such, the court ruled that the relevant community was in Indiana because it was not the mere publication of the articles that damaged the plaintiff’s reputation; it was their publication in Indiana that caused such injury.<sup>59</sup> The Seventh Circuit refined the geographic test

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<sup>54</sup> See *Jean v. Dugan*, 20 F.3d 255, 261 (7th Cir. 1994). Among the allegations in the case, the plaintiff claimed Dugan told union members that Jean “sided with a contractor over a member and even plaintiff’s wife is a witness for a contractor” and told union members that Jean “had made a deal and sided with a contractor to deprive a member of benefits.” *Id.* at 260.

<sup>55</sup> *Id.* at 261. The court had to decide between applying the substantive law of Illinois or Indiana. The substantive law of Iowa was not considered because neither the plaintiff nor the defendant has significant contacts in Iowa. *Id.*

<sup>56</sup> *Id.*

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

<sup>58</sup> *Id.* at 261-262. “We think it clear that ‘the place where the conduct causing the injury occurred’ is the most significant factor and that it favors our application of Indiana law.” *Id.* at 261.

<sup>59</sup> *Id.* at 262.

used by courts in earlier cases to look not singularly at the location of publication, but at where the publication's effect on reputation might be most greatly felt.

In 2001, the Third Circuit dealt with a similar choice-of-law issue involving a defamation lawsuit between a Pennsylvania attorney, an Indiana client and the client's Illinois attorneys in *Remick v. Manfredy*.<sup>60</sup> The attorney sued over a defamatory letter he claimed was both faxed to his office and distributed by the defendants to others in the "professional boxing community," whom the plaintiff often represented.<sup>61</sup> In the case, the attorney claimed that his home state, Pennsylvania, was the professional community and that proper jurisdiction lie there.<sup>62</sup> The *Remick* court found that the letters, written outside of Pennsylvania, could have caused the plaintiff harm in Pennsylvania, where most of his professional activity was centered.<sup>63</sup> However, the court found that because the recipients of the letters (other than the plaintiff and two members of his staff) were located outside Pennsylvania, it was not just to require the defendants to defend themselves in Pennsylvania, because there was not publication necessary for the defamation action to stand and thus no actual injury to his reputation in his professional community in Pennsylvania.<sup>64</sup> Thus, while the *Remick* court was willing to accept Pennsylvania as the plaintiff's professional community for the defamation claim, his claim failed to establish

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<sup>60</sup> See *Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001).

<sup>61</sup> *Id.* at 257-258. "The second letter, dated September 11, 1998, was sent by Klaus to Remick and reiterated Manfredy's statements in the March 2nd letter that Remick was fired for inadequately representing Manfredy and urged him to stop "insist[ing] on attempting to extort money." *Id.* at 258.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* "Defamation is an intentional tort and, because Remick's professional activities are centered in Pennsylvania and the allegedly defamatory letters question Remick's professional ability, Remick may reasonably contend that he suffered the brunt of the harm in Pennsylvania." *Id.*

<sup>64</sup> *Id.* at 259. "According to Remick, the allegedly defamatory letters and the charges therein were published throughout the boxing community, not just in Philadelphia. Significantly, Remick has not asserted that Pennsylvania has a unique relationship with the boxing industry .... Even if the letter itself, other than merely the charges in the letter as the complaint alleges, were distributed or shared with other persons in the professional boxing community, such persons were apparently located throughout the country." *Id.*

adequate publication from which harm to reputation in that community could occur. In its opinion, the Third Circuit seems to be recognizing that a plaintiff's reputation can be injured in a community other than that where the plaintiff or the publishing entity resides.

In 2004, while contemplating the broad reach of allegedly defamatory stories by the media, the Seventh Circuit implied the possibility of a nationwide community.<sup>65</sup> After the *New York Times* and other national media entities published articles saying the federal government was investigating the ties between certain charitable organizations and terrorist groups, Global Relief Fund sued for defamation.<sup>66</sup> The court, in analyzing the defamation claim, notes the potential impact of stories being printed and aired across the country:

GRF has raised a genuine issue of material fact related to damages by showing that donations to the organization diminished after the publication of these statements. ... The articles themselves, which quote persons who had donated to GRF or other charities in the past, are replete with evidence that donors had serious misgivings about the group on hearing of the government probe. GRF has produced sufficient evidence of publication; the statements appeared in prominent newspapers and on national television.<sup>67</sup>

Noting the national interest in the story, the court seemed to conclude that a large-scale community may be the appropriate one and that the plaintiffs were likely to succeed in proving harm to reputation.<sup>68</sup> The court, however, affirmed the lower court's order of summary judgment for the media entities, noting that the allegations were substantially true.<sup>69</sup>

The *Global Relief Fund* case is not the only example of a recent decision where the court has contemplated a national community for the purposes of a defamation action. In 2003, the

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<sup>65</sup> See *Global Relief Fund v. New York Times*, 390 F.3d 973 (7th Cir. 2004).

<sup>66</sup> *Id.* at 973-974.

<sup>67</sup> *Id.* at 981-982.

<sup>68</sup> *Id.* at 982.

<sup>69</sup> *Id.* at 989-990. "The district court was correct to enter summary judgment in favor of the defendants because their reports about GRF were substantially true." *Id.* at 990.

Eleventh Circuit heard *Ford v. Brown*,<sup>70</sup> a case dealing with a defamation claim arising out of the firing of an attorney. The plaintiff, a British attorney working in Hong Kong who had decided to withdraw from representing his client, sued that client, a Florida businessman, for defamation and other torts after the client publicly fired the plaintiff.<sup>71</sup> The court, in trying to decide whether litigation was appropriate in Florida, noted that “all of the alleged acts occurred in Hong Kong” and the requisite inquiry at trial would mandate an examination of the plaintiff’s reputation in Hong Kong before and after the statements.<sup>72</sup> In making this observation, the court noted that the plaintiff’s practice base was in Hong Kong with clients in Hong Kong.<sup>73</sup> As a result, the 11th Circuit reversed the lower court’s decision and remanded the case with instructions that Hong Kong be the proper forum in which to try the case.<sup>74</sup> Despite dismissing the case, the Florida court recognized the possibility that such actions affected the reputation of the plaintiff, who had been doing business throughout Hong Kong. Once again, a federal court appears to have recognized the potential reach of defamatory communications and the breadth of modern-day communities in defamation actions.

### **Federal Trial Courts**

A majority of the U.S. District Court cases involving a developed discussion of community arose after 1990. The federal trial courts in New York were the first to provide some insight into the emerging role of community in defamation litigation. In *McNally v. Yarnell*,<sup>75</sup> the U.S.

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<sup>70</sup> 319 F.3d 1302 (11th Cir. 2003).

<sup>71</sup> *Id.* at 1305. “Plaintiff contends that this conduct, combined with a series of public statements to the Hong Kong press and Hong Kong legal community, constitutes several actionable torts.” *Id.*

<sup>72</sup> *Id.* at 1308.

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

<sup>74</sup> *Id.* at 1311.

<sup>75</sup> 764 F. Supp. 838 (S.D.N.Y. 1991).

District Court for the Southern District of New York was asked to settle a defamation lawsuit arising out of the sale of stained glass artwork. The discussion of community in the case took shape as the court grappled with whether the plaintiff was a public figure.<sup>76</sup> The court recognized that the general population would not be concerned with the stained glass artwork of one artist.<sup>77</sup> However, the judge noted that to a community of art traders and scholars, the subject would be of great importance. Similarly, the reputations of historians and sellers would be equally valuable in that community.<sup>78</sup> In this discussion, the judge implied that the plaintiffs' reputations, while not injured in the eyes of the general public, could be harmed in their art community.<sup>79</sup> In the end, the court granted the museum's motion for summary judgment and dismissed the plaintiffs' defamation claims.<sup>80</sup> Even though the court discussed community within the context of plaintiff status, it drew attention to the concept of a sub-community for the purposes of defamation litigation.

In 1993, the same year as *McNally*, the U.S. District Court for the Eastern District of New York addressed the definition of community when the purported defamation comes in the form of a novel. After the publication of Oscar Hijuelos' novel *The Mambo Kings Play Songs of Love*, Gloria Parker, who appears in the novel as a "peripheral true-life character" sued for defamation.<sup>81</sup> Parker alleged in her lawsuit that she had been subject to ridicule in both the

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<sup>76</sup> *Id.* at 847.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* "Where, however, as here, the statements of Yarnall on the authenticity and value of works attributed to La Farge affect the market for and the tax implications of donating La Farge's works among the segment of the population that trades such works as well as the community of scholars with an interest in La Farge, such statements are of public import." *Id.*

<sup>80</sup> *Id.* at 853.

<sup>81</sup> *Parker v. Hijuelos*, 1991 WL 158976 (E.D.N.Y.).

entertainment community and the general community.<sup>82</sup> In its decision, the court discussed community as it applied to determining whether the passages within the novel were defamatory.<sup>83</sup> The court then determined after evaluating the passages in the eyes of “the average reader” that Parker could not have suffered harm in the eyes of the general community:

Thus, although a person may suffer some injury to his or her reputation among a particular constituency or localized community, no claim of defamation will lie unless the statements also would appear offensive to a substantial portion of the community at large.<sup>84</sup>

While the *McNally* court appeared ready to recognize sub-communities for the purpose of defamation law, only two months later in a neighboring jurisdiction, the *Parker* court was not willing to make such a finding, adding to the state of flux in defamation law.

The U.S. District Court for the District of Maryland also addressed the issue of sub-communities when it was asked to decide a case involving an insurance company, National Life, who sued Phillips Publishing, the publisher of an investment newsletter.<sup>85</sup> The issue arose when the court had to determine if the insurance company would be considered a public figure. The court, in its analysis, examined whether the company was “a prominent member of the community,” which the court defined as a limited audience who would come into contact with the alleged defamatory statements:

Here, [p]laintiff’s community is defined with respect to the specialized audience familiar with this controversy and who would be probable readers of the promotional materials and publications.<sup>86</sup>

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<sup>82</sup> *Id.* at 2.

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

<sup>84</sup> *Id.* at 3.

<sup>85</sup> *See Nat’l Life Ins. Co. v. Phillips Publ’g, Inc.*, 793 F. Supp. 627 (D. Md. 1992).

<sup>86</sup> *Id.* at 638.

In determining the specialized nature of the community, the court looked to the target audiences of the publications in question, which entailed not an inquiry into a geographic area but an inquiry into a specialized, professional community.<sup>87</sup> Among the members of the publications' target audiences, the court concluded that National Life had unquestionably attained a prominent status.<sup>88</sup> Unlike previous decisions, the *National Life* court combines the target audience of the publication – the investment community – with the recognition of a sub-community to ascertain its definition of community for the case.

A community defined by the boundaries of the profession was also recognized by the U.S. District Court for the District of New Mexico in its 1994 decision in *Lebya v. Renger*.<sup>89</sup> In the case, an anesthesiologist sued a physician and a physician's association, alleging that negative comments by the physician to other doctors and a hospital committee caused the anesthesiologist to be denied staff privileges at the hospital.<sup>90</sup> In its discussion, the court noted that at least one doctor testified he did not believe the anesthesiologist had a good reputation within the professional community.<sup>91</sup> The court noted that one doctor saying that another did not live up to the standards of the profession or have a good reputation within the community certainly had the potential to cause injury to reputation within such a community.<sup>92</sup> As a result, the court denied

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* “When the bald facts of Plaintiff's corporate size are coupled with its' press coverage, its' leadership in national insurance organizations, and its' extensive national advertising, National Life's prominence in this community is undisputed.” *Id.*

<sup>89</sup> 874 F. Supp. 1218 (D. N.M. 1994).

<sup>90</sup> *Id.* at 1219-1220.

<sup>91</sup> *Id.* at 1221. “The fourth statement came in response when Dr. Lewis was asked about whether Dr. Renger gave any impression as to what Dr. Leyba's reputation was in the community as an anesthesiologist.” *Id.*

<sup>92</sup> *Id.* at 1221-1222.

the defendant's motion for summary judgment on the defamation claim, finding that injury to reputation within the community could have occurred.<sup>93</sup>

### State Court Cases

State courts, too, have weighed in on the proper definition of community for the purposes of a defamation lawsuit. As far back as 1893, the Louisiana Supreme Court heard a case in which the plaintiff alleged that his daughter's reputation had been injured in their residential community.<sup>94</sup> Given that the lawsuit, like many during the years before the mass media, alleged that the defendant made defamatory statements in public about his daughter being seduced by a man in the community, it is not surprising that the residential community was the community chosen.<sup>95</sup> However, as mediums of mass communication became more pervasive, states began to take that into consideration more frequently in evaluating the proper scope of the community.

Exploring the U.S. Supreme Court's 1919 *Peck* decision, the Supreme Court of Oregon recognized in 1930 that a plaintiff need not prove that every member of the public thought less of his reputation after a defamatory comment.<sup>96</sup> In the case, the plaintiff sued the editor, publisher and printer of a Finnish-language newspaper that was widely circulated in Oregon, alleging an article in the newspaper called the plaintiff an agitator who was trying to disrupt the local union.<sup>97</sup> Quoting *Peck*, the Oregon court found that even though the plaintiff alleged that he had

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<sup>93</sup> *Id.* at 1228.

<sup>94</sup> See *Lester v. Corley*, 13 So. 467 (La. 1893). The Kansas courts have also used residential community as the community in which to determine whether actual injury to reputation occurred. See *Gobin v. Globe Publ'g. Co.*, 649 P.2d 1239, 1244 (Kan. 1982). "By the gambit followed here, plaintiff was able to claim and be awarded substantial damages for claimed harm to his innermost feelings, all the while preventing the jury from hearing and determining what his true reputation was in the community of his residence, and from determining whether the publication complained of damaged that reputation in the least." *Id.*

<sup>95</sup> *Id.* at 468.

<sup>96</sup> See *Reiman v. Pacific Development Society et. al*, 284 P. 575 (Ore. 1930).

<sup>97</sup> *Id.* at 576-577.

been “subjected to public hatred, contempt, or ridicule” that the word “public” need not be read to mean every member of the community.<sup>98</sup> Instead, the court said it was enough that the statement “obviously would hurt the plaintiff in the estimation of an important and respectable part of the community.”<sup>99</sup> Although cases involving publication in a newspaper were becoming more common, the Oregon court was still hesitant to recognize a larger community – outside the readers of the Finnish-language newspaper – or to require the plaintiff to prove injury to reputation in the eyes of a majority of the public in the geographic community.

In 2006, a Florida appellate court addressed the notion of a “substantial and respectable minority.”<sup>100</sup> *Rapp v. Jews for Jesus* dealt with a defamation lawsuit brought by the stepmother of an employee of a religious organization, whose newsletter and Web site claimed the Jewish stepmother had accepted Christian beliefs.<sup>101</sup> In addressing whether the statement was defamatory, the court opined that it must be looked at in the manner in which the average person in the community would view it.<sup>102</sup> Along those lines, the court looked to the Restatement (Second) of Torts, which says in a comment:

A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them. On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority. If the communication is defamatory only in the eyes of a minority group, it must be shown that it has reached one or more persons of that group. ... Although defamation is not a question of majority opinion, neither is it a question of the existence of some

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<sup>98</sup> *Id.* at 578.

<sup>99</sup> *Id.* (quoting *Peck v. Tribune Co.*, 214 U. S. 185 (1909)).

<sup>100</sup> *See Rapp v. Jews for Jesus*, 944 So.2d 466 (Fla. Dist. Ct. App. 2006).

<sup>101</sup> *Id.* at 462.

<sup>102</sup> *Id.* at 465.

individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent. The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them.<sup>103</sup>

The court then says, had it found a Florida court that adopted the Restatement position, the plaintiff's case might be allowed to continue.<sup>104</sup> However, because it had not, the plaintiff's defamation claim was dismissed.<sup>105</sup>

Along those lines, the Supreme Judicial Court of Massachusetts dealt with a 1974 case in which the plaintiff architect sued the publisher of a promotional newsletter after the newsletter listed another architecture firm as working on the project, statements the plaintiff believed were defamatory.<sup>106</sup> In deciding the case, the court noted that although the statements may have appeared innocent to members of the general public who came into contact with the brochure, the statements could still be actionable in the plaintiff architect's community.<sup>107</sup> Thus, because the plaintiff was alleging injury to professional reputation, the proper community in which to examine whether there was harm is that of professional architects.<sup>108</sup> Requiring otherwise would provide no protection to the plaintiff's professional reputation:

It would be anomalous at best if words clearly understood in a defamatory sense among that community should fail to be actionable merely because they would appear innocent to the general public.<sup>109</sup>

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<sup>103</sup> *Id* at 466 (quoting RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977)).

<sup>104</sup> *Id.* at 466.

<sup>105</sup> *Id.*

<sup>106</sup> *See* Sharratt v. Hous. Innovations, Inc., 310 N.E.2d 343 (Mass. 1974).

<sup>107</sup> *Id.* at 346.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Thus, the court looked to the target audience of the publication, which happened to also be the plaintiff's professional community, a sub-community of architects and real estate developers. Once again, a court has based the definition of community not on geographical boundaries but on professional affiliations.

The Oregon Supreme Court took a similar position when it opined that intraoffice dissemination of defamatory materials could be actionable.<sup>110</sup> In the case, a former supervisor sued a union steward for circulating materials implying that plaintiff was an alcoholic.<sup>111</sup> Citing the Kansas Court of Appeals, Oregon court wrote that protecting one's reputation in both the residential and occupational communities is at the heart of the defamation tort.<sup>112</sup> "An individual's interest in maintaining a good reputation in the business community to which the individual belongs is not modified by the individual's relationship to the defamer."<sup>113</sup> As a result, the court ruled that the plaintiff could have suffered injury to reputation within his work community that would be redressable in tort.

Although the Massachusetts court may have been willing to recognize a sub-community of professionals and the Oregon court allowed intra-office defamation claims to proceed, a state appellate court in Delaware would not recognize a distinct sub-community when the plaintiff was a prison inmate.<sup>114</sup> The defamation lawsuit was filed after a television station aired a

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<sup>110</sup> See *Wallulis v. Dymowski*, 918 P.2d 755 (Ore. 1996).

<sup>111</sup> *Id.* at 757. The Kansas courts have also recognized professional communities as being acceptable for determining defamatory meaning. In *Luttrell v. United Telephone Systems, Inc.*, the Kansas Court of Appeals opined "Certainly, damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside." 683 P.2d 1292, 1294 (Kan. App. 1984).

<sup>112</sup> *Id.* at 759 (quoting *Luttrell*, 683 P.2d at 1294).

<sup>113</sup> *Id.* at 760.

<sup>114</sup> See *Saunders v. Bd. of Directors, WHYY*, 382 A.2d 257 (Del. Super. Ct. 1978).

broadcast referring to the incarcerated plaintiff as an FBI informant.<sup>115</sup> In rejecting the plaintiff's claim for defamation, the court noted that defamation only protects a person from injury to reputation among "right-minded people."<sup>116</sup> Therefore, the court reasoned that although the broadcast may injure the plaintiff's reputation among the prison community, it would not be reduced in the eyes of the general public:<sup>117</sup>

However, it is not one's reputation in a limited community in which attitudes and social values may depart substantially from those prevailing generally which an action for defamation is designed to protect.<sup>118</sup>

In denying the plaintiff's right to protect his reputation within the prison community, the court also noted that the broadcast was made to a general audience, not specifically to the incarcerated community.<sup>119</sup> Much like the courts that refuse to acknowledge professional sub-communities, the *Saunders* court invalidated the plaintiff's sub-community claims by instead imposing upon him a larger community – the general community's television audience.

In 1986, a New York trial court dealt squarely with the issue of community in determining whether *Time* magazine was liable for defaming the plaintiff, an Orthodox Jewish rabbi, in *Weiner v. Time & Life Inc.*<sup>120</sup> Writing an article about anti-Semitic violence near Yeshiva University in New York City, *Time* quoted the rabbi as saying he removes his yarmulke when he drives.<sup>121</sup> The rabbi, who belongs to a small Orthodox sect in Upper Manhattan sued, alleging

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<sup>115</sup> *Id.* at 258.

<sup>116</sup> *Id.* at 259 (*quoting* both *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975); *Sharratt*, 310 N.E.2d at 343).

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 507 N.Y.S.2d 784, 785 (N.Y. App. Div. 1986).

<sup>121</sup> *Id.*

such statements were libelous.<sup>122</sup> The trial court refused to accept the plaintiff’s definition of community, saying it would be impossible to hold a national publication – whose audience spans the multitudes of race, ethnicity and religion – to a different standard in each community in which it published:

Libel is a warped mirror which gives back a grossly distorted picture of reality to those who view it. But if the mirror is to be deemed faulty, it must present a distorted view to those who gaze upon it squarely and with no eccentric perceptions or preconceptions. If the mirror gives back a fair reflection, it cannot be condemned because some few may think they see figures and shadows not perceived by most.<sup>123</sup>

The court noted that focusing on small enclaves inhibits our ability to see the bigger picture in context, examining how the published statements were viewed in the eyes of the majority of those who read them:<sup>124</sup>

While it is obvious that a person can only be injured in his community, i.e., with those who know him personally or by reputation, the corollary is also true that a person cannot be injured by the feelings of those he does not know and will never meet.<sup>125</sup>

As a contrast, the *Weiner* court compared the notion of community in defamation actions to that of community in obscenity, where the courts use a community standard without reference to a “unique or special minority” to determine whether expression is obscene.<sup>126</sup> As a result, the court rejected the plaintiff’s construction of community, saying his reputation cannot be judged based on the perceptions of only the small group of people who are familiar with him and his

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

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* “Like the remarkable ultra-magnified perspectives revealed by an electron microscope, a view which focuses wholly on the microcosm carries us away from recognizable reality to magnify imperfections into misshapen nightmare shapes and figures. A publication designed to reach a national audience cannot be judged by the standards of a unique and fractional segment of its total readership.” *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

strict religious beliefs.<sup>127</sup> Instead, the *Weiner* court judged the statement in the view of an ordinary *Time* reader and concluded it was not defamatory.<sup>128</sup> Once again, a court returned to looking at the distribution of a publication – this time a national magazine – instead of the plaintiff’s sub-community to assess injury to reputation.

The view in *Weiner* is one that has frequently been used by New York state courts to determine how to define community in defamation actions. In 1981, a New York appellate court held in *Fairly v. Peekskill Star Corp.* that the eccentricities of a small group cannot be used as the basis for community to make a determination on defamatory meaning.<sup>129</sup> The suit pitted the owners of a care facility against a newspaper, with the plaintiff alleging a newspaper story contained a defamatory statement about the proposed facility the owner planned to open.<sup>130</sup> The plaintiff also alleged that the description of him as a “social scientist” was both false and defamatory.<sup>131</sup> The court, however, in determining whether the statement was defamatory, ruled that although some may consider the term unflattering, a “substantial portion of the community” must recognize the words as subjecting the plaintiff to “public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.”<sup>132</sup> Instead, the court ruled the proper community

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 786.

<sup>129</sup> 445 N.Y.S.2d 156 (N.Y. App. Div. 1981)

<sup>130</sup> *Id.* at 156. “The article took the position that the planned facility would not meet State standards concerning the care of the mentally retarded and that a formal application had little chance for success.” *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 158 (*quoting* *Sydney v. Macfadden Newspaper Publ’g. Corp.*, 151 N.E. 209 (N.Y. 1926)).

is a larger, more mainstream community. “[T]he peculiarities of taste found in eccentric groups cannot form a basis for a finding of libelous inferences.”<sup>133</sup>

Like some of the federal courts had ruled in print defamation cases, the Superior Court of Delaware concluded that the proper community for a broadcast defamation case was defined by the geographic distribution area of the statements. In *Q-Tone Broadcasting Co. v. Musicradio of Maryland*, the court ruled on a motion to determine whether the plaintiffs were public figures.<sup>134</sup> In doing so, the court was required to ascertain the proper community and cited a Fourth Circuit decision for the proposition that community is “the area where the alleged defamation took place. Nationwide fame is not necessary.”<sup>135</sup> Thus, in *Q-Tone*, the court considered the proper community to lie in the geographic area in which the radio station’s broadcast signal could be heard.<sup>136</sup>

Place of publication was also a deciding factor in an Ohio appellate court’s determination of community. In *Waterson v. Cleveland State University*, a university police official sued the university for defamation after an editorial in the university newspaper claimed the official had a reputation for excessive use of force, racism and homophobia.<sup>137</sup> When determining whether the lower court erred in finding the plaintiff to be a public official, the appellate court discussed community in the context of plaintiff status.<sup>138</sup> The court reasoned that the audience to whom the

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<sup>133</sup> *Id.*

<sup>134</sup> 1995 WL 875438 (Del. Super. Ct.)

<sup>135</sup> *Id.* at \*5 (quoting *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1296 n. 22 (D.C. Cir. 1980)).

<sup>136</sup> *Id.* at \*6.

<sup>137</sup> 639 N.E.2d 1236 (Ohio Ct. App. 1994).

<sup>138</sup> *Id.* at 1239.

editorial was targeted was the proper community for the defamation action.<sup>139</sup> Thus, in the case at hand, community was defined as the Cleveland State University community.<sup>140</sup>

### **The Courts Look at Community: Online Defamation**

In their limited discussions of community, courts in online defamation cases have begun to look at community as a result of examining jurisdictional questions. For the most part, these courts are determining whether it is proper for the court to decide the merits of the case. *Wagner v. Miskin* is a prime example of a case in which the court discussed community in the context of answering a preliminary question about whether it has the authority to hear the case.<sup>141</sup>

In *Wagner*, the North Dakota Supreme Court was asked to determine whether the North Dakota courts had jurisdiction over Internet communications originating outside the state's borders "especially when [the comments were] not particularly and exclusively directed toward the State."<sup>142</sup> The 2003 case involved a University of North Dakota college student who had been stalking and harassing her professor using electronic communications. The professor sued and the state trial court awarded him \$3 million in damages for libel and intentional interference with business relationships.<sup>143</sup> In addressing its first Internet jurisdiction case, the North Dakota Supreme Court held that the communications were directly targeted toward that state.<sup>144</sup> The court looked at the Internet address, [www.undnews.com](http://www.undnews.com), as well as the subject matter – stories

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<sup>139</sup> *Id.* "Finally, the CSU community is the principal audience of the publication in which the editorial in question appeared, precisely the audience with the greatest interest in the performance of CSU police officers, including plaintiff." *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 660 N.W.2d 593 (N.D. 2003).

<sup>142</sup> *Id.* at 596.

<sup>143</sup> *Id.* at 595.

<sup>144</sup> *Id.* at 599. "Contrary to her assertion, we conclude from the record available to us that Miskin did particularly and directly target North Dakota with her website, specifically North Dakota resident John Wagner." *Id.*

and links about UND issues and staff – to make that determination.<sup>145</sup> Noting that the case primarily involved Internet communications, the court went on to reason that the student had physical connections to North Dakota during the communications as well: she was a state resident at one time, attended a state university, lived in campus housing and even used the school’s computer network for some of the communications.<sup>146</sup> Although the court did not explicitly examine community in the case, the factors it touches on as a part of its jurisdictional inquiry are similar to those other courts have addressed when defining community in traditional defamation cases.

Courts may also look at community as a part of the choice-of-law analysis. *Condit v. Dunne* is representative of this approach.<sup>147</sup> There, the U.S. District Court for the Southern District of New York was asked to decide whether the substantive defamation law of California or New York applied to the defamation action brought by former Congressman Gary Condit against *Vanity Fair* correspondent Dominick Dunne.<sup>148</sup> In the case, the court discussed several statements that appeared at Entertainment Tonight Online, an Internet celebrity gossip site.<sup>149</sup> Although the plaintiff alleges the defamatory statements led “millions of members of the public” to view him in disrepute, the court narrows in on a more select community when making the choice-of-law determination:

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> 317 F.Supp.2d 344 (S.D.N.Y. 2004).

<sup>148</sup> *See Condit*, 317 F. Supp.2d at 367.

<sup>149</sup> *Id.* “*ET Online* quotes defendant as stating that ‘Gary Condit rides with The Hell’s Angels as a motorcyclist, and repeats defendant’s original ‘theory’ that Ms. Levy was taken away on the back of a motorcycle as a favor to plaintiff.’” *Id.*

In general, to determine which state has the most significant interest in, or relationship to, the litigation, the Court should look chiefly to 'the parties' domiciles and the locus of the tort.'<sup>150</sup>

Noting that the locus of the tort is the location where the party was harmed, the court reasoned that when defamatory statements are published nationally, the plaintiff's injuries can also occur nationally.<sup>151</sup> To determine the proper jurisdiction, the court looked at where the plaintiff suffered the greatest injury, where the statements were published, where the authors and publishers reside and where the activities spoken about occurred.<sup>152</sup> The court concluded that California's interest in protecting the plaintiff outweighed New York's interest in protecting the speaker:

[N]one of the conduct about which defendant spoke took place in New York, and plaintiff has no specific connection to New York. Moreover, defendant's comments also have no specific connection to New York, except that defendant happened to be physically present in New York when he uttered the statements that were broadcast nationwide. Defendant, for example, did not speak to a New York audience or through a New York media outlet about a matter of national significance, other than at the New York dinner party. Instead, defendant repeatedly spoke to a national audience about circumstances related to a Congressman from California.<sup>153</sup>

Such an interest was tied to protecting the plaintiff's reputation where it likely suffered the greatest harm: in California, where he was formerly an elected representative.<sup>154</sup> Although this argument was made in a decision about jurisdiction, the same rationale may be applied to determine community in an online defamation case. For example, although online defamation

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<sup>150</sup> *Id.* at 352 (quoting *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999)).

<sup>151</sup> *Condit*, 317 F.Supp.2d at 353.

<sup>152</sup> *Id.* at 354.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* "As plaintiff was a Congressman, his reputation necessarily was a matter of national significance, but it mattered most in California where he had been elected to office, and where the people whom he represented resided." *Id.*

may injure a plaintiff's reputation internationally, the courts may decide to define community in terms of the location where the greatest injury occurred.

One court has taken a substantive look at community in an online defamation case. In *Rapp*,<sup>155</sup> Florida's Fourth District Court of Appeal refused to accept the plaintiff's construction of community when she sued after an organization's online newsletter reported she had surrendered her Jewish faith and accepted Christian beliefs – a statement she argued would injure her reputation in the eyes of many Jewish people.<sup>156</sup> There, the court ruled that the community to whom the statements had been published – a religious group who would have looked positively upon such statements – was the proper community to be used when determining whether a statement is defamatory.<sup>157</sup> Even though the plaintiff's amended complaint proved the Internet statement reached members outside the community, namely one of the plaintiff's relatives, the court refused to find the statement defamatory by relying on 'the common mind' rule.<sup>158</sup> Under Florida's common mind rule, the Florida court found a reasonable person would interpret the statements as having been conveyed in a positive, non-defamatory manner.<sup>159</sup> Thus, even though the Internet publication was accessible to one group who could interpret the words to be defamatory, the court looked specifically at the community to whom the communication was targeted. In doing so, the court ruled that Jews for Jesus – the target community for the newsletter and Web site – would not think less of the plaintiff based on the statements.

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<sup>155</sup> *See infra*.

<sup>156</sup> *See Rapp*, 944 So.2d at 465.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

## Conclusion

The American legal system has amassed a number of cases dealing with the definition of community in defamation actions. Some of the courts have drawn upon the language of the Restatement (Second) of Torts, utilizing its statements to determine how large a community must be and how many members must think less of the plaintiff for a cause of action to succeed. Others have followed the guidance of the U.S. Supreme Court in its limited discussions of community in *Peck* and *Milkovich*. And even others have ventured out on their own, carving out a particular definition of community that is appropriate to the case at hand – sometimes looking at the distribution of a publication or the cohesive nature of a sub-community.

Despite the amount of variance in how courts define community, certain trends have emerged in the jurisprudence. As a general rule, courts often look at one of three factors to determine proper community: where the defamatory statements were published, where the plaintiff resides or where the plaintiff works. Occasionally, courts may consider those factors in conjunction with other factors, including the size of the community or the mainstream acceptance of a sub-group, when trying to properly ascertain the community for a defamation action. As a result, defining community in cases has been a fairly fact-sensitive, ad-hoc decision.

Because defining community can be a fact-sensitive, ad-hoc decision, the courts have not crafted separate rules for online defamation cases. However, the nature of the Internet has already begun to play a role in these determinations of community. For example, courts dealing with online defamation cases are beginning to look at the potential for more widespread communication when deciding cases involving online defamation. Similarly, there seems to be recognition on the part of at least one court that the online community viewing a statement may be very different from the traditional community in which the plaintiff lives or works. Thus, it appears courts may be likely in online defamation cases to apply a variety of methods to define

community by balancing the multiple interests created by the facts. In general, though, most courts examining online defamation cases seem to be following principles developed in traditional print and broadcast defamation cases.

### **Geographic Area of Publication**

Several courts have looked at the site of publication to determine proper community in defamation actions. Several federal appellate courts – along with state courts in New York, Delaware and Ohio – have taken this approach, noting that the proper community can be determined based on the reach of a publication.<sup>160</sup> This approach takes into account the audience that may have come into contact with any defamatory statements, and it has been applied in cases involving newspapers, national magazines, radio stations and television stations.

### **Site of Plaintiff Residence**

A number of courts, including the Fourth and Seventh circuits, have used the community in which the plaintiff resides as guidance in constructing the notion of community in defamation cases. This view rests on the notion that one is most likely to have his reputation harmed in the community in which he resides. Some courts justify this approach by noting that one's reputation in the residential community is at the forefront of his identity. This view seems to come primarily from the Restatement (Second) of Torts.

### **Specialized or Professional Community**

Using a specialized setting – typically a sub-community or professional community – to define community is one of the tests that has become more popular among courts in recent years. Rooted in Justice Oliver Wendell Holmes' example of a medical doctor losing standing among

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<sup>160</sup> *See infra*.

his peers in the medical community,<sup>161</sup> this notion has largely developed in jurisprudence since the 1980s. Courts in Oregon and Kansas have followed this notion, emphasizing the importance of one's professional reputation within the workplace as well as his reputation within the residential community.<sup>162</sup> Other courts, including federal courts in New York and New Mexico, as well as state courts in Massachusetts and Oregon, have recognized sub-communities to define community in defamation actions. However, some state courts, including those in New York, Delaware and Florida, have explicitly rejected the use of sub-communities.

### **Mixed Methods**

Most often, it seems, even though courts may apply one method, they often weigh factors from a number of the methods to determine proper community. For example, a court may look at both where a person works and resides.<sup>163</sup> Or it may look both at a publication's target audience and how that overlaps with the plaintiff's community.<sup>164</sup> Thus, it seems the courts often use more than one gauge of the plaintiff's community in both traditional and online defamation cases, with one factor weighted more significantly given the facts of the case.

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<sup>161</sup> *Peck*, 214 U.S. at 190.

<sup>162</sup> *See infra*.

<sup>163</sup> *See infra*.

<sup>164</sup> *See infra*.

## CHAPTER 5 DEFINING PLAINTIFF STATUS

The public person/private person dichotomy plays an important role in defamation litigation. Courts may use a plaintiff's status to make several determinations critical to the litigation. First, the evaluation of the plaintiff's status determines the level of fault<sup>1</sup> he must prove to succeed in a defamation action. Second, courts may look to the plaintiff's status to determine his or her proper community. Finally, courts may again turn to the plaintiff's status when evaluating the proper level of damages. In any sense, the courts must determine the plaintiff's status before such important decisions can be made.

### **The Courts Look at Plaintiff Status: Print and Broadcast Defamation**

While the U.S. Supreme Court has addressed plaintiff status on numerous occasions, its jurisprudence provides overarching themes to serve as guidance for the lower federal courts. In its opinions, the Court has broken plaintiff status into three categories: public officials, public figures and private persons. As a result of these distinctions, plaintiffs may be required to prove defendants acted with varying levels of fault in order to succeed in their defamation lawsuits. Although the Court created three categories of plaintiffs, it did not provide bright-line rules for which plaintiffs should be placed in which categories. Thus, the notions of plaintiff status discussed by the Supreme Court are merely a starting point from which the lower courts begin their analysis.

### **U.S. Supreme Court**

The body of Supreme Court precedent on plaintiff status is a well-developed one, crafted by the Court in a series of six major cases. Although the Court initially constructed the public

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<sup>1</sup> This refers to whether a plaintiff must prove actual malice, which is the case with public officials and public figures, or negligence, which is the standard for some private-person plaintiffs. Black's Law Dictionary defines fault as "The intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person." *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

official category, which it linked with the actual malice standard of fault in *New York Times v. Sullivan*, the justices went on to carve out a public figure category as well as the remaining private person category. Through the years, the public figure category has grown to encompass three-subcategories of public figures: all-purpose, or general; limited purpose, or vortex; and involuntary public figures. All three types of public figures can be held to the actual malice fault standard in specific instances. The remaining category, the Court noted, contained private person, whom the justices said must prove negligence at a minimum. Although the Supreme Court carved out the categories in six major cases, the lower courts continue to flesh out the specifics of membership within the categories of plaintiff status.

### ***New York Times v. Sullivan: Public officials and actual malice***

In 1964, the U.S. Supreme Court brought defamation within the parameters of First Amendment protection in its landmark *New York Times v. Sullivan*<sup>2</sup> ruling, in which the Court held that public officials would be required to prove actual malice to succeed in a defamation action.<sup>3</sup> At the heart of the case was a one-page advertisement placed in the *New York Times*. The ad detailed the Alabama arrest of the Rev. Martin Luther King Jr. and implied that such law enforcement efforts were an attempt to quell the Civil Rights Movement. L.B. Sullivan, an elected city commissioner in Montgomery, Ala., filed suit against the *Times* as well as individuals listed as signatories of the advertisement, claiming that the ad had personally defamed him by speaking disparagingly of the city's police force. At the time, Alabama's libel statute did not require Sullivan to prove actual harm from the ad's publication. Additionally, because the advertisement contained minor factual errors, the *Times* could not rely on truth as a

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<sup>2</sup> For a thorough analysis of *New York Times v. Sullivan*, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1992).

<sup>3</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment requires public officials prove actual malice to prevail in libel lawsuits against media defendants concerning matters of public importance).

defense under Alabama law.<sup>4</sup> At trial, Sullivan was victorious, winning a \$500,000 judgment<sup>5</sup> against the news organization.

On appeal to the Alabama Supreme Court, Sullivan again prevailed, with the state's high court affirming the trial judge's ruling and the final verdict.<sup>6</sup> The Alabama court noted that the jury could have rightfully inferred that the statements were "of and concerning" Commissioner Sullivan and that the verdict was not excessive based on the possible inference of malice that could be taken from the *Times*' failure to correct misstatements in the advertisements.<sup>7</sup> Having lost its appeal to the state Supreme Court, the *New York Times* petitioned the U.S. Supreme Court for a writ of certiorari, which was granted in 1964.<sup>8</sup>

The Supreme Court ruled 9-0 that Sullivan could not rely on Alabama's strict liability libel statute to prevail in a civil lawsuit against the New York Times Company for the political advertisement, which ran in the newspaper.<sup>9</sup> The state law, requiring no proof of fault or falsity, did not provide the protection required by the First Amendment, according to Justice William

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<sup>4</sup> The Supreme Court opinion noted with detail the manner in which the verdict was rendered: "The trial judge submitted the case to the jury under instructions that the statements in the advertisement were 'libelous per se' and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made 'of and concerning' respondent. The jury was instructed that, because the statements were libelous per se, 'the law . . . implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'" *Sullivan*, 376 U.S. at 262.

<sup>5</sup> A \$500,000 judgment in 1962 would be the equivalent to a judgment of more than \$3.4 million in 200. *See* Federal Reserve Bank of Minneapolis, *What a Dollar is Worth*, <http://www.minneapolisfed.org/research/data/us/calc/> (last visited July 25, 2007).

<sup>6</sup> *See* 144 So.2d 25 (Ala. 1962).

<sup>7</sup> *See id.*

<sup>8</sup> *See* 371 U.S. 946 (1964).

<sup>9</sup> Too see a copy of the advertisement, *see* LEWIS, *supra* note 2.

Brennan’s majority opinion.<sup>10</sup> Noting that democracy requires citizens to be able to discuss political and social issues, Brennan wrote:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>11</sup>

Brennan noted that criticism of government officials can not lose its protection merely because it may endanger the officials’ reputations.<sup>12</sup> Instead, Brennan wrote, criticism of government officials is at the very heart of American government.<sup>13</sup> Noting the immunity that states provide their highest officials engaged in critical commentary, Brennan wrote that it would be only logical to extend such protection to citizens in the role of government critic.<sup>14</sup> Thus, public officials would be required under the Constitution to prove actual malice in order to recover damages for defamation – the presumption of malice, or reckless disregard for the truth,<sup>15</sup> would not be constitutional.<sup>16</sup>

With its ruling in *Sullivan*, the Supreme Court dramatically changed the law of defamation in the United States, indicating that in the future, public officials would be required to prove fault

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<sup>10</sup> *Sullivan*, 376 U.S. at 264. “We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.” *Id.*

<sup>11</sup> *Id.* at 270.

<sup>12</sup> *Id.* at 273

<sup>13</sup> *Id.* at 274.

<sup>14</sup> *Id.* at 283.

<sup>15</sup> Black’s Law Dictionary defines “actual malice” as “Knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true.” *See* BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>16</sup> *Sullivan*, 376 U.S. at 284.

and falsity to prevail in a defamation action against media defendants.<sup>17</sup> Once the Court raised the burden on public official plaintiffs in libel cases, it would only be a short time before it commented on libel plaintiffs who were not considered public officials but had ascertained a certain level of societal prominence.

### ***Curtis Publishing v. Butts*: A standard for public figures**

Within three years of *Sullivan*, public figures would also essentially be required to prove actual malice.<sup>18</sup> In the companion cases of *Curtis Publishing v. Butts* and *Associated Press v. Walker*, the Supreme Court recognized a second set of defendants who would be required to prove ‘reckless disregard’ to succeed in a libel case. These public figures, as the Court termed them, would be treated much like *Sullivan*’s public officials.

In *Butts*, former University of Georgia football coach and current university athletics director Wally Butts sued the publisher of the *Saturday Evening Post* alleging that it defamed him by reporting he conspired with coaching legend Bear Bryant to fix a game between his Georgia Bulldogs and Bryant’s Crimson Tide of Alabama.<sup>19</sup> Butts, whose salary was paid by an alumni fund, could not be considered a public official under *Sullivan*. However, the Court noted that by extension, the privilege announced in *Sullivan* could be expanded to protect defamatory criticism of nonpublic persons who “are nevertheless intimately involved in the resolution of

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<sup>17</sup> *Id.* at 279-280. “The constitutional guarantees require, we think, a federal rule that prohibits a public official 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.” *Id.*

<sup>18</sup> *See e.g.*, *Curtis Publ’g v. Butts*, *Associated Press v. Walker*, 388 U.S. 130 (1967) (holding that the U.S. Constitution requires a public figure prove recklessness to succeed in a defamation action regarding a matter of public concern).

<sup>19</sup> Among the passages in the article were two particularly striking paragraphs. “Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one.” *Id.* at 136. “The chances are that Wally Butts will never help any football team again. ... The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure.” *Id.* at 137.

important public questions or, by reason of their fame, shape events in areas of concern to society at large.”<sup>20</sup> Thus, the public figure was born.

Public figures, the court said, can play as important of a role in shaping society as public officials.<sup>21</sup> As a result, the Court was unwilling to differentiate between such situations on the “assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials.”<sup>22</sup> Quoting the Declaration of Independence, the justices noted that communicating information of a public concern was an “unalienable right.”<sup>23</sup> Libel actions involving public figures are far more akin to those involving public officials than they are to those pursued by private people, and as a result, the Court extended the constitutional protections of actual malice to those being sued by public figures as well.<sup>24</sup>

A plaintiff does not become a public figure based on the actions of the defendant, who would then be creating his or her own defense, in essence. In *Hutchinson v. Proxmire*, the U.S. Supreme Court found Ronald Hutchinson, a university professor, to be a private person despite the amount of publicity he got after William Proxmire, a Wisconsin senator, awarded him a “Golden Fleece” award.<sup>25</sup> The award, given monthly by Proxmire, was designed to put the

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<sup>20</sup> *Id.* at 164.

<sup>21</sup> *Id.* at 145. “In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.” *Id.*

<sup>22</sup> *Id.* at 148 (*quoting* Pauling v. Globe-Democrat Publ’g Co., 362 F.2d 188, 196 (8th Cir. 1966)).

<sup>23</sup> *Curtis Publ’g*, 388 U.S. at 149.

<sup>24</sup> *Id.* at 150. “We consider and would hold that a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.*

<sup>25</sup> 443 U.S. 111, 114 (1979) (holding that a university professor was not a public figure in a defamation action based on the press interest in the case or because of an interest in public spending of taxpayers’ money to fund his grant).

spotlight on wasteful government spending, and the federal agencies selected were chosen based on grant aid they contributed toward Hutchinson's research on aggression in animals.<sup>26</sup> After publishing a statement in the *Congressional Record*, Proxmire also included mention of the "Golden Fleece" in his newsletter and press release.<sup>27</sup> Proxmire even discussed Hutchinson's grant-funded research on television, although he did not mention Hutchinson's name.<sup>28</sup> Both the U.S. District Court for the District of Wisconsin and the Seventh Circuit decided that Hutchinson was a public figure.<sup>29</sup> Hutchinson appealed, and the U.S. Supreme Court granted certiorari.<sup>30</sup>

Before the Supreme Court, Proxmire's attorney argued that Hutchinson was a limited-purpose public figure<sup>31</sup> with regard to the public money he received to pursue his research.<sup>32</sup> He based this argument on the fact that local newspapers reported on Hutchinson's successful application for funds and that Hutchinson had access to the media to respond to the "Golden Fleece" announcement.<sup>33</sup> However, the Court was not persuaded that these two factors alone would transform Hutchinson from a private person into a limited-purpose public figure:

On this record, Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden

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<sup>26</sup> *Id.* at 114-115. At the heart of the lawsuit is a comment published by Proxmire in the *Congressional Record*. "It is time for the Federal Government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer." *Id.* at 116.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See 431 F. Supp. 1311, 1327 (D.Wis.1977); 579 F.2d 1027 (7th Cir. 1978).

<sup>30</sup> *Hutchinson*, 443 U.S. at 122.

<sup>31</sup> A limited-purpose public figure is "a person who, having become involved in a particular public issue, has achieved fame or notoriety only in relation to that particular issue." See BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>32</sup> *Hutchinson*, 443 U.S. at 134-135.

<sup>33</sup> *Id.* at 135.

Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.<sup>34</sup>

The Court noted that instead of pointing to a specific controversy, the defendants claimed the generic interest in overseeing the expenditure of public money – a subject on which Hutchinson sought no notoriety.<sup>35</sup> If that alone were enough to raise someone to the level of a public figure, the Court reasoned, there would be an unlimited number of researchers and professors in such a category.<sup>36</sup> Furthermore, the Court noted that Hutchinson’s access to the media was limited to responses about the “Golden Fleece” and that he did not have the type of extended and continuous access that is “one of the accouterments of having become a public figure.”<sup>37</sup>

### ***Rosenbloom v. Metromedia* and *Gertz v. Welch*: The standard for private persons**

The next logical step following *Sullivan* and *Butts* was to address the application of actual malice to private persons. Initially, the Supreme Court attempted to clarify standard of fault in some cases involving private persons, when it ruled in *Rosenbloom v. Metromedia*.<sup>38</sup> The case involved a magazine publisher who sued a radio station after the station repeatedly broadcast that the petitioner was arrested for possession of obscene literature, which the police had seized from his business.<sup>39</sup> Although the broadcasts did not mention Mr. Rosenbloom by name, they instead referred to him as a “girliebook peddler” and as being involved in a “smut literature racket.”<sup>40</sup>

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<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 136.

<sup>38</sup> See *Rosenbloom*, 403 U.S. at 29 (holding that private persons must prove actual malice by clear and convincing evidence in defamation actions concerning matters of public importance).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

The trial jury found for Rosenbloom, awarding him general damages in the amount of \$25,000 and punitive damages of \$725,000, reduced to \$250,000 by the court.<sup>41</sup>

After the state's high court reversed, holding that *New York Times* actual malice was the proper standard to be applied to the defendant, the U.S. Supreme Court granted a writ of certiorari.<sup>42</sup> The plaintiff in *Rosenbloom* was neither a public official nor public figure, which would have required a showing of actual malice.<sup>43</sup> Instead, the defamatory remarks made about him occurred in the discussion of a subject he conceded to be of public interest.<sup>44</sup> In holding that private plaintiffs must, by clear and convincing evidence prove actual malice, in cases where the matter is once of public importance, a plurality<sup>45</sup> of the Court applied the *New York Times* standard to private plaintiffs in a limited set of circumstances.<sup>46</sup>

In *Rosenbloom*, the plurality wrote that some issues may be important enough to the public that a showing of actual malice would be justified to ensure that speech on such subjects would not be chilled by the imposition of a lesser fault standard. These issues of public importance, or matters of public concern, were at the core of speech protected by the First Amendment.<sup>47</sup> The Court returned to *Thornhill v. Alabama*<sup>48</sup> to support its decision. There, it noted:

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 40.

<sup>44</sup> *Id.*

<sup>45</sup> Justice Brennan authored an opinion in which Justices Blackmun and Burger joined. Justices Black and White also concurred in judgment, completing a majority of the Court for the judgment but not for the reasoning. Justice Harlan authored a dissenting opinion and Justice Marshall authored a dissenting opinion in which Justice Stewart joined. Justice Douglas took no part in the case.

<sup>46</sup> *Id.* at 29.

<sup>47</sup> *Id.* at 41. "Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government." *Id.*

<sup>48</sup> 310 U.S. 88 (1940).

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.<sup>49</sup>

Justice Brennan, writing for the plurality, foresaw the difficulties that may arise in determining whether a person was public or private, instead wishing to rely on whether the nature of the discussion was a matter of public concern, as envisioned in *Thornhill*.<sup>50</sup> This view, Brennan concluded, required that myriad issues be considered of public concern, pointing to the Court's decisions in *Butts* and *Walker* as two cases that concerned dramatically different matters of public concern: fixing a sporting event and leading a charge against federal agents.<sup>51</sup> Thus, he wrote:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.<sup>52</sup>

*Rosenbloom*'s plurality opinion was short-lived, however, and the Court quickly readdressed the private person issue during its 1973-1974 term, when the justices decided *Gertz v. Welch*. The 7th Circuit case pitted the John Birch Society and *American Opinion* magazine against Elmer Gertz.<sup>53</sup> Gertz, a prominent Chicago attorney was hired by a family to represent them in their lawsuit against a police officer who had killed their son.<sup>54</sup> Because of this, an article in

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<sup>49</sup> *Thornhill*, 310 U.S. at 102 (holding unconstitutional an Alabama law that made picketing a criminal offense). In the case, Bryon Thornhill had been convicted of loitering and picketing in Tuscaloosa County, Alabama. The Supreme Court, finding no clear and present danger arising from his activity, overturned his conviction.

<sup>50</sup> *Rosenbloom*, 403 U.S. at 42. "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.* at 43.

<sup>51</sup> *Id.* at 42.

<sup>52</sup> *Id.* at 43.

<sup>53</sup> *See Gertz*, 418 U.S. at 323.

<sup>54</sup> *Id.* at 326.

*American Opinion* labeled Gertz as a “Leninist” and “Communist-fronter,” based on his litigation against law enforcement.<sup>55</sup> As a result, Gertz sued, seeking compensation for harm to his reputation.<sup>56</sup> Relying on *Sullivan* and *Rosenbloom v. Metromedia*,<sup>57</sup> the Court of Appeals affirmed the district court’s ruling based on a finding that Gertz had not shown sufficient evidence of any actual malice on the part of the editors of *American Opinion*.<sup>58</sup>

The Supreme Court granted certiorari and voted 5-4 to reverse the 7th Circuit, whose opinion was written by then-Judge John Paul Stevens.<sup>59</sup> In doing so, the Court concluded that private persons, such as Elmer Gertz, need not prove actual malice as established in *Sullivan*, *Butts* and *Rosenbloom*.<sup>60</sup> Justice Powell, writing for the majority, rebuked Justice Brennan’s assertion that deciding whether a matter was of public concern was easier than deciding whether a plaintiff was a public person. Powell wrote for the Court:

But this approach (in *Rosenbloom*) would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.<sup>61</sup>

In providing more protection for private persons, Justice Powell asserted that private persons, unlike public officials and public figures, don’t have the same means of redress to

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Rosenbloom*, 403 U.S. at 29.

<sup>58</sup> *Gertz*, 418 U.S. at 331-332.

<sup>59</sup> *Id.* at 333.

<sup>60</sup> *Id.* at 351-352.

<sup>61</sup> *Id.* at 343-344.

counteract damage to reputation.<sup>62</sup> Public officials and public figures have greater access to the media and have opened themselves up to criticism based on the highly public nature of their lifestyles.<sup>63</sup> In the case of private persons, however, the state has a much greater interest in protecting them from reputational injury.<sup>64</sup> To do so, states may rely on any standard of fault that rises above strict liability.<sup>65</sup> The *Gertz* majority did leave open the possibility that individual states could constitutionally require even private plaintiffs to prove actual malice in order to succeed in a defamation action.<sup>66</sup> Under *Gertz*, though, actual malice must still be proven for a private person to recover punitive damages.<sup>67</sup>

*Gertz* left unanswered the question of the appropriate fault standard for private persons defamed during the discussion of a private matter. That question, presented squarely to the Court in *Dun & Bradstreet v. Greenmoss Builders*,<sup>68</sup> was answered in a manner that provided more protection to private plaintiffs seeking to protect their reputations on private matters. In ruling that a private person need not prove actual malice in order to recover in a defamation lawsuit over a purely private matter, Justice Louis Powell reasoned that the same balance used in *Gertz* – the state’s interest in protecting reputation versus the First Amendment interest in protecting expression – would be appropriate in *Dun & Bradstreet*.<sup>69</sup> In balancing those interests, the Court

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 343-345.

<sup>64</sup> *Id.* at 344.

<sup>65</sup> *Id.* at 347-348.

<sup>66</sup> *Id.* at 348-350.

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

<sup>68</sup> See *Dun & Bradstreet*, 472 U.S. 749 (1985) (holding that a private person need not prove actual malice to recover presumed or punitive damages in a defamation action involving purely private matters).

<sup>69</sup> *Id.* at 757.

concluded that the state's interest was "strong and legitimate."<sup>70</sup> However, in *Dun & Bradstreet*, the First Amendment interest was found to be substantially lower than in *Gertz* given the private nature of the speech.<sup>71</sup> As a result, the common law rule allowing the award of presumed and punitive damages without a showing of actual malice was upheld.<sup>72</sup>

After *Dun & Bradstreet*, the Supreme Court established one more hurdle for private plaintiffs, requiring them to prove falsity in addition to fault in lawsuits against media defendants where the matter was an issue of public concern.<sup>73</sup> In *Philadelphia Newspapers v. Hepps*, the Court heard a case in which Maurice Hepps, a private person sued after the newspaper reported Hepps had links to organized crime.<sup>74</sup> On appeal to the Pennsylvania Supreme Court, the court interpreted *Gertz* to mean that although Hepps must prove fault, he need not prove falsity to recover.<sup>75</sup> The newspaper appealed and the U.S. Supreme Court granted certiorari to decide if the Constitution required a showing of fault by private plaintiffs defamed during the discussion of matters of public concern.<sup>76</sup>

The Supreme Court reversed the state supreme court's decision, holding that the private plaintiff was required to show falsity to recover damages in a defamation suit against a media defendant where the issue is a matter of public concern.<sup>77</sup> The Court reasoned that such a

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<sup>70</sup> *Id.* (quoting *Gertz*, 418 U.S. at 348).

<sup>71</sup> *Dun & Bradstreet*, 472 U.S. at 757-761.

<sup>72</sup> *Id.* at 761.

<sup>73</sup> See *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767 (1986) (holding that private figures must prove falsity to recover from a media defendant if the defamatory statement stemmed from an issue of public concern).

<sup>74</sup> *Id.* at 769.

<sup>75</sup> See 485 A.2d 374, 379 (Penn. 1984).

<sup>76</sup> *Hepps*, 475 U.S. at 769.

<sup>77</sup> *Id.* at 776-777.

decision would protect important speech on public issues as mandated by the requirements of the First Amendment.<sup>78</sup> Allocation of such a burden to the plaintiff is justified, the Court said, to prevent a chilling effect on speech.<sup>79</sup> Such a burden is not unreasonable given that a private plaintiff must already prove actual malice in cases involving matters of public concern.<sup>80</sup> As a result of *Gertz* and *Hepps*, private plaintiffs suing for defamation stemming from a matter of public concern must prove both fault and falsity.

The Supreme Court framework for defamation has taken on a complex structure.<sup>81</sup> As it stands today, public officials and public figures, as well as private plaintiffs seeking punitive damages, must prove actual malice in order to recover in a defamation action. Private plaintiffs who merely seek to recover actual and compensatory damages need prove only the level of fault established by state law, which can range from actual malice to any level of fault greater than strict liability. Such a setup has created both a constitutional framework and state-law framework in which defamation lawsuits must be argued.

### **The Lower Courts and Plaintiff Status**

Although the Supreme Court has provided much of the framework needed to determine plaintiff status, lower courts have been left to the day-to-day decisions. Thus, the determinations

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<sup>78</sup> *Id.* “To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.” *Id.*

<sup>79</sup> *Id.* at 778.

<sup>80</sup> *Id.*

<sup>81</sup> The Court summarized the structure in *Hepps*. “When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.” *Id.* at 775.

of which plaintiffs fall into the categories of public official, public figure and private person are hashed out regularly in cases across the country. Similarly, the determination of which matters are of public concern and which are not is routinely made as cases come up for trial. Although many of these issues are resolved by stipulation in some cases, they are often issues central to the litigation in other cases. Thus, the role of the lower courts in setting such precedent is an important one.

### **Public officials**

Determining whether a plaintiff is a public official is likely the simplest inquiry for the courts. Guided by the Supreme Court's general discussion in *Sullivan* that judges, government officials and elected commissioners fall within such a category,<sup>82</sup> the lower courts have gone on to address the issue dealing with government employees at all levels, including international officers, national officers, state officers and even municipal employees.<sup>83</sup> As a result, the category of public official has grown somewhat based on determination by lower courts that certain plaintiffs have taken on the role of public officials and therefore should be subject to the actual malice standards.

Officials in public education are often considered to be public figures.<sup>84</sup> Members of local school boards have been held to be public officials. In *Garcia v. Board of Education of Socorro Consolidated School District*, the Eleventh Circuit ruled that school board members suing the

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<sup>82</sup> *Sullivan*, 376 U.S. at 273. "If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners." *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

<sup>83</sup> *See, e.g.*, *Varanese v. Gall*, 518 N.E.2d 1177 (Ohio 1988) (applying the actual malice standard of *New York Times Co. v. Sullivan* to an Ohio public official's state-law defamation claim); *Sullivan*, 376 U.S. at 264 (ruling that a municipal public official must prove actual malice to succeed in a defamation claim).

<sup>84</sup> *Cf., e.g.*, *Kumaran v. Brotman*, 617 N.E.2d 191, 200 (Ill. App. 1993) (holding that a frequent substitute teacher was a private person for a defamation lawsuit); *Nodar v. Galbreath*, 462 So.2d 803, 808 (Fla. 1984) (holding that a high school English teacher was not a public official for the purposes of a slander lawsuit).

school superintendent for defamation were public officials and, as a result, must prove actual malice to recover on their claims.<sup>85</sup> The appellate court turned to the U.S. Supreme Court's decision in *Rosenblatt v. Baer*, in which the Court said the:

‘public official’ designation applies at the very least to 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 governmental affairs.<sup>86</sup>

Despite the board members’ various arguments, including that they were not school employees, did not get paid and were merely local, the appellate court found they qualified as public officials.<sup>87</sup> Citing a long list of cases in which court had found elected officials to be public officials, the appellate court noted that public education is “among the utmost importance to a community, and school board policies are often carefully scrutinized by residents.”<sup>88</sup>

Additionally, the court noted that the public has a strong interest in evaluating their job performance, which weighs in favor of considering them to be public officials.<sup>89</sup>

Similarly, the U.S. District Court for the District of Minnesota held an elementary school principal to be a public official.<sup>90</sup> Shirley Johnson, the principal of a Minneapolis area public school sued after a group of parents wrote a letter to the school board stating:

All of these things show me that Shirley Johnson is not a good administrator. She cannot handle the job. In addition to not being able to do the job, she has introduced prejudice to the children and faculty. She should not be whining about her skin color. Her inability to be a principal has caused more harm to Meadow Lake school and its population than her skin color.<sup>91</sup>

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<sup>85</sup> 777 F.2d 1403 (11th Cir. 1985).

<sup>86</sup> *Id.* at 1408 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

<sup>87</sup> *Garcia*, 777 F.2d at 1408.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See *Johnson v. Robbinsdale Ind. Sch. Dist.*, 872 F. Supp. 1439 (D. Minn. 1993).

<sup>91</sup> *Id.* at 1441.

The defendants moved for summary judgment, arguing that the principal was a public official under Minnesota law and had not proven actual malice.<sup>92</sup> The district court, interpreting Minnesota law, noted the state supreme court's intention to broadly define public figures.<sup>93</sup> In *Hirman v. Rogers*,<sup>94</sup> the Minnesota Supreme Court wrote that any government employees who "perform governmental duties, directly related to the public interest, are public officials."<sup>95</sup> Because the issue was one of first impression in Minnesota, the district court looked to other jurisdictions for guidance, noting a distinct split.<sup>96</sup> Because Minnesota courts had ruled that education was a matter of public importance, the district court, noting the favored position to broadly construe public official designations, ruled that an elementary school principal was a public official under Minnesota law.<sup>97</sup>

The courts have considered some professors at the university level to be public officials as well.<sup>98</sup> In *Grossman v. Smart*, the U.S. District Court for the Central District of Illinois held that a professor of law who chaired a search committee, along with the Graduate College's vice

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1442.

<sup>94</sup> 257 N.W.2d 563, 566 (Minn. 1977).

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.,* Palmer v. Bennington School District, Inc., 615 A.2d 498, 501 (Vt. 1992) (elementary school principal is a public official); Kapiloff v. Dunn, 343 A.2d 251, 258 (Md. 1975) (high school principal is a public official), *cert. denied*, 426 U.S. 907 (1976); State v Defley, 395 So.2d 759, 761 (La. 1981) (school supervisor is a public official); Reaves v. Foster, 200 So.2d 453, 456 (Miss.1967) (high school principal is a public official); Junior-Spence v. Keenan, 1990 WL 17241, \*4 (Tenn. Ct. App.1990) (high school principal is a public official). *Cf. Kumaran*, 617 N.E.2d at 200 (frequent substitute teacher was a private person); *Nodar*, 462 So.2d at 808 (high school English teacher was not a public official), *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992) (high school principal is not a public official), *cert. denied*, 507 U.S. 1025 (1993); *McCutcheon v. Moran*, 425 N.E.2d 1130, 1131 (Ill. App. 1981) (public school principal's relationship to conduct of government is too remote to justify public official designation).

<sup>97</sup> *Johnson*, 827 F. Supp. at 1443. "Thus, the court holds that public school principals criticized for their official conduct are public officials for purposes of defamation law. A contrary holding would stifle public debate about important local issues." *Id.*

<sup>98</sup> *See e.g.,* Grossman v. Smart, 807 F. Supp. 1404 (C.D. Ill. 1992) (holding that a vice chancellor of research and a professor of agriculture law were public officials while an assistant professor of law was not).

chancellor of research, who served as a grievance officer as well, were public officials.<sup>99</sup> In making such a decision, the judge ruled that one does not have to be at the top of the bureaucracy to have the authority necessary to impact government action.<sup>100</sup> Along those lines, however, the court found that an assistant professor of law, who had no role in making decisions before or after his hiring at the University of Illinois, was not a public official.<sup>101</sup> Thus, it seems members of a university faculty may not automatically attain public official status.<sup>102</sup>

Members of law enforcement have often been considered public officials by the courts.<sup>103</sup> The U.S. District Court for the District of Columbia held a Secret Service agent charged with the protection of former president Gerald Ford to be a public figure.<sup>104</sup> Larry Buendorf sued National Public Radio after a newscaster erroneously implied that he was homosexual.<sup>105</sup> Citing the Seventh Circuit's decision in *Meiners v. Moriarty*,<sup>106</sup> the district court ruled that Buendorf was a public official based on his authority to use force as a federal law enforcement officer.<sup>107</sup>

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<sup>99</sup> *Id.* at 1408.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See also* Woodruff v. Ohman, 29 Fed. Appx. 337 (6th Cir. 2002) (holding that a post-doctoral research assistant was not a public official). "Since a post-doctoral research assistant does not affect the lives, liberty, and property of citizens, and since Woodruff did not control government affairs and was instead in one of the countless public positions that have little direct impact on citizens' lives, the district court's determination that Woodruff was a public official is erroneous." *Id.* at 348.

<sup>103</sup> *See, e.g.,* Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); *St. Amant*, 390 U.S. at 730; Henry v. Collins, 380 U.S. 356 (1965); Cibenko v. Worth Publishers, 510 F. Supp. 761, 765 (D. N.J. 1981); Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6, 16 (Pa. Super. Ct. 1982).

<sup>104</sup> *See* Buendorf v. National Public Radio, Inc., 822 F. Supp. 6 (D. D.C. 1993).

<sup>105</sup> *Id.* at 7-9.

<sup>106</sup> 563 F.2d 34, (7th Cir. 1977) (holding that federal agents were public officials for defamation purposes).

<sup>107</sup> *Buendorf*, 822 F. Supp. at 10-11. "Mr. Buendorf's qualifications and performance are of interest to the public in an important and special way-because his assigned duties could affect an individual's personal freedom." *Id.*

Municipal law enforcement officers have also been found to be public officials. The Tenth Circuit found a municipal policeman in a small Wyoming town to be a public official for the purposes of a defamation action.<sup>108</sup> In *Coughlin v. Westinghouse Broadcast & Cable*, the Third Circuit ruled that a police officer in a major metropolitan area was a public figure for the purposes of a defamation action.<sup>109</sup> The Philadelphia police officer sued a television station after it broadcast a segment implying that he had accepted a bribe while showing clandestine video of him exiting an “after-hours” club while on duty carrying an envelope.<sup>110</sup> To support its ruling affirming the district court’s finding that Coughlin was a public official, the appellate court referred specifically to the lower court ruling.<sup>111</sup> Citing a string of cases, the district court held that police officers have consistently been found to be public officials because of their position of authority:

The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.<sup>112</sup>

Using that reasoning, the Tenth Circuit held that a retired FBI agent could be considered a public official.<sup>113</sup> In *Revell v. Hoffman*, the former Associate Deputy Director of the FBI, who

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<sup>108</sup> See *Gray v. Udevitz*, 656 F.2d 588 (10th Cir. 1981).

<sup>109</sup> 780 F.2d 340 (1986).

<sup>110</sup> *Id.* at 341.

<sup>111</sup> *Id.* at 324.

<sup>112</sup> *Coughlin v. Westinghouse Broad. & Cable*, 607 F. Supp. 377, 385-386 (E.D. Pa. 1985) (quoting *Gray*, 656 F.2d, at 591).

<sup>113</sup> The U.S. District Court for the District of Minnesota has also held that an FBI agent was a public official. See *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988) (holding that an FBI agent who sued a publisher for a book discussing the conduct of FBI agents in investigating the murder of Native Americans was a public official required to prove actual malice).

had spent 30 years with the agency, sued David Hoffman, an author whose books contained statements about Revell's employment with the agency.<sup>114</sup> Looking to its 1981 decision in *Gray v. Udevitz*,<sup>115</sup> the appellate court concluded that Revell retained his status as a public official,<sup>116</sup> noting:

That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*.<sup>117</sup>

Thus, even a law enforcement officer no longer active in law enforcement maintains his public official status related to that employment for an undetermined amount of time so long as the matter remains in the public's interest.

Similarly, in *Hatfill v. New York Times Co.*, the U.S. District Court for the Eastern District of Virginia ruled that a former government employee who was now in the private sector could still be considered a public official with regard to activities associated with the government.<sup>118</sup> Steven Hatfill, who had been employed in various roles with the United States government and had an extensive knowledge on bioterror issues, sued the *New York Times*, alleging a column implied that he was involved in the deadly 2001 anthrax mailings.<sup>119</sup> Shortly before the anthrax mailings, Hatfill's security clearance was revoked and he was terminated from his job at one of

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<sup>114</sup> 309 F.3d 1228 (10th Cir. 2002).

<sup>115</sup> 656 F.2d 588 (10th Cir. 1981) (holding that a police officer in a town of 30,000 people was a public official).

<sup>116</sup> *Cf. Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) (holding that a former public official and candidate for public office was no longer a public official for defamation purposes). "It is true that plaintiff had been a public official for a time and had been a candidate for public office. Yet these public activities had nothing to do with the reference to Richard Ryder in the essay and, in any case, those activities were no longer engaged in by plaintiff." *Id.* at 826.

<sup>117</sup> *Id.* at 1232-1233 (quoting *Gray*, 656 F.2d at 591).

<sup>118</sup> 2007 WL 404856 (E.D. Va. 2007).

<sup>119</sup> *Id.* at \*1-3.

the top government contractors.<sup>120</sup> He was then employed by Louisiana State University to work on a government-funded project.<sup>121</sup> Relying on the notion that a person can be a public official if he has “substantial responsibility for or control over the government affairs,” the judge reasoned that someone need not be an official government employee to be considered a public official.<sup>122</sup>

In making that decision, the court noted Hatfill’s close connection to the government:

Plaintiff’s participation in government training and decisionmaking placed him in a position of public trust. The public had an independent interest in Plaintiff’s qualifications and performance given the highly sensitive nature of his work and its importance to national defense.<sup>123</sup>

Even a civilian employee of the Armed Services has been considered a public official. In *Rusack v. Harsha*, the U.S. District Court for the Middle District of Pennsylvania ruled that a civilian employee who worked as a supervisory contract negotiator at a naval purchasing office in Mechanicsburg, Pennsylvania, was a public official.<sup>124</sup> The judge reasoned that the plaintiff was in a position of public trust and authorized to expend public funds, making him a public official:

Assuming that plaintiff is not involved with the administration of the contracts, it is nevertheless evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be with any governmental employee.<sup>125</sup>

Further, the judge reasoned that such responsibility gave the plaintiff significant control of the way government does business regardless of the fact that he was a civilian employee. As a result,

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<sup>120</sup> *Id.* at \*3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*5 (quoting *Baumback v. American Broad. Co.*, 1998 U.S. App. LEXIS 18770, at \*13-14 (4th Cir. 1998).

<sup>123</sup> *Hatfill*, 2007 WL 404856, at \*5.

<sup>124</sup> 470 F. Supp. 285, 293 (M.D. Pa. 1978).

<sup>125</sup> *Id.* at 298-299.

the court held Rusack to be a public official required to prove actual malice under *New York Times v. Sullivan*.<sup>126</sup>

### **Public figures**

If a plaintiff is not found to be a public official, he or she may qualify as a public figure. Even under this status, a plaintiff must still prove actual malice to succeed in a defamation action. Within the public figure category, a number of lower courts have broken out subsections, including all-purpose public figure, limited-purpose public figures and involuntary public figures. As a result many have enunciated tests to determine which category is best suited for a particular plaintiff. Those who do not meet the public figure criteria would then be categorized as private plaintiff, who may or may not need to prove actual malice.

First labeled by the Court in *Gertz*, the all-purpose public figure category that had been discussed in *Curtis Publishing* was designed for plaintiffs with widespread notoriety.<sup>127</sup> There, the Court said that “[s]ome occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>128</sup> Since that time, many courts have mentioned all-purpose public figures, but few have found plaintiffs that fit the bill.<sup>129</sup>

One of the most substantial discussions of all-purpose public figures came in a case involving Johnny Carson and his wife.<sup>130</sup> In *Carson v. Alliance News Co.*, both Carson and his wife admitted they were public figures and Carson’s brief describes him as ““a preeminent

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<sup>126</sup> *Id.* at 298.

<sup>127</sup> *Gertz*, 418 U.S. at 345.

<sup>128</sup> *Id.*

<sup>129</sup> A July 26, 2007, Westlaw search of “all-purpose public figure” in the database containing all federal cases turned up 33 hits. The same search in the database containing all state cases turned up 66 cases that included the phrase.

<sup>130</sup> *See Carson v. Alliance News Co.*, 529 F.2d 206 (7th Cir. 1976).

entertainer and show business personality.”<sup>131</sup> The Seventh Circuit reiterated the *Gertz* dicta about all-purpose public figures.<sup>132</sup> The appellate court further explained that because Carson had made his livelihood on television and enjoyed a worldwide reputation based on that work, he fit the *Gertz* definition of an all-purpose public figure.<sup>133</sup>

In the same year, the Second Circuit found journalist William Buckley Jr. to be an all-purpose public figure in his defamation lawsuit against an author.<sup>134</sup> Noting that Buckley’s syndicated column ran three times per week in hundreds of U.S. newspaper, the Second Circuit reasoned that he was just the type of person for whom the *Gertz* court envisioned the all-purpose public figure category:

He may fairly be described as perhaps the leading advocate, ideologue [sic] or theoretician of conservative political beliefs and ideas. He is, in short, a public figure for all purposes and in the classic sense of the Supreme Court cases.<sup>135</sup>

Ruling that some of the author’s book was defamatory and some was not, the Second Circuit reduced the punitive damages awarded to Buckley from \$7,500 to \$1,000.

In 1998, the Ninth Circuit, in *Newcombe v. Adolf Coors Co.*, was not required to determine whether the plaintiff, a former major league pitcher, was an all-purpose public figure<sup>136</sup> for the purposes of his defamation suit against a beer company.<sup>137</sup> However, in a footnote, the court

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<sup>131</sup> *Id.* at 210.

<sup>132</sup> *Id.* at 209.

<sup>133</sup> *Id.* at 209-210.

<sup>134</sup> *See* *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976).

<sup>135</sup> *Id.* at 886.

<sup>136</sup> In *Cepeda v. Cowles Magazines & Broadcasting*, the Ninth Circuit, hearing a case involving major league player Orlando Cepeda, referred to him throughout as a “public figure.” Although the court never called him an “all-purpose” public figure in this pre-*Gertz* decision, the court mentioned “Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.” 392 F.2d 417, 419 (9th Cir 1968).

<sup>137</sup> 157 F.3d 686, 695 (9th Cir. 1998).

stated that there was a “strong argument [he] is subject to the more rigorous constitutional standard because he is ... an all-purpose public figure based on his baseball fame.”<sup>138</sup> But because there was not evidence to prove defamation even if he were categorized as a private person, the appellate court did not decide the issue.<sup>139</sup>

In a number of cases, the courts have determined that a plaintiff who does not have the celebrity status and notoriety to qualify as an all-purpose public figure may be considered a limited-purpose public figure instead. Often when limited-public figure status is conferred, it is based on an event or issue that captures the public’s attention and creates discussion. For example, the children of Julius and Ethel Rosenberg sued the publisher of a book about their parents’ trial, claiming statements in the book defamed them.<sup>140</sup> In *Meerpol v. Nizer*, the Second U.S. Circuit Court of Appeals ruled that the Rosenberg’s children were public figures with respect to their defamation action against a publisher. The appellate court agreed with the district court’s findings that the trial of the Rosenbergs had captured the public’s attention, propelling the Rosenbergs and their children into the public spotlight.<sup>141</sup> As a result, the plaintiffs were required as public figures to show actual malice in order to succeed against the publishers.

In *Waldbaum v. Fairchild Publications*,<sup>142</sup> the U.S. Court of Appeals for the D.C. Circuit fleshed out a test used to determine if a plaintiff is a limited-purpose public figure after deciding that Eric Waldbaum, president and CEO of Greenbelt Consumer Services, did not rise to all-

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See Meerpol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

<sup>141</sup> *Id.* at 1066. “In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became ‘public figures’ under the Gertz standards.” *Id.*

<sup>142</sup> 627 F.2d 1287 (D.C. Cir. 1980) (holding that the well-known operator of a large consumer cooperative was a limited-purpose public figure for defamation purposes).

purpose status. Waldbaum sued after a Fairchild Publications' trade journal, *Supermarket News*, ran an article about his ouster.<sup>143</sup> The appellate court quickly determined that Waldbaum was not an all-purpose public figure, given that he was not "a 'celebrity,' whose name was a 'household word,' whose ideas and actions the public in fact follows with great interest."<sup>144</sup> Instead, noting that few would meet such an all-purpose test, the court went on to discuss whether he would constitute a limited-purpose public figure, which the court defined as:

a person [who] is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.<sup>145</sup>

To determine whether a plaintiff would then be considered a limited-purpose public figure, the *Waldbaum* court established a three-part test.<sup>146</sup> First, the court isolated the purported public controversy in which the plaintiff was involved.<sup>147</sup> Such a controversy must not be contrived, but should be a major issue of public concern in which the plaintiff is a significant stakeholder.<sup>148</sup> The mere fact that an issue received media coverage is not enough, standing alone, to create such a controversy.<sup>149</sup> Such a determination can be made by judging whether members of the public were actually discussing the purported controversy:

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<sup>143</sup> *Id.* at 1290.

<sup>144</sup> *Id.* at 1292.

<sup>145</sup> *Id.*

<sup>146</sup> See e.g., *Avins v. White*, 627 F.2d 637 (3d Cir. 1980) (holding that a law school dean was a limited-purpose public figure in the context of law school accreditation);

<sup>147</sup> *Id.* at 1296.

<sup>148</sup> *Id.* "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Id.*

<sup>149</sup> *Id.*

If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.<sup>150</sup>

After ascertaining the extent of the controversy, the court must focus on the plaintiff's role in such a controversy to determine whether he qualifies as a limited-purpose public figure.<sup>151</sup>

Further, the court must consider the plaintiff's role in the controversy and whether he has affected its outcome:

Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye.<sup>152</sup>

Past conduct, press coverage and public reaction can all be used to evaluate the plaintiff's role in a public controversy.<sup>153</sup> If the defamation relates to the controversy, then it merits the *New York Times* protection. If not, the plaintiff qualifies as a private person.

While hearing a case involving a once-prominent couple – a former singer and professional athlete – who had stepped out of the public's eye, the Fifth Circuit had to decide whether the husband and wife were all-purpose or limited-purpose public figures.<sup>154</sup> Anita Brewer filed suit after the Memphis *Commercial Appeal* published a People item in the paper implying that Brewer, who had once dated Elvis Presley, stopped in at his last show for a “reunion” of sorts.<sup>155</sup> The item went on to say that Elvis had recently filed for divorce and that Anita Brewer was divorced from her football star husband Johnny Brewer.<sup>156</sup> Relying on *Gertz*, the Fifth Circuit

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<sup>150</sup> *Id.* at 1297.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1298.

<sup>153</sup> *Id.* at 1297.

<sup>154</sup> *See* Brewer v. Memphis Publ'g Co., 626 F.2d 1238 (5th Cir. 1980) (holding that former singer who maintained celebrity relationship with Elvis Presley and then went on to marry NFL star was a public figure).

<sup>155</sup> *Id.* at 1240.

<sup>156</sup> *Id.*

concluded that, at the very least, the Brewers had been public figures at some point.<sup>157</sup> The tougher question, the Court acknowledged was whether they retained that public figure status:

We therefore focus instead on plaintiffs' actions in seeking publicity or voluntarily engaging in activities that necessarily involve the risk of increased exposure and injury to reputation.<sup>158</sup>

In doing so, the appellate court noted that both Anita and Johnny Brewer made their livings in fields that required them to be in the spotlight, appearing before the media and public audiences.<sup>159</sup> Further, the court reasoned, the article pertained to Anita's former and possibly current relationship with Elvis Presley, which had advanced her career and promoted her celebrity status in the beginning.<sup>160</sup> As a result, the appellate court determined Anita Brewer remained a public figure, at least as the article applied to the basis of her former fame.<sup>161</sup> But, noting that the couple had never acquired the pervasive notoriety of someone like Johnny Carson, the court concluded that neither Anita nor Johnny Brewer was an all-purpose public figure.<sup>162</sup>

Like the Third Circuit, the Fourth Circuit developed a test to provide guidance on public figure determinations.<sup>163</sup> This five-part test was originated in *Fitzgerald v. Penthouse*

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<sup>157</sup> *Id.* at 1253. "The evidence in this case shows that both plaintiffs at one time or another vigorously and successfully sought the public's attention or gained notoriety for their own achievements. Both achieved 'pervasive fame or notoriety,' at least regionally; whether it was 'such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts' is a more difficult question." *Id.*

<sup>158</sup> *Id.* at 1254.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1257. "It might be that during the 'active' public figure period a wider range of articles, including those only peripherally related to the basis of the public figure's fame, are protected by the malice standard and that the passage of time or intentional retreat narrows the range of articles so protected to those directly related to the basis for fame." *Id.*

<sup>161</sup> *Id.* at 1257-1258.

<sup>162</sup> *Id.* at 1251. "The Brewers' power and influence never were as pervasive [as Johnny Carson's]." *Id.*

<sup>163</sup> *See, e.g.,* Reuber v. Food Chemical News, Inc., 925 F.2d 703 (4th Cir. 1991) (using the *Fitzgerald* factors to determine that a research scientist who blew the whistle on the potential carcinogenicity of malathion, an

*International*.<sup>164</sup> The plaintiff sued after the magazine ran an article detailing his role in the military's use of trained dolphins.<sup>165</sup> To determine that Fitzgerald qualified as a limited-purpose public figure, the appellate court looked at five factors:

(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.<sup>166</sup>

When applying the test to Fitzgerald, the appellate court found he clearly met the standard enunciated. First, the national press had covered the military's use of dolphins in Vietnam for at least two years.<sup>167</sup> Next the plaintiff had lectured publicly on the topic, written articles and even appeared on national television programs.<sup>168</sup> Because Fitzgerald sought to capitalize financially on this knowledge, the court found that he had thrust himself into the controversy, which existed before and lasted long after the publication by Penthouse.<sup>169</sup> Even after the Penthouse article, Fitzgerald's opinion was still sought out on the topic, which added to his public figure status.<sup>170</sup>

In 1980, the Sixth Circuit was also trying to decide how to determine if a plaintiff had risen to the level of a limited-purpose public figure.<sup>171</sup> In *Street v. National Broadcasting Co.*, the

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insecticide); *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981) (using similar factors to determine that a police undercover informant was a private figure and had not obtained even limited-purpose public figure status).

<sup>164</sup> 691 F.2d 666 (4th Cir. 1982).

<sup>165</sup> *Id.* at 668.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 669.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See Street v. National Broad. Co.*, 645 F.2d 1227 (6th Cir. 1980) (holding that the primary prosecution witness from a decades-old rape trial was a limited-purpose public figure).

appellate court attempted to determine whether a public controversy existed during the Scottsboro rape trial.<sup>172</sup> To do so, the court looked at whether the trial was the “focus of major debate” and “generated widespread press and attracted public attention for several years.”<sup>173</sup> After determining that the event was a public controversy, the court examined the plaintiff’s role in the controversy. Because the plaintiff was the sole witness in the trial of nine black youths, the court determined she was a prominent figure in the controversy.<sup>174</sup> Noting that the media devoured the trial, longing for interviews with the plaintiff, the court concluded she had the necessary “access to the media.”<sup>175</sup> However, the court struggled with the notion that she had not voluntarily injected herself into the controversy.<sup>176</sup> Given that the voluntariness hinged on whether her accusations of rape were truthful, the court determined it would normally be appropriate to leave the voluntariness prong out of its inquiry.<sup>177</sup> However, the court found that the plaintiff spoke freely with the media and “aggressively promoted her version of the case outside of her actual court room testimony.”<sup>178</sup>

Even though the plaintiff was a public figure at the time, the *Street* court had to decide whether she continued to be a limited-purpose public figure years after the trial. The court,

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<sup>172</sup> *Id.* at 1234.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1235. “If there were no evidence of voluntariness other than that turning on the issue of truth, we would not consider the fact of voluntariness. In such a case, the other factors prominence and access to media alone would determine public figure status. But in this case, there is evidence of voluntariness not bound up with the issue of truth.” *Id.*

<sup>178</sup> *Id.* “In the context of a widely-reported, intense public controversy concerning the fairness of our criminal justice system, plaintiff was a public figure under *Gertz* because she played a major role, had effective access to the media and encouraged public interest in herself.” *Id.*

noting that *Wolston* left the question open, held that once a person becomes a public figure on a matter, she remained a public figure with regard to that matter.<sup>179</sup> Citing *Meerpol* and *Brewer*, the Sixth Circuit noted broad support for this notion that a person retained their earlier-found status despite the passage of time.<sup>180</sup> As a result, the Scottsboro plaintiff would have to prove actual malice to recover against NBC, despite the fact that 40 years had passed since the original rape trial.

Courts have gone as far as to consider companies to be public figures. In *Schiavone Construction Co. v. Time, Inc.*, the Third Circuit ruled that a construction company and its controlling individual were public figures in a defamation action against *Time* magazine.<sup>181</sup> The suit was filed after the magazine reported that the name “Schiavone” was found in FBI documents about missing labor leader Jimmy Hoffa, who had ties to organized crime.<sup>182</sup> The appellate court noted that Schiavone and the construction company invited public figure status by seeking out the press and actively participating in the controversy that led *Time* to write the story in question:

Schiavone thrust himself into the controversy surrounding Donovan and his company by letter campaigns and his active investigation into the private lives of the committee members investigating Donovan<sup>183</sup>

As a result, the appellate court found both the company and Schiavone to have obtained limited-purpose public figure status as it related to the Jimmy Hoffa/Raymond Donovan incident.

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> 847 F.2d 1069 (3d Cir. 1988).

<sup>182</sup> *Id.* at 1072.

<sup>183</sup> *Id.* at 1079.

The final category of public figure plaintiff envisioned in *Gertz* was the involuntary public figure, which the *Gertz* court said “must be exceedingly rare.”<sup>184</sup> The D.C. Circuit found just such an instance in *Dameron v. Washington Magazine, Inc.*<sup>185</sup> Merle Dameron, an air traffic controller, sued *Washington Magazine* after it published an article detailing the crash of Flight 90, which occurred while he was the only controller on duty at Washington Dulles International Airport.<sup>186</sup> Although the appellate court agreed with the district court that Dameron had not injected himself into the controversy, the judges noted that there were additional ways for a plaintiff to become a public figure. “Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person.”<sup>187</sup> The court turned back to the three-part test established in *Waldbaum*, an opinion in which the D.C. Circuit found *Waldbaum* to be a limited-purpose public figure, to determine Dameron’s status. First, it acknowledged that the Flight 90 crash was a public controversy.<sup>188</sup> Then, it modified the second prong of the *Waldbaum* test by taking into account that a plaintiff’s action may involuntarily embroil him in a public controversy.<sup>189</sup> Turning to *Gertz*, the appellate court notes, “Nevertheless, the Supreme Court has recognized that it is possible, although difficult and rare, to become a limited-purpose public

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<sup>184</sup> *Gertz*, 418 U.S. at 345.

<sup>185</sup> 779 F.2d 736 (D.C. Cir. 1985) (holding that an air traffic controller was a limited-purpose public figure for a defamation case arising from an accident that occurred while he was working).

<sup>186</sup> *Id.* at 738. “Dameron asserts that *The Washingtonian’s* statement that he was partly to blame for the death of 92 people libels him, that the statement is false, brings him into disrepute, and has caused him humiliation and mental anguish.” *Id.*

<sup>187</sup> *Id.* at 741.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

figure *involuntarily*.”<sup>190</sup> Finally, the court concluded that the defamation at issue was clearly connected to the public controversy, making him one of a very limited number of involuntary limited-purpose public figures.<sup>191</sup>

In 2001, the Georgia Court of Appeals ruled that a security guard present at the Centennial Olympic Park bombing was an involuntary public figure in his case against the *Atlanta Journal-Constitution*.<sup>192</sup> Jewell sued the newspaper after it ran an article naming him as a suspect in the case.<sup>193</sup> Initially dubbed a hero for saving lives, Jewell then became the focus of the federal inquiry in the 1996 blast.<sup>194</sup> The trial court found Jewell was a limited-purpose public figure based on his extensive role in the media regarding the bombing:

During interviews, he discussed his participation in the events, his previous training, the training and reactions of other law enforcement personnel on the scene, and urged the public to show the bomber that this type of activity would not be tolerated.<sup>195</sup>

Citing *Dameron*, the Georgia appellate court ruled that, at the very least, Jewell was an involuntary public figure even if he did not rise to the level of limited-purpose public figure:

Whether he liked it or not, Jewell became a central figure in the specific public controversy with respect to which he was allegedly defamed: the controversy over park safety.<sup>196</sup>

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<sup>190</sup> *Id.* at 741-742.

<sup>191</sup> *Id.* at 742. “Paradoxically, the magazine article never mentions Dameron's name or other identifying characteristics. If Dameron had not been previously linked with accounts of the tragedy, no magazine reader could tie the alleged defamation to Dameron. Indeed, it was partly *because* of the defendant's public notoriety that he was identifiable at all from the oblique reference in *The Washingtonian*.” *Id.*

<sup>192</sup> *See Jewell*, 555 S.E.2d at 175.

<sup>193</sup> *Id.* at 178.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 185.

<sup>196</sup> *Id.* at 186. “Jewell was an ordinary citizen who was unknown to the public before the Olympic Park bombing, never sought to capitalize on the fame he achieved through his actions in events surrounding the bombing, and never acquired any notoriety apart from the bombing and the investigation which followed. However, there is no question that Jewell played a central, albeit possibly involuntary, role in the controversy over Olympic Park safety.” *Id.*

## Private persons

Although courts frequently find defamation plaintiffs to be public figures, there are instances where individual and corporate plaintiffs have been found to be private persons. As a result, these plaintiffs often need only show negligence and the defendants cannot rely on the constitutional protections of *New York Times v. Sullivan*. Plaintiffs found to be private persons often fail to meet one, two or even all of the criteria needed to be considered limited-purpose public figures.

A prime example of a defendant, initially considered to be a public figure but then determined to be a private person, arose in the Fourth Circuit case of *Jenoff v. Hearst Corp.*<sup>197</sup> In the case, the Fourth Circuit decided that an undercover police informant, held by the lower courts to be either a public official or a public figure, had been improperly classified.<sup>198</sup> Citing both his lack of formal government employment along with the fact that he did not occupy a position that would invite public scrutiny, the court held he was not a public official.<sup>199</sup> However, using a test similar to the one established in *Fitzgerald*, the appellate court also ruled that he was not a public figure – limited-purpose or otherwise.<sup>200</sup> *Jenoff*, they noted, had no special access to the media, nor did he seek attention from his undercover pursuits.<sup>201</sup> Further, the court added that *Jenoff* did not seek, through his undercover work, to “influence the resolution of any public issue.”<sup>202</sup> As a result, the appellate court held he rightfully should be classified as a private person.

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<sup>197</sup> *Jenoff*, 644 F.2d. at 1004.

<sup>198</sup> *Id.* at 1006.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1007.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

Even business managers and owners have been held to be private persons in some cases. For example, the publisher of a business newsletter was held to be a private figure by the Eleventh Circuit despite his prominence in the business community.<sup>203</sup> Likening the case to a classic *Gertz* situation, the appellate court concluded in *Straw v. Revel* that despite J.F. Straw's notoriety among business circles as the publisher of *Business Opportunity Digest*, this was not enough to bring him within the ambit of a public figure.<sup>204</sup> In fact, his notoriety was quite limited given the circulation of his magazine was small:

He is well known in some circles, and publishes in a particular field; but not every publisher is automatically a public figure by virtue of his access to a printing press.<sup>205</sup>

Additionally, the court noted that simply reporting something in his publication was not enough to say that Straw injected himself into a public controversy.<sup>206</sup> As a result, the appellate court ruled the trial court had properly categorized him as a private plaintiff instead of a limited-purpose public figure.<sup>207</sup>

Corporations have been found to be private persons under defamation law in some instances. In *Bruno & Stillman Inc. v. Globe Newspaper Co.*,<sup>208</sup> the First Circuit was asked to determine whether a Delaware corporation engaged in the manufacture of commercial fishing vessels was rightfully categorized as a public figure for the purposes of a defamation lawsuit. Bruno & Stillman sued after the *Boston Globe* published a series of articles detailing defects in

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<sup>203</sup> See *Straw v. Revel*, 813 F.2d 356 (11th Cir. 1987).

<sup>204</sup> *Id.* at 361.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> 633 F.2d 583 (1st Cir. 1980).

the plaintiff's crafts.<sup>209</sup> The appellate court found Bruno & Stillman was not a public figure, and it declined to adopt a rule that would automatically treat corporations as public figures. The appellate court noted that it could not find evidence of any public controversy with regard to the faulty boats.<sup>210</sup> Further, the court found that Bruno & Stillman had done nothing to inject the corporation into any such controversy or limelight.<sup>211</sup> The court contrasted the actions of Bruno & Stillman with those of other companies found to be public figures and noted the dramatic difference.<sup>212</sup> As a result, the appellate court ruled that, without more evidence, Bruno & Stillman could not be considered a public figure.<sup>213</sup>

Similarly, in *U.S. Healthcare Inc. v. Blue Cross of Greater Philadelphia*, the Third Circuit refused to consider either party a limited-purpose public figure.<sup>214</sup> The lawsuit arose over defamatory speech contained within a comparative advertising war between the two companies initiated after Blue Cross lost some clients to U.S. Healthcare.<sup>215</sup> The appellate court refused to consider either party a limited-purpose public figure, noting that such commercial speech likely would not be chilled by the negligence standard and was not the type of speech that *New York Times v. Sullivan* sought to protect:

The express analysis in *Gertz* is not helpful in the context of a comparative advertising war. Most products can be linked to a public issue. And most advertisers — including both claimants here seek out the media. Thus, it will always be true that such advertisers have

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<sup>209</sup> *Id.* at 585.

<sup>210</sup> *Id.* at 591.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 592. “This record is to be contrasted with the concentrated ‘advertising blitz’ which the Third Circuit held ‘invited public attention, comment, and criticism’ in *Steaks Unlimited*.” *Id.* (quoting *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980)).

<sup>213</sup> *Bruno*, 633 F.2d at 592.

<sup>214</sup> 898 F.2d 914 (3d Cir. 1990).

<sup>215</sup> *Id.* at 917-920.

voluntarily placed themselves in the public eye. It will be equally true that such advertisers have access to the media.<sup>216</sup>

Instead, the appellate court concluded the speech was not worthy of the heightened constitutional protections provided under actual malice, and declared both corporations to be private figures for the purpose of the defamation action.<sup>217</sup> The appellate court provided three reasons for providing less protection to the speech. First, it said commercial speech does not make the same level of contribution to the “exposition of ideas” as political and social speech.<sup>218</sup> Second, it said because of their economic self-interest, commercial speakers are less likely to be chilled if they are not protected by the actual malice standard.<sup>219</sup> Finally, because of their high level of knowledge about their market and their consumers, commercial speakers are better equipped to evaluate the truthfulness of any speech that enters the market.<sup>220</sup>

Courts have found plaintiffs to be private persons in situations in which the plaintiff might appear to be a limited-purpose public figure. Usually, however, this is because at least one prong of the public-figure test that the court applied had not been fulfilled, leaving the plaintiff free to pursue the defamation action as a private person. As a result, defendants are typically not allowed to rely on the protections of *New York Times v. Sullivan*, and plaintiffs oftentimes need only prove negligence to succeed.

### **The Courts Look at Plaintiff Status: Online Defamation**

To make determinations of plaintiff status in online defamation cases, the most frequent focus thus far has been the plaintiffs’ use of the media. A handful of courts – both federal and

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<sup>216</sup> *Id.* at 939.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 934.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

state – have examined the role of Internet usage in online defamation cases when deciding whether a plaintiff is a private person or a limited-purpose public figure. For the most part, the courts have relied on the *Waldbaum* test<sup>221</sup> with some minor modifications to account for the importance of any Internet communications that occurred in the cases.

In 2002, the Georgia Supreme Court addressed plaintiff status in an online defamation case involving the director of a solid-waste management authority..<sup>222</sup> In *Mathis v. Cannon*, the Court considered whether he was a public figure for the purposes of a defamation action arising out of comments posted on an electronic message board.<sup>223</sup> The state supreme court, referencing the federal appellate court decision in *Waldbaum*, applied the same test for plaintiff status used in traditional print and broadcast defamation cases.<sup>224</sup> Thus, it focused its inquiry on defining the public controversy, uncovering the plaintiff’s role in the identified controversy and deciding whether the communication is relevant to the plaintiff’s role in the controversy.<sup>225</sup> The state supreme court, noting the public controversy surrounding the operation of the solid-waste and recycling facilities, cited three ways in which the director was involved:

First, [Cannon] was a crucial actor in helping the authority obtain the commitments from other county and city governments in south Georgia to provide solid waste for the authority's facility. ... Second, Cannon represented the authority in a variety of ways that far exceeded the terms of TransWaste's contract to collect and haul solid waste to Crisp County. ... Third, Cannon precipitated the financial crisis in November 1999 by filing a

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<sup>221</sup> *See infra*.

<sup>222</sup> *See Mathis v. Cannon*, 573 S.E.2d 376 (Ga. 2002).

<sup>223</sup> *Id.* at 377-378.

<sup>224</sup> *Id.* at 381. “Under this analysis, a court ‘must isolate the public controversy, examine the plaintiff’s involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff’s participation in the controversy.’” *Id.* (quoting *Jewell*, 555 S.E.2d at 175 (adopting the test used in *Waldbaum*, 627 F.2d at 1296-1298)).

<sup>225</sup> *Mathis*, 573 S.E.2d at 381.

lawsuit against the authority and then temporarily halting deliveries to the solid waste recovery plant.<sup>226</sup>

Observing that the determining factor is not the mass interest in a specific controversy, but is instead whether such a controversy generates “discussion, debate and dissent in the relevant community,” the supreme court found the comments posted by the defendant to be germane to the plaintiff’s role in the solid-waste controversy.<sup>227</sup> Because all three prongs of the *Waldbaum* test were met, the supreme court found the plaintiff to be a limited-purpose public figure for the purposes of the online defamation case.<sup>228</sup>

Three years after *Mathis*, the Georgia Court of Appeals addressed the same issue in *Atlanta Humane Society v. Mills*.<sup>229</sup> After Kathi Mills posted comments on an Internet bulletin board about the Atlanta Humane Society’s animal control work in Fulton County, Georgia, the AHS and its director, Bill Garrett, filed suit for defamation.<sup>230</sup> The Georgia Court of Appeals held that Garrett was properly classified as a limited-purpose public figure.<sup>231</sup> In making such a determination, the court noted that Garrett had given many interviews and issued numerous press releases pertaining to AHS’ work in Fulton County.<sup>232</sup> Further, the court noted, he specifically spoke to an Atlanta TV station that was doing an investigative piece that led to the public outcry surrounding AHS’ work.<sup>233</sup> In addition, he sent a letter to county government officials to voice

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<sup>226</sup> *Id.* at 382.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 383.

<sup>229</sup> *See* 618 S.E.2d 18 (Ga. Ct. App. 2005).

<sup>230</sup> *Id.* at 23.

<sup>231</sup> *Id.* at 24.

<sup>232</sup> *Id.* at 23.

<sup>233</sup> *Id.*

support for AHS.<sup>234</sup> Even if those actions alone would not be enough to establish that Garrett voluntarily participated in influencing the outcome of a public controversy, the court noted that he may be one of the limited number of plaintiffs rightly classified as involuntary public figures.<sup>235</sup> Citing *Atlanta Journal-Constitution v. Jewell*,<sup>236</sup> the court said his position as director may place him in a role that would be expected to affect the outcome of a controversy:

[O]ccasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has ‘invited comment’ relating to the issue at hand.<sup>237</sup>

As a result, the court while deciding an online defamation case, turned to one of the key elements used to determine plaintiff status in print and broadcast defamation cases: access to the media.

Not long after the second online defamation case in Georgia addressed the issue of plaintiff status, a case arose in California as well. In *Ampex Corporation v. Cargle*,<sup>238</sup> a California appellate court ruled that Ampex, a corporation that was suing a former employee for posting defamatory statements online, was a limited-purpose public figure.<sup>239</sup> In making this determination, the court noted that the fact there were a number of postings on Yahoo! Message boards regarding Ampex’s decision to discontinue one of its technology projects was evidence of a public controversy likely to impact nonparticipants.<sup>240</sup> Ampex, the court noted, was a publicly traded company with more than 59,000 outstanding shares of stock, the prices of which would be affected by Ampex’s decision to discontinue one of its projects. As evidence that Ampex

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *See infra.*

<sup>237</sup> *Id.* (quoting *Jewell*, 555 S.E.2d at 193).

<sup>238</sup> 27 Cal.Rptr.3d 863 (Cal. App. 4th, 2005).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 870.

voluntarily sought to influence public opinion about its technology project, the court pointed to the press releases and letters, which Ampex posted on its Web site, touting the potential of the project for the company's future.<sup>241</sup> When determining that the alleged defamatory comment pertained to the controversy, the court reasoned that the former employee's comments provided a contrast to those of Ampex, pointing to management issues with the project as opposed to trouble in the technology market.<sup>242</sup> All of those factors, including the company's use of its own Web site to communicate,<sup>243</sup> provided enough evidence to support the finding that Ampex was a limited-purpose public figure for the purpose of its online defamation case against Cargle, the former employee.<sup>244</sup>

The Tennessee Court of Appeals heard a similar case involving a businessman who modified Jet Skis.<sup>245</sup> In *Hibdon v. Grabowski*, the businessman sued for defamation after Grabowski, a personal watercraft user, made statements on an Internet news group and a competitor's Web site questioning whether Hibdon's watercraft performed as he had claimed.<sup>246</sup> In ruling that Hibdon was a limited-purpose public figure, the court noted that he had availed himself of the media resources available by boasting on a Internet news group, agreeing to interviews for magazine articles (including a cover story) about his Jet Skis and fielding

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See also *Bieter v. Fetzer*, 2005 WL 89484 (Minn. Ct. App.). In *Bieter*, the Minnesota Court of Appeals noted, in ruling that plaintiff Bieter was a limited-purpose public figure, that he had started an Internet chatroom dedicated to the refutation of defendant Fetzer's speech. Further, the court opined that he presented his experience as a prosecutor in a manner that cast him as an expert to discredit Fetzer's communications. *Id.* at 3.

<sup>244</sup> *Id.*

<sup>245</sup> See *Hibdon v. Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005).

<sup>246</sup> *Id.* at 55.

worldwide phone inquiries about his products.<sup>247</sup> The court found that a public controversy existed as to Hibdon's Jet Ski modifications arising out of his Internet news group posting well before the defamatory statements were made.<sup>248</sup> One of the reasons the court cited for finding the issue was a public controversy was the wide reach of the Internet news group, which allowed people who were not direct participants to obtain information about the discussion:

The dispute as to the accuracy of Hibdon's claimed successes with modifying jet skis to achieve record-breaking speeds received public attention because its ramifications would be felt by persons who are not direct participants, those persons being individuals in the jet ski modification business, as well as recreational jet ski enthusiasts and purchasers of jet skis. This group includes individuals within the United States and many foreign countries.<sup>249</sup>

The court further found that Hibdon's extensive use of the Internet and a magazine to counter the alleged defamatory statements, which occurred as a result of the controversy surrounding Hibdon, placed him into the category of those speakers who voluntarily inject themselves into a public controversy with the intent of shaping the outcome.<sup>250</sup> Thus, the very nature of the discussion, arising out of the Internet news groups, helped to propel Hibdon to his status as a limited-purpose public figure in the eyes of the court.

In the same year, the U.S. District Court for the District of Columbia ruled on a motion for summary judgment in which the defendants asserted the plaintiffs were public figures.<sup>251</sup> In *OAO Alfa Bank v. Center for Public Integrity*, the Center for Public Integrity argued that OAO Alfa Bank should be considered a public figure, in which case it would be required to prove actual

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<sup>247</sup> *Id.* at 59.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 60.

<sup>250</sup> *Id.* at 62.

<sup>251</sup> *See* *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp.2d 20 (D. D.C. 2005).

malice in its online defamation lawsuit.<sup>252</sup> The case stemmed from an online report published by the Center for Public Integrity that alleged the plaintiffs and OAO Alfa Bank had ties to organized crime and the drug trade.<sup>253</sup> Relying, like the state courts in their respective cases, on the D.C. Circuit’s *Waldbaum* decision, the federal district court found the plaintiffs to be limited-purpose public figures.<sup>254</sup>

In its decision, the D.C. trial court noted that *Waldbaum* requires that a limited-purpose public figure have the “necessary degree of notoriety ... where the defamation was published.”<sup>255</sup>

In this case, the defamatory statements were published on the Internet, and the court reasoned:

[t]he audience for the CPI article is not confined to the United States merely because that is where the authors of the piece choose to work, and it is not immediately apparent why the limited public figure inquiry should be so confined.<sup>256</sup>

Further, the court looked at the plaintiffs’ access to media on a worldwide scale to bolster its assertion that the plaintiffs were limited-purpose public figures.<sup>257</sup> In its analysis, the district court appears to be recognizing special circumstances created by the use of the Internet.

By 2006, federal courts, as well as state courts, seemed to be using the traditional *Waldbaum* test of access to the media, with some modifications to examine the role of the Internet, to determine plaintiff status in online defamation cases. In *World Wide Association of Specialty Programs v. Pure Inc.*,<sup>258</sup> the Tenth Circuit relied on a modified *Waldbaum* analysis to

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<sup>252</sup> *Id.* at 42.

<sup>253</sup> *Id.* at 43-46.

<sup>254</sup> *Id.* at 47. “Simply put, [the plaintiffs] are players on the world stage; hence, they are limited public figures not only in Russia, but in the United States as well.” *Id.*

<sup>255</sup> *Id.* (quoting *Waldbaum*, 627 F.2d at 1295 n. 22).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> See 450 F.3d 1132 (10th Cir. 2006).

uphold a district court decision. In the case, it ruled that an association of residential treatment programs for at-risk teens was a limited-purpose public figure in a defamation case that stemmed from comments pseudonymously posted on the Internet by a competitor.<sup>259</sup> The court, identifying the public controversy as “how to deal with troubled teens,” noted that the plaintiff’s employees had been interviewed numerous times by large-scale, national media entities for the purpose of commenting on the issue.<sup>260</sup> Further, the plaintiff’s business was designed to promote the techniques used by its member schools as a means of treating troubled teens, which placed World Wide squarely in the middle of the controversy.<sup>261</sup> The court repeatedly mentions World Wide’s use of the media to promote its clients as a justification for its limited-purpose public figure status in much the same way that the Georgia and Tennessee courts used that rationale in earlier online defamation cases.

### Conclusion

The Supreme Court has created a complex framework for determining plaintiff status, a decision that determines whether a plaintiff will be required to prove actual malice or negligence to succeed in defamation action. The Supreme Court has outlined three major categories of plaintiffs in defamation actions: public officials, public figures and private persons. It has gone on to discuss each category in its jurisprudence.

Guided by the Supreme Court’s general discussion in *Sullivan* that judges, government officials and elected commissioners should be classified as public officials for the purpose of

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<sup>259</sup> *Id.* at 1137.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* “As the marketing arm for the various programs that it promotes, World Wide ‘chose to place itself in the national spotlight advocating this method.’” *Id.*

defamation actions,<sup>262</sup> the lower courts have gone on to address the issue dealing with government employees at all levels.<sup>263</sup> As a result, the category of public official has grown somewhat based on determination by lower courts that certain plaintiffs – including law enforcement officials and public school teachers in many instances – have taken on the role of public officials and therefore should be subject to the actual malice standard. As a general rule, the courts have relied on the definition of a public official from *Rosenblatt v. Baer*, in which the Court said the:

‘public official’ designation applies at the very least to 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 governmental affairs.<sup>264</sup>

Law enforcement officers and teachers have been added to that list by some courts that have cited their authority and the public’s interest in ensuring their qualifications and job performance.

If a plaintiff is not found to be a public official, he or she may qualify as a public figure. Even under this status, a plaintiff must still prove actual malice to succeed in a defamation action. Within the public figure category, a number of lower courts have broken out subsections, including all-purpose public figures, limited-purpose public figures and involuntary public figures.

First enunciated by the Court in *Gertz*, the all-purpose public figure category was designed for plaintiffs with widespread notoriety.<sup>265</sup> There, the Court said that “[s]ome occupy positions

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<sup>262</sup> *Sullivan*, 376 U.S. at 273. “If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials, such as elected city commissioners.” *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

<sup>263</sup> See, e.g., *Varanese v. Gall*, 518 N.E.2d at 1177. (applying the actual malice standard of *New York Times Co. v. Sullivan* to an Ohio public official’s state-law defamation claim); *Sullivan*, 376 U.S. at 254 (ruling that a municipal public official must prove actual malice to succeed in a defamation claim).

<sup>264</sup> *Id.* at 1408 (quoting *Rosenblatt v. Baer*, 383 U.S. at 85).

<sup>265</sup> *Gertz*, 418 U.S. at 345.

of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>266</sup> Since that time, many courts have mentioned all-purpose public figures, but few have found plaintiffs that fit the bill.<sup>267</sup> As a rule, these plaintiffs have been celebrities and sports figures.

In a number of cases, the courts have determined that a plaintiff who does not have the notoriety to qualify as an all-purpose public figure may be considered a limited-purpose public figure instead. Often when limited-public figure status is conferred, it is based on an event or issue that captures the public’s attention and creates discussion. The predominant test to determine whether a plaintiff is a limited-purpose public figure is the *Waldbaum* test.<sup>268</sup> It requires the court to isolate the purported public controversy in which the plaintiff was involved and examine the plaintiff’s role in such a controversy to determine whether he has attempted to affect its outcome.

The final category of public figure plaintiff envisioned in *Gertz* was the involuntary public figure, who the *Gertz* court said “must be exceedingly rare.”<sup>269</sup> These are plaintiffs, the courts noted, that have become embroiled in a public controversy – a plane crash or a bombing for example – without voluntarily injecting themselves.

Although courts frequently find defamation plaintiffs to be public figures, there are instances where individual and corporate plaintiffs have been found to be private persons. As a result, these plaintiffs often need only show negligence and the defendants cannot rely on the constitutional protections of *New York Times v. Sullivan*. Plaintiffs found to be private persons

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<sup>266</sup> *Id.*

<sup>267</sup> A Westlaw search of “all-purpose public figure” in the database containing all federal cases turned up 33 hits. The same search in the database containing all state cases turned of 66 cases that included the phrase.

<sup>268</sup> See e.g., *Avins v. White*, 627 F.2d at 637 (holding that a law school dean was a limited-purpose public figure in the context of law school accreditation);

<sup>269</sup> *Gertz*, 418 U.S. at 345.

often fail to meet one, two or even all of the criteria needed to be considered limited-purpose public figures.

To make determinations of plaintiff status in online defamation cases, the most frequent focus thus far has been the plaintiffs' use of the media. A handful of courts – both federal and state – have examined the role of Internet usage in online defamation cases when deciding whether a plaintiff is a private person or a limited-purpose public figure. For the most part, the courts have relied on the *Waldbaum* test with some minor modifications to account for the importance of any Internet communications that occurred in the cases. In some of these cases, the courts seem to imply that the plaintiffs' extensive reliance on the Internet has pushed them into the public figure categories.

## CHAPTER 6 DEFINING HARM

The concept of harm plays an important role in defamation litigation. Courts may use harm to make several determinations critical to the litigation. First, the evaluation of the level of harm may be used to determine whether the plaintiff actually has a cause of action. Second, courts may look to level of harm to determine a plaintiff's right to damages. In any sense, the courts must determine what harm occurred before such important decisions can be made.

### **The Courts Look At Harm: Print and Broadcast Defamation**

The U.S. Supreme Court has addressed the definition of harm on numerous occasions, and its jurisprudence constructs overarching guidelines to provide direction for the lower courts in assessing damages. In its opinions, the Court has examined harm in a variety of contexts, including as part of the plaintiff's prima facie case and as part of the evaluation of damages. Thus, the notions of harm discussed by the Supreme Court provide the starting point from which the lower courts begin their analysis.

The U.S. Supreme Court has often said the primary interest behind the tort of defamation is the compensation of individuals whose reputations have been harmed by defamatory falsehoods.<sup>1</sup> Justice Stewart enunciated this eloquently in *Rosenblatt v. Baer*, writing that allowing such compensation:

reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.<sup>2</sup>

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<sup>1</sup> See *Gertz v. Welch*, 418 U.S. 323, 341 (1974).

<sup>2</sup> 383 U.S. 78, 92 (1966) (Stewart, J., concurring).

The need for the state to provide protection for reputation runs throughout the Court's defamation jurisprudence, with the Court noting in *Getz v. Welch* that the "truth rarely catches up with a lie."<sup>3</sup> However, as the Court's defamation jurisprudence has matured, the justices have overlaid several constitutional hurdles through which defamation plaintiffs must climb on the common law requirements of damages.<sup>4</sup>

### **Common Law Damage Requirements**

At common law, damage resulting from a defamatory publication could be presumed.<sup>5</sup> In these libel per se situations, "the existence of injury is presumed from the fact of publication."<sup>6</sup> Presumed damages allowed plaintiffs to be compensated for emotional harm that resulted from the injury to reputation. Such a view is represented in the *Restatement (Second) of Torts*.<sup>7</sup> Libel not falling into the libel per se category – libels that were not considered defamatory on their face – were labeled as libel per quod.<sup>8</sup> The distinction between libel per se and per quod is important because it has ramifications upon a plaintiff's burden of pleading and proof on the issue of damages. Notably, when a plaintiff pleads and establishes libel per se, the plaintiff need not allege or prove any special damages, which would compensate the plaintiff for monetary loss. In fact, general damages are presumed and nominal damages are available in any event.<sup>9</sup> Many states still allow plaintiffs to proceed in court without having to prove actual damages to

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<sup>3</sup> *Getz*, 418 U.S. at 344 (n. 9).

<sup>4</sup> *See, e.g., Getz v. Welch*, 418 U.S., at 323; *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

<sup>5</sup> *See* DAN B. DOBBS, *LAW OF TORTS* § 422 (2000).

<sup>6</sup> *Getz*, 418 U.S. at 349.

<sup>7</sup> *See* RESTATEMENT (SECOND) OF TORTS § 569.

<sup>8</sup> Black's Law Dictionary defines libel per quod as "Libel in which the defamatory meaning is not apparent from the statement on its face but rather must be proved from extrinsic circumstances." *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>9</sup> *See Shoemaker v. Community Action Org. of Scioto City*, 2007 WL 2070365 ¶ 13 (Ohio Ct. App.).

meet the common law damages requirement.<sup>10</sup> In these states, certain types of defamatory statements – those that are *libelous per se* – are harmful on their face and the court will instruct the jury to presume that injury to reputation follows if the statement is found to be defamatory.

To recover damages at common law, libel per quod plaintiffs were required to plead and prove special damages, which covered specific economic losses stemming from the defamation.<sup>11</sup> Special damages, as defined by the *Restatement*,<sup>12</sup> cover “the loss of something having economic or pecuniary value,” which has been defined by the courts to include losses that are “capable of being estimated in money.”<sup>13</sup>

Except in a specific group of cases outlined by the Supreme Court in *Gertz*, the common law damages rules still apply to defamation lawsuits in most jurisdictions.<sup>14</sup> For private plaintiffs suing over defamation that arises in the discussion of matters of private concern – those plaintiffs covered by the Supreme Court’s decision in *Dun & Bradstreet v. Greenmoss Builders* – the common law damage rules guide the award of damages. Thus, the Constitution does not impose any restrictions on damages in this category of cases.<sup>15</sup>

Courts relying on the common law approach to defamation often reason that it is too difficult in many defamation cases to prove reputational harm. A Maryland appellate court wrote, on requiring proof of injury to reputation, “This approach, in our view, fails to respect the

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<sup>10</sup> See, e.g., *Bentley v. Bunton*, S.W.3d 561, 605 (Texas 2002); *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. App. 2007) “If the communication is defamatory per se, damages are presumed even without proof of actual harm to the plaintiff’s reputation.” *Id.* at 1243.

<sup>11</sup> See RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 7.1 (2d ed. 2004).

<sup>12</sup> See *RESTATEMENT (SECOND) OF TORTS* § 575, cmt. b.

<sup>13</sup> See *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717 (7th Cir. 2004).

<sup>14</sup> See *DOBBS*, *supra* note 5, at § 422.

<sup>15</sup> *Dun & Bradstreet*, 472 U.S. at 759-760.

centuries of human experience which led to a presumption of harm flowing from words actionable per se. One reason for that common law position was the difficulty a defamation plaintiff has in proving harm to reputation.”<sup>16</sup>

State courts have established a variety of methods of proof through which plaintiffs can fulfill the common law damage requirements. Often, plaintiffs prove any of several types of harm: injury to business reputation, injury to personal reputation or pecuniary injury.

### **Injury to business reputation**

Injury to business reputation comes up frequently as a means of proving damages. The Seventh Circuit dealt with such a case after a wood-burning stove dealer sued his supplier for omitting the dealer’s name from a list of dealerships.<sup>17</sup> In the case, the court held that such an omission cannot form the basis for a defamation claim because it does not injure business reputation.<sup>18</sup> Judge Richard Posner reasoned that although being left off a dealership list may in fact decrease the opportunity for sales, it is not enough to have impugned the reputation of the dealer:

More is necessary than a diminution of transactional opportunities. In a business setting the imputation, to count as defamation, must charge dishonorable, unethical, unlawful, or unprofessional conduct.<sup>19</sup>

Implying that someone is not a dealer is not the same as tarnishing their business reputation through statements implying a lack of honesty, integrity or professionalism and does not, therefore, cause the necessary harm.

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<sup>16</sup> *Hearst Corp. v. Hughes*, 466 A.2d 486, 495 (Md. 1983).

<sup>17</sup> *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987).

<sup>18</sup> *Id.* at 1166.

<sup>19</sup> *Id.*

Several states' laws allow damage awards under a theory of injury to business reputation for a broad assortment of harms. The First Circuit, applying New Hampshire law, found that a doctor had adequately proven actual injury by showing that a *USA Today* article had caused public outrage among the veterans he treated and his colleagues at the Veterans Administration, prompted a campaign calling for his termination and lead to threats at both his workplace and his home.<sup>20</sup> In a case in which an oil service company sued its competitor for defamation, the Fifth Circuit found the plaintiff had proven injury to business reputation based on an advertising expert's testimony that the company would require \$650,000 in rehabilitative advertising along with the testimony of the company's economist who said the oil services company would lose millions in profits due to the false report.<sup>21</sup>

### **Injury to personal reputation**

Plaintiffs can also recover damages by showing injury to personal reputation. Often, this includes plaintiffs proving that the defamatory statement lowered their reputation in the eye of the community, caused them personal humiliation or subjected them to scorn. Such is the case in New Mexico, where the courts require a showing of some type of harm, allowing recovery for harms to personal reputation caused by defamatory statements.<sup>22</sup> Similarly, the Tenth Circuit, applying New Mexico law, held that a doctor whose privileges were revoked at a local hospital could have suffered "impairment of reputation and standing in the community or personal humiliation" as a result.<sup>23</sup>

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<sup>20</sup> 875 F.2d 935, 948 (1st Cir. 1989).

<sup>21</sup> *Brown v. Petrolite Corp.*, 965 F.2d 38, 46 (5th Cir. 1992).

<sup>22</sup> *Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1236 (N.M. 1989).

<sup>23</sup> *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1336 (10th Cir. 1996).

## **Pecuniary injury**

Several courts, applying Indiana law, have refused to allow damages in defamation cases in which the plaintiff could prove numerous other types of harm, but could not show pecuniary injury. For a plaintiff to obtain damages on a defamation claim in Indiana, he must be able to prove pecuniary injury even if other types of harm are present.<sup>24</sup> For example, the Seventh Circuit has refused to allow damages in at least two Indiana cases in which the plaintiffs could not prove economic harm. In *Grzelak v. Calumet Publishing Company*, the court upheld a motion to dismiss a defamation claim because the plaintiff had shown “severe mental and emotional pain and agony” but could not prove fiscal injury.<sup>25</sup> Sixteen years later in *Tackett v. Delco Remy Div. of General Motors Corp.*, the court held that the plaintiff’s psychological harm was not sufficient to support the jury’s award of damages.<sup>26</sup> Thus, without a showing of financial injury stemming from a defamatory statement, the plaintiffs could not obtain damages.

Under Massachusetts law, a plaintiff can recover lost earnings resulting from a defamation claim.<sup>27</sup> For example, the court awarded lost earnings after potential employers testified they decided not to hire the plaintiff as a result of the defamatory statement.<sup>28</sup> The courts have also rejected such claims when plaintiffs have provided no proof that they could not find comparable employment as a result of defamatory statements.<sup>29</sup> This requirement stems in part, from

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<sup>24</sup> *Stanley v. Kelley*, 422 N.E.2d 663, 668 (Ind. Ct. App. 1981).

<sup>25</sup> 543 F.2d 579 (7th Cir.1975).

<sup>26</sup> 937 F.2d 1201 (1991). “[W]e find Tackett’s evidence of psychological injury insufficient to demonstrate the special damages necessary to uphold the jury’s award.” *Id.* at 1208.

<sup>27</sup> *See Faulk v. Aware, Inc.*, 19 A.D.2d 464 (Mass. 1963).

<sup>28</sup> *Id.* at 470.

<sup>29</sup> *See Tosti v. Ayik*, 394 Mass. 482 (Mass. 1985).

Massachusetts' requirement that plaintiffs prove special damages in order to recover for monetary losses in a defamation claim.

### **Constitutional Damage Requirements**

As the Supreme Court began to constitutionalize the law of defamation in the 1960s, its rulings would overlay a set of constitutional requirements for damages on top of the common law requirements.<sup>30</sup> The Court has visited the issue of damages on two occasions in which it began to construct the constitutional restrictions upon damage awards. The most notable – and likely complex – discussions of the subject come in *Gertz v. Welch* and *Dun & Bradstreet v. Greenmoss Builders*. In *Gertz*, the Court explicitly discussed the common law of defamation's failure to require evidence of loss or injury.<sup>31</sup> In these situations, the plaintiff had not been required to plead and prove harm or injury; instead, it was merely presumed from the publication of a defamatory statement:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.<sup>32</sup>

The Court reasoned that it would be possible for a jury to award damages merely to punish a sentiment with which it disagreed.<sup>33</sup> As a result, the *Gertz* Court ruled that plaintiffs who fail to prove actual malice can only recover damages based on actual injury under the Constitution's protections.<sup>34</sup> By its very wording, the *Gertz* opinion placed no restrictions on plaintiffs who

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<sup>30</sup> See ROBERT D. SACK, SACK ON DEFAMATION § 10.2 (3d ed. 2000).

<sup>31</sup> *Gertz*, 418 U.S. at 349.

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.* at 349-350. "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Id.* at 349.

prove actual malice, whether they be public officials, public figures or private persons.<sup>35</sup> Under *Gertz* then, a plaintiff must prove actual malice in order to recover either presumed or punitive damages in cases involving matters of public concern.

The *Gertz* opinion clearly established that “actual injury damages” were those damages designed to compensate a plaintiff for the injury to reputation that could actually be proven.<sup>36</sup> However, the Court did not define the term, writing that trial courts could properly frame the jury instructions for their defamation trials.<sup>37</sup> Instead, the Court provided some examples of actual injury, which made it clear that actual injury could include more than simply pecuniary harm:

Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.<sup>38</sup>

In making such a decision, the Court also established the need for a plaintiff to present concrete evidence supporting claims of actual injury, noting that mere speculation would not justify an award of damages to compensate a plaintiff.<sup>39</sup>

The *Gertz* decision did not answer all the questions regarding damages. After *Gertz*, a case that involved speech about a matter of public concern, it was unclear what showing of harm private plaintiffs suing over speech that did not involve a matter of public concern would be required to prove to recover damages. In 1985 in *Dun & Bradstreet v. Greenmoss Builders*,

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* “Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.” *Id.*

Justice Lewis Powell, writing for a plurality of the Court, noted that when speech involves purely private matters:

[T]he rationale of the common-law rules has been the experience and judgment of history that ‘proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.’<sup>40</sup>

As a result, in cases involving private persons defamed in connection with matters that are not a matter of public concern, the Supreme Court has upheld the allowance of presumed damages and punitive damages, noting that the Constitution imposes no restrictions on damage awards. These cases arise, the Court said, when speech involves purely private matters, such as in the case of a credit report. Because of this, the Court stated that there is no public interest and no need for “uninhibited, robust and wide-open” debate on such private matters.<sup>41</sup> Thus, no special protection for the private speech, such as requiring a plaintiff to prove actual injury, is provided by the Court before an award of presumed or punitive damages.<sup>42</sup>

### **The Courts Look at Harm: Online Defamation**

For the most part, courts have begun to look at harm in online defamation cases in a manner similar to the way they have addressed harm in traditional defamation cases, applying the same constitutional and common law principles. Thus far, only two state appellate courts and one federal trial court have provided substantive discussion of harm in the context of online defamation cases. The discussions of harm seem to offer little recognition of the unique nature of the medium and the potential for differences in the types of harm that may emerge from

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<sup>40</sup> *Id.* (quoting WM. PROSSER, LAW OF TORTS § 112, p. 765 (4th ed. 1971))

<sup>41</sup> *Dun & Bradstreet*, 472 U.S. at 762 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 264, 270 (1964)).

<sup>42</sup> *Id.* at 764. “We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.” *Id.*

defamatory statements published on the Internet, unlike the community and plaintiff status discussions. As a result, harm in online cases is most often judged using the same common law rules that courts apply in traditional print and broadcast defamation cases.

The first significant discussion of harm occurred in an online defamation case largely focused on the issue of anonymity. In *Dendrite International, Inc. v. Doe, No. 3*, the appellate division of the New Jersey Superior Court affirmed the trial court's ruling that the plaintiff corporation must show harm resulting from a defamatory statement before it was entitled to discovery to obtain an anonymous speaker's identity.<sup>43</sup> Dendrite sued after John Doe No. 3, posting online as "xxplr," made several comments on a Yahoo! message board about the president's financial dealings and the corporation's accounting practices.<sup>44</sup> The corporation argued, before the state appellate court, that harm was not an element required to be plead as a part of its online defamation lawsuit.<sup>45</sup> In the alternative, the corporation asserted it had proven the element of harm, meaning the trial court had erred in its ruling.<sup>46</sup> The appellate court rejected both of Dendrite Corp.'s claims, ruling first that the company must prove harm and, second, that it had not done so.<sup>47</sup> The court noted that Dendrite Corp.'s claim made vague references to the harms stemming from the John Doe statements:

Defendants' publication of these statements has caused irreparable harm to Dendrite for which Dendrite has no adequate remedy at law, and will continue to cause such irreparable harm unless restrained by this Court. In addition, as a proximate result of defendants' publication of these statements, Dendrite has sustained harm to its business reputation

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<sup>43</sup> *Dendrite International Corp. v. Doe*, 775 A.2d 756, 759-760 (N.J. Super. Ct. App. Div. 2001).

<sup>44</sup> *Id.* at 763. "John's [Dendrite president John Bailye] got his contracts salted away to buy another year of earnings- and note how they're changing revenue recognition accounting to help it." *Id.*

<sup>45</sup> *Id.* at 766.

<sup>46</sup> *Id.*

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

resulting in damages in an amount to be proven at trial, and Dendrite will continue to suffer additional damages in the future according to proof.<sup>48</sup>

In a preliminary ruling, one judge alluded to the type of harm that would have met Dendrite Corp.'s burden.<sup>49</sup> Noting the court was looking for a more concrete showing, the judge said that linking the statements to a decline in stock price may have been acceptable if it had been done by an expert.<sup>50</sup> Further, the judge asserted that it was not enough for Dendrite Corp. to allege the statements harmed the company; it must instead show the actual harm the stemmed from those messages.<sup>51</sup> The appellate court affirmed the standard used by the motion judge to make the ruling even though it was more burdensome than the standard the appellate court would have applied.<sup>52</sup>

In *Sunlight Saunas v. Sundance Saunas*,<sup>53</sup> the U.S. District Court for the District of Kansas heard a defendant's motion to dismiss a defamation case where the plaintiff claimed the defendant defamed his company through false representations on the defendant's Web site and false oral statements to customers.<sup>54</sup> Among other claims, the defendant asserted the plaintiff could not show causation between the defamatory statements, which attacked the quality and

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<sup>48</sup> *Id.* at 769.

<sup>49</sup> *Id.*

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 771. "Here, although Dendrite's defamation claims would survive a traditional motion to dismiss for failure to state a cause of action, we conclude the motion judge appropriately reviewed Dendrite's claim with a level of scrutiny consistent with the procedures and standards we adopt here today and, therefore, the judge properly found Dendrite should not be permitted to conduct limited discovery aimed at disclosing John Doe No. 3's identity." *Id.*

<sup>53</sup> See 427 F.Supp.2d 1032 (D. Kan. 2006).

<sup>54</sup> *Id.* at 1071. "Lie # 3: No Safety Warnings Sunlight Saunas has no safety compliance. The Truth Ever wonder why they aren't UL, CSA, or ETL certified? Ask your home Insurance company about products with heaters operating at several hundred degrees that don't meet these standards. Infrared sauna Heaters operate between 300 and 600 degrees [F]ahrenheit. Can you imagine buying an oven that has not been certified to the minimum standards the USA has established for safety? Now imagine putting those oven heating elements inches from kiln dried wood without any safety certification. Sounds crazy but Sunlight as usual takes the shortcut to profit." *Id.* at 1046.

safety of the spas, and harm to Sunlight's reputation.<sup>55</sup> The district court, relying on the standards used in traditional print and broadcast defamation cases, concluded that the plaintiff could establish such causation in three ways.<sup>56</sup> First, the business could show that people were deterred from associating with the business. A second method would allow business owners to show the business's reputation had been lowered in the community. Finally, the business owner could show its business suffered. Using the three methods, courts are allowed to make reasonable inferences as to damage based on the evidence presented.<sup>57</sup> Here, the court noted that could include the inference of damage to business reputation based on evidence of lost sales.<sup>58</sup> In making such a conclusion, the court ruled that the plaintiff had established a contested fact issue with regard to harm and denied the defendant's motion for summary judgment.<sup>59</sup>

In 2004, the Missouri Court of Appeals discussed harm in the context of a case involving a high school principal who was defamed via the Internet by his wife's paramour.<sup>60</sup> Steven Scott, a high school principal, sued Robert LeClerq after LeClerq, who was having an affair with Scott's wife, engaged in a defamatory chat room conversation with a student in Scott's school district.<sup>61</sup> In those conversations, LeClerq wrote that Scott "was being investigated for harassment and sexual stuff" and that the student should take caution as well as that the principal was mentally

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1072.

<sup>57</sup> *Id.* (citing *Moran v. State*, 985 P.2d 127, 133 (1999)).

<sup>58</sup> *Sunlight Saunas*, 427 F. Supp.2d at 1072.

<sup>59</sup> *Id.*

<sup>60</sup> *See Scott v. LeClerq*, 136 S.W.3d 183 (Mo. App. W.D. 2004).

<sup>61</sup> *Id.* at 194.

unstable.<sup>62</sup> To prove harm, the principal called the school superintendent, who testified that those kind of allegations would damage an educator's reputation:

It is a business where you really live and die on your credibility. That's really all you have is your professional reputation and how the public perceives you and how the board of education perceives you. And if there is a rumor of that nature out there and it isn't true I think it would be normal for that to be reported.<sup>63</sup>

The superintendent went further, saying that he thought Scott's reputation was damaged in the eyes of others and that some people likely believed the allegations.<sup>64</sup> The appellate court, noting that the third-party testimony about injury to reputation was from a person of authority in Scott's profession, found that testimony to be sufficient evidence of harm.<sup>65</sup> As a result it seems that at least one court was willing to accept testimony as to harm from third-party witnesses who were not privy to the defamatory statements.

### **Conclusion**

Whether a plaintiff must prove damages in a defamation action depends on both the constitutional and common law rules that apply. Under *Gertz*, private plaintiffs who file suit over defamatory statements arising from the discussion of matters of public concern must prove actual injury damages to recover. Private plaintiffs suing for defamation arising from matters of private concern – those plaintiffs discussed in *Dun & Bradstreet* – need only meet the common law damages requirements established by their jurisdictions. In such cases, presumed damages may be available to plaintiffs who sue under libel per se. However, some states will require plaintiffs

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<sup>62</sup> *Id.* at 195.

<sup>63</sup> *Id.* at 195.

<sup>64</sup> *Id.* at 196.

<sup>65</sup> *Id.* “Evidence of the chat room conversation was sufficient to support a finding of actual reputational harm entitling Mr. Scott to damages. Therefore, this court need not decide whether Mr. LeClerq's publishing Mr. Scott's name, address, and telephone number on websites catering to homosexuals and stating that Mr. Scott was a homosexual soliciting sexual relationships with other men, which resulted in Mr. Scott's receiving solicitations from men who had seen this information on the websites, constituted evidence of actual reputational harm.” *Id.*

to prove special damages. Although it varies from state to state what a plaintiff must prove in these situations, most courts allow plaintiffs to prove injury to business reputation, injury to personal reputation and pecuniary loss.

Both the common law standards and constitutional requirements used by the courts traditional print and broadcast defamation cases have been applied to plaintiffs seeking to prove harm in online defamation cases. For the most part, courts have not yet recognized varying definitions of harm or different standards of proof for injury to reputation caused by online defamation. In fact, in most cases, the courts simply apply standards gleaned from earlier print or broadcast defamation cases.

## CHAPTER 7 CONCLUSION

This dissertation has outlined the major defamation jurisprudence shaping the concepts of community, harm and plaintiff status in the United States. The court decisions involving traditional print and broadcast defamation provide a solid foundation for defining those elements in online defamation cases. However, courts are just beginning to address the concepts of community, harm and plaintiff status in cases involving online defamation. In some opinions, including the Supreme Court's *Reno v. ACLU* decision, the courts have begun to recognize that the Internet's unique characteristics, such as the lack of geographic boundaries, may require special consideration. However, in others, the courts have simply applied the constructs used in traditional print and broadcast defamation to cases involving online defamation.

This chapter will begin with an overall summary of the jurisprudence in both traditional and online defamation cases. It will then discuss the implications of the jurisprudence for online defamation cases. From there, First Amendment theories will be used to address the implication of the jurisprudence for online speech.

This chapter will answer the Research Questions presented in Chapter One:

- What are the significant issues for online defamation that have not been adequately addressed in the scholarly literature?
- How do the courts define the notions of community, harm and public figure status in defamation cases that do not involve online defamation?
- How do the courts define the notions of community, harm and public figure status in online defamation cases?
- What considerations are important when the courts try to define the notions of community, harm and public figure status in online defamation cases?
- What issues are important to consider when balancing reputation and the First Amendment?

Chapter Seven will conclude with suggestions for future research and summary of the dissertation's findings.

### **Research Questions**

Based on this dissertation's legal research methodology and data, the author set out to answer the following research questions:

#### **What Are the Significant Issues for Online Defamation that Have Not Been Adequately Addressed in the Scholarly Literature?**

After conducting a review of the literature, it was clear that scholars had begun to discuss two key areas in the context of online defamation: jurisdiction and anonymity. The Internet creates unique concerns with regard to both jurisdiction and anonymity, and both scholars and courts have thoroughly addressed those issues. For example, many scholars have addressed the number of frameworks that courts have developed to determine when a plaintiff can compel the identification of an anonymous defendant in an online defamation action.<sup>1</sup> Similarly, a number of articles have touched on the jurisdictional complications associated with online defamation lawsuits, including determining whether a court can exercise authority over a defendant and what state's laws should apply to a particular case.<sup>2</sup>

However, there was not a well-developed body of literature with regard to the definitions of community, harm and plaintiff status in online defamation actions. There are some articles discussing these concepts in the framework of traditional print and broadcast defamation cases,

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<sup>1</sup> See, e.g., Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 886 (2000).; Margo E.K. Reder and Christine Neylon O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. TECH. L. REV. 196, 217 (2002).; Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

<sup>2</sup> See, e.g., Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473 (2004).; Eric Barendt, *Jurisdiction in Internet Libel Cases*, 110 PENN. ST. L. REV. 727 (2006).

but very few discuss the concepts as they relate to online defamation.<sup>3</sup> To date, no authors have thoroughly addressed community, harm and plaintiff status in online defamation cases.

### **How Do the Courts Define the Notions of Community, Harm and Plaintiff Status in Defamation Cases that Do Not Involve Online Defamation?**

Approaches to defining community, harm and plaintiff status can be traced back to the U.S. Supreme Court's jurisprudence. In a few instances, these cases date back to the days before *Times v. Sullivan*. But for the most part, the Supreme Court has only recently begun to explore such modern concepts of the defamation tort in light of the Court's move to constitutionalize major issues in libel law to protect wide open speech about people who play a significant role in the country's decision-making. In the case of all three categories that have become the focus of this dissertation, the U.S. Supreme Court has provided guidelines instead of bright-line rules to the lower courts to help them define the concepts in the defamation cases they decide. In the past four decades, the lower courts have utilized this guidance from the Supreme Court to craft their own analytical frameworks and tests to define community, harm and plaintiff status in their traditional print and broadcast defamation cases.

#### **Community**

The Supreme Court's conception of community dates back to Justice Oliver Wendell Holmes' 1909 decision in *Peck v. Tribune Co.*<sup>4</sup> There, he noted that for a statement to be defamatory, it must "hurt the plaintiff in the estimation of an important and respectable part of the community."<sup>5</sup> From this point, the court would focus on the description of the community in which the plaintiff asserted an injury to reputation, and most often these approaches were based

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<sup>3</sup> See David Anderson, *Reputation, Compensation & Proof*, 25 WM. & MARY L. REV. 747, 764-66 (1984).

<sup>4</sup> See generally *Peck v. Tribune Co.*, 214 U. S. 185 (1909); Lyriisa Barnett Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1 (1996).

<sup>5</sup> *Peck*, 214 U.S. at 190.

on some sort of geographical inquiry. The Court added a second prong to the definition of community in *Joint Anti-Fascist Refugee Committee v. McGrath*.<sup>6</sup> There, Justice Harold Burton turned to the *Restatement of Torts*, which defined a defamatory communication as a message that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>7</sup> For the first time, the Court incorporated the element of association as a gauge of reputational injury.

More than eight decades later, in *Milkovich v. Lorain Journal Co.*,<sup>8</sup> Chief Justice William Rehnquist wrote that the Court must view defamatory statements in the context in which they were communicated. Thus, he insisted the *Milkovich* court look at the actionable statement in light of the entire metro area of Cleveland, not simply the one small town in which the plaintiff resided.<sup>9</sup> Although the town in which the case arose was a small one, Rehnquist wrote that the court must consider that the controversy leading to the judicial proceeding involved schools from around the Cleveland area, which were members of the athletic conference in which Milkovich’s school competed.<sup>10</sup>

From the Supreme Court’s decisions, the lower courts have gone on to look at several key factors when defining community in the context of a defamation case. First, many courts have looked at community as the target audience of the purported defamatory communication. The U.S. Court of Appeals for the D.C. Circuit decided that a newspaper article in a defamation case must be taken as a whole as it would be read by the average reader in the community targeted by

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<sup>6</sup> See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

<sup>7</sup> See RESTATEMENT OF TORTS §559 (1938).

<sup>8</sup> For a brief description of the *Milkovich* case, see *infra* ch. 4.

<sup>9</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 n.9 (1990).

<sup>10</sup> *Id.*

the publication.<sup>11</sup> Courts in Delaware and Ohio have examined where statements were published, noting that the proper community can be determined based on the reach of a publication.<sup>12</sup> This approach takes into account a large portion of the audience that likely come into contact with the defamatory statements.

A second gauge established by the lower courts is where the plaintiff resides or works to determine where injury to reputation occurs.<sup>13</sup> A number of courts have used the community in which the plaintiff resides as guidance in constructing the notion of community in defamation cases. This view, which is reflected in the *Restatement (Second) of Torts*, rests on the notion that one is most likely to have his reputation harmed in the community in which he resides. Courts in Oregon and Kansas have examined the plaintiff's occupation to define community, emphasizing the importance of one's professional reputation within the workplace as well as his reputation within the residential community.<sup>14</sup>

Other courts, taking a third approach, have looked at the location of the injury to reputation, or where the harm occurs, in conjunction with other factors. This mixed methods approach does not seem to vary dramatically from the other geography-based inquiries. However, the courts seem to pay particular attention to where the statement was published and whether the plaintiff's asserted community is an acceptable size and construction. These cases tend to inquire into whether the plaintiff's asserted community is the type of community society is willing to recognize. This approach may also consider other factors as well, including where a plaintiff works and where a plaintiff lives. Even though courts may apply one of the geographic

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<sup>11</sup> *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966).

<sup>12</sup> See discussion *infra* ch. 4.

<sup>13</sup> See *Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001).

<sup>14</sup> See discussion *infra* ch. 4.

approaches, they often weigh a number of the geographic factors to determine proper community in traditional defamation cases. For example, a court may look at both where a person works and resides.<sup>15</sup> Or it may look both at a publication's target audience and how that overlaps with the plaintiff's community.<sup>16</sup> In *Jean v. Dugan*, the Seventh Circuit did not wholly abandon the geographic test of community, but it did refine the test to look not singularly at the location of publication, but also at where the publication's effect on reputation might be most greatly felt by examining where the plaintiff lived, where he worked and where the defamation was published.<sup>17</sup>

Although defining community in defamation cases up to this point has been a fact-sensitive decision made with no real bright-line rules, all three of these approaches – target audience of the publication, plaintiff's living or working community and the mixed methods approach – largely rely on geography-centered inquiries.

### **Plaintiff status**

The courts' jurisprudence in the area of plaintiff status really began with the U.S. Supreme Court's decision in *Times v. Sullivan* and took shape through the development of its progeny. Although the Court initially constructed the public official category, which it linked with the actual malice standard of fault in *Times v. Sullivan*, the justices went on to carve out a public figure category as well as the remaining private person category. Through the years, the public figure category has grown to encompass three subcategories of public figures: all-purpose, or general; limited purpose, or vortex; and involuntary public figures. While all-purpose public figures are always held to the actual malice fault standard, limited-purpose and involuntary

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<sup>15</sup> See discussion *infra* ch. 4.

<sup>16</sup> See discussion *infra* ch. 4.

<sup>17</sup> See *Jean v. Dugan*, 20 F.3d 255, 261 (7th Cir. 1994).

public figures can be held to that fault standard in specific instances. The remaining category, the Court noted, contained private persons, for whom the justices said proving negligence provided adequate constitutional protection for defamation defendants.

The Supreme Court established relatively clear guidelines for lower courts to determine whether a plaintiff is a public official. In *Rosenblatt v. Baer*, the Court defined the public official category as containing “at the very least to 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 governmental affairs.”<sup>18</sup> Writing for the Court in *New York Times v. Sullivan*, Justice Brennan noted that criticism of government officials cannot lose its First Amendment protection merely because it may endanger the officials’ reputations.<sup>19</sup> Instead, Brennan wrote, criticism of government officials is at the very heart of American government:<sup>20</sup>

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>21</sup>

After deciding in *Sullivan* that public officials must prove actual malice to succeed in a defamation case, the Supreme Court then tackled the public figure plaintiff, a category that has proven much more difficult to delineate. Public figures, the court said, can play as important of a role in shaping society as public officials.<sup>22</sup> As a result, the Court was unwilling to differentiate

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<sup>18</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>19</sup> *See New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)

<sup>20</sup> *Id.* at 274.

<sup>21</sup> *Id.* at 270.

<sup>22</sup> *See Curtis Publ’g v. Butts, Associated Press v. Walker*, 388 U.S. 130, 145 (1967). “In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and

between such categories of plaintiffs on the “assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials.”<sup>23</sup>

In its public-figure cases, the Supreme Court seems to have enunciated three sub-categories of public figures: all-purpose, limited-purpose and involuntary public figures. All-purpose public figure status is granted based on a person’s notoriety, which means that he is a “celebrity” whose name becomes a “household word, whose ideas and actions the public in fact follows with great interest.”<sup>24</sup> For those plaintiffs who do not rise to that level, the courts have created limited-purpose public figure status, which is typically used for plaintiffs who have thrust themselves into discussion of a public controversy with the purpose of affecting the outcome of the debate.<sup>25</sup> Finally, the Supreme Court mentioned the possibility of involuntary public figures, who are drawn into the discussion of a public controversy through no action of their own. As a result of these distinctions, much of the discussion in the area of plaintiff status has focused on the three categories of public figures.

Starting with *Curtis Publishing*, where the Court found a former college football coach to be a public figure, the Supreme Court has gone on to require a showing akin to actual malice for plaintiffs who “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.”<sup>26</sup>

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implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.” *Id.*

<sup>23</sup> *Id.* at 148 (quoting *Pauling v. Globe-Democrat Publ’g Co.*, 362 F.2d 188, 196 (8th Cir. 1966)).

<sup>24</sup> *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (holding that the well-known operator of a large consumer cooperative was a limited-purpose public figure for defamation purposes).

<sup>25</sup> *Meerpol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

<sup>26</sup> *Curtis Publ’g*, 388 U.S. at 164.

In *Gertz v. Welch*, the Supreme Court added to that the notion that public figures have access to the media in a way that would allow them to better defend their reputations should they be tarnished during the discussion of a matter of public concern.<sup>27</sup> However, a plaintiff does not become a public figure based on the actions of the defendant, who would then be creating his or her own defense, in essence. In *Hutchinson v. Proxmire*, the U.S. Supreme Court found Ronald Hutchinson, a university professor, to be a private person despite the amount of publicity he got after William Proxmire, a Wisconsin senator, awarded him a “Golden Fleece” award for his federally funded research.<sup>28</sup> As a part of the Supreme Court’s test to determine whether a person is a public figure, the justices stated that a specific public controversy must exist in which the plaintiff is involved, not merely a general interest in an issue. If just a general public interest were required, the Court reasoned, there would be an inordinate number of plaintiffs in such a category.<sup>29</sup>

The Supreme Court also addressed the level of fault that a private person would constitutionally be required to prove in its 1974 *Gertz* decision. In the case, the Court held that a prominent Chicago attorney was a public person for the purposes of his defamation lawsuit over an article in *American Opinion* that referred to him as a “Leninist” and “Communist-fronter,” based on his litigation against law enforcement.<sup>30</sup> Private figures, the Court reasoned in *Gertz v. Welch*, do not play that type of prominent role in shaping society.<sup>31</sup> Ruling that the Constitution

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<sup>27</sup> *Gertz*, 418 U.S. at 343-345.

<sup>28</sup> *Hutchinson*, 443 U.S. at 114 (holding that a university professor was not a public figure in a defamation action based on the press interest in the case or because of an interest in public spending of taxpayers’ money to fund his grant).

<sup>29</sup> *Id.*

<sup>30</sup> *Gertz*, 418 U.S. at 326.

<sup>31</sup> *Id.*

requires only that a private person prove some level of fault to succeed in a defamation action, Justice Powell asserted that private persons, unlike public officials and public figures, don't have the same means of redress to counteract damage to reputation.<sup>32</sup> Public officials and public figures have greater access to the media and have opened themselves up to criticism based on the highly public nature of their lifestyles.<sup>33</sup> In the case of private persons, however, the state has a much greater interest in protecting them from reputational injury.<sup>34</sup>

The rules regarding what level of fault private plaintiffs must prove continued to be refined by the U.S. Supreme Court. In *Dun & Bradstreet v. Greenmoss Builders*,<sup>35</sup> the Court ruled that a private person need not prove actual malice in order to recover in a defamation lawsuit over a purely private matter. However, shortly after *Dun & Bradstreet*, the Court ruled in *Philadelphia Newspapers v. Hepps* that private plaintiffs must prove falsity in addition to fault in lawsuits against media defendants where the matter was an issue of public concern.<sup>36</sup>

After the U.S. Supreme Court crafted the major categories of plaintiff status and outlined general guidelines for determining who fit which category, the lower federal courts began piecing together a picture of how to categorize defamation plaintiffs. Determining whether a plaintiff is a public official is likely the easiest categorization for the lower courts to make. Guided by the Supreme Court's general discussion in *Sullivan* that judges, government officials

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 343-345.

<sup>34</sup> *Id.* at 344.

<sup>35</sup> See *Dun & Bradstreet*, 472 U.S. at 749 (holding that a private person need not prove actual malice to succeed in a defamation action involving purely private matters).

<sup>36</sup> See *Hepps*, 475 U.S. at 767 (holding that private figures must prove falsity to recover from a media defendant if the defamatory statement stemmed from an issue of public concern).

and elected commissioners fall within such a category,<sup>37</sup> the lower courts have gone on to address the issue dealing with government employees at all levels, including international officers, national officers, state officers and even municipal employees. As a rule, the courts have often put law enforcement officials and public school educators into the public official category based on their authority and their discretion to make important decisions that affect society.<sup>38</sup>

To determine whether a plaintiff is a limited-purpose public figure, lower courts have typically followed one of two tests established in the federal appellate courts. The D.C. Circuit crafted a three-part test in *Waldbaum v. Fairchild Publications* that asks whether:

(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy.<sup>39</sup>

Along the same lines, the Fourth Circuit expanded the *Waldbaum* test into a five-part inquiry in *Fitzgerald v. Penthouse International*.<sup>40</sup> That test is:

(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the alleged time of the allegation.<sup>41</sup>

As a result, the lower federal courts look at two basic elements to determine whether a plaintiff is rightfully classified into the public-figure category or instead remains a private person for most

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<sup>37</sup> *Sullivan*, 376 U.S. at 273. “If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials, such as elected city commissioners.” *Id.* (quoting *Craig*, 331 U.S. at 376).

<sup>38</sup> *See, e.g., Garcia*, 777 F.2d at 1403; *Buendorf*, 822 F. Supp. at 6.

<sup>39</sup> *Walbaum*, 627 F.2d at 1296.

<sup>40</sup> *Fitzgerald*, 691 F.2d at 666.

<sup>41</sup> *Id.* The fifth item refers to the precedent that public figure status can survive many years, even decades, when the alleged defamation is about events of the past.

of the traditional print and broadcast defamation cases. The first is whether there is a matter of public concern in which the plaintiff has sought to influence the outcome. The second is to examine the plaintiff's access to the media. Applying these criteria, the federal appellate courts have found the Rosenberg children,<sup>42</sup> the CEO of a food co-op<sup>43</sup> and an expert on the military's use of dolphins<sup>44</sup> to be limited-purpose public figures.

## **Harm**

The concept of harm plays an important role in defamation litigation. The U.S. Supreme Court has often said the primary interest behind the tort of defamation is the compensation of individuals whose reputations have been harmed by defamatory falsehoods.<sup>45</sup> Justice Stewart enunciated this eloquently in *Rosenblatt v. Baer*, writing that allowing such compensation:

reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.<sup>46</sup>

The need for the state to provide protection for reputation runs throughout the Court's defamation jurisprudence, with the Court noting in *Getz v. Welch* that the "truth rarely catches up with a lie."<sup>47</sup> However, as the Court's defamation jurisprudence has matured, the justices have injected the common law of defamation with several constitutional hurdles over which defamation plaintiffs must climb.<sup>48</sup>

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<sup>42</sup> See *Meerpol*, 560 F.2d at 1061.

<sup>43</sup> See *Waldbaum*, 627 F.2d at 1292.

<sup>44</sup> See *Fitzgerald*, 691 F.2d at 666.

<sup>45</sup> See *Gertz*, 418 U.S. at 341 (1974).

<sup>46</sup> 383 U.S. 78, 92 (1966) (Stewart, J., concurring).

<sup>47</sup> *Gertz*, 418 U.S. at 344 (n. 9).

<sup>48</sup> See, e.g., *Gertz*, 418 U.S. at 323; *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

At common law, damage resulting from a defamatory publication could be presumed.<sup>49</sup> In these libel per se situations, “the existence of injury is presumed from the fact of publication.”<sup>50</sup> Presumed damages allowed plaintiffs to be compensated for emotional harm that resulted from the injury to reputation. Such a view is represented in the *Restatement (Second) of Torts*.<sup>51</sup> Notably, when a plaintiff pleads and establishes libel per se, the plaintiff need not allege or prove any special damages. In fact, general damages are presumed and nominal damages are available in any event.<sup>52</sup> Many states still allow plaintiffs to proceed in court without having to prove actual damages to meet the common law damages requirement.<sup>53</sup> In these states, certain types of defamatory statements – those that are *libelous per se* – are harmful on their face and the court will instruct the jury to presume that injury to reputation follows if the statement is found to be defamatory. State courts have established a variety of methods of proof through which plaintiffs can fulfill the common law damage requirements. Often, plaintiffs prove any of several types of harm: injury to business reputation, injury to personal reputation or pecuniary injury.

As the Supreme Court began to constitutionalize the law of defamation in the 1960s, its rulings would overlay a set of constitutional requirements for damages on top of the common law requirements.<sup>54</sup> Except in a specific group of cases outlined by the Supreme Court in *Gertz*, the common law damages rules still apply to defamation lawsuits in most jurisdictions.<sup>55</sup> For

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<sup>49</sup> See DAN B. DOBBS, *LAW OF TORTS* § 422 (2000).

<sup>50</sup> *Gertz*, 418 U.S. at 349.

<sup>51</sup> See *RESTATEMENT (SECOND) OF TORTS* § 569.

<sup>52</sup> See *Shoemaker v. Community Action Org. of Scioto City*, 2007 WL 2070365 ¶ 13 (Ohio Ct. App.).

<sup>53</sup> See, e.g., *Bentley v. Bunton*, S.W.3d 561, 605 (Texas 2002); *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. App. 2007) “If the communication is defamatory per se, damages are presumed even without proof of actual harm to the plaintiff’s reputation.” *Id.* at 1243.

<sup>54</sup> See ROBERT D. SACK, *SACK ON DEFAMATION* § 10.2 (3d ed. 2000).

<sup>55</sup> See DOBBS, *supra* note 49, at § 422.

private plaintiffs suing over defamation that arises in the discussion of matters of private concern – those plaintiffs covered by *Dun & Bradstreet* – the common law damage rules guide the award of damages. Thus, the Constitution does not impose any restrictions on damages in this category of cases.<sup>56</sup>

The *Gertz* Court ruled that plaintiffs who fail to prove actual malice can only recover damages based on actual injury under the Constitution’s protections.<sup>57</sup> By its very wording, the *Gertz* opinion placed no restrictions on plaintiffs who prove actual malice, whether they be public officials, public figures or private persons.<sup>58</sup> Under *Gertz* then, a plaintiff must prove actual malice in order to recover either presumed or punitive damages in cases involving matters of public concern.

The *Gertz* opinion clearly established that “actual injury damages” were those damages designed to compensate a plaintiff for the injury to reputation that could actually be proven.<sup>59</sup> However, the Court did not define the term, writing that trial courts could properly frame the jury instructions for their defamation trials.<sup>60</sup> Instead, the Court provided some examples of actual injury, which included “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”<sup>61</sup>

The *Gertz* decision did not answer all the questions regarding damages. After *Gertz*, which applied to speech about a matter of public concern, it was unclear what harm private plaintiffs

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<sup>56</sup> *Dun & Bradstreet*, 472 U.S. at 759-760.

<sup>57</sup> *Id.* at 349-350. “It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.” *Id.* at 349.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

suing over speech that did not involve a matter of public concern would be required to prove to recover damages. In 1985 in *Dun & Bradstreet v. Greenmoss Builders*, Justice Lewis Powell, writing for a plurality of the Court, noted that when speech involves purely private matters:

The rationale of the common-law rules has been the experience and judgment of history that ‘proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.’<sup>62</sup>

As a result, in cases involving private persons defamed in connection with matters that are not a matter of public concern, the Supreme Court has upheld the allowance of presumed damages and punitive damages. Under the *Gertz* standard, however, parties who are defamed by speech involving a matter of public concern must still show proof of actual injury damages to recover presumed and punitive damages.

### **How Do Courts Define the Notions of Community, Harm and Plaintiff Status in Online Defamation Cases?**

As discussed in this and earlier chapters, courts – in the relatively few online defamation opinions issued so far – often turn to the same rules they apply in traditional print and broadcast defamation cases to define the notions of community, harm and plaintiff status in cases involving online defamation. For the most part, courts rely on the rules that have largely developed since *Times v. Sullivan*.

#### **Community**

Most courts that have discussed the issue of community in online defamation cases have done so in the context of deciding whether a court has jurisdiction to hear the case. Although most of these jurisdiction decisions do not directly address the definition of community as an element of defamation, they certainly provide insight into how the courts may decide online

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<sup>62</sup> *Id.* (quoting W. PROSSER, LAW OF TORTS § 112, p. 765 (4th ed. 1971)).

defamation cases and how they view the role of the Internet in mass communication. Most of these jurisdictional questions arise when a court is unsure whether it can legally hear a case involving communication from one jurisdiction that may bring about injury in another jurisdiction. For instance, while discussing jurisdiction in a case between a college professor and his former student located in two different states at the time, the North Dakota State Supreme Court discussed the notion of community.<sup>63</sup> In that case, the court looked at the geographic reference to the University of North Dakota contained in the Web site's Internet address (www.undnews.com), the Internet site's subject and the geographical boundaries of the network used to transmit the communication to determine the proper jurisdiction – and arguably community – was in North Dakota, not Minnesota.<sup>64</sup> The court reasoned that the plaintiff “did particularly and directly target” North Dakota with her Web site.<sup>65</sup> A publication's target audience is one of the factors that courts used to define community in traditional defamation cases and may be one of many relevant factors to defining community in online defamation.

In addition to examining a court's jurisdictional analysis in online defamation cases, it is possible to glean some inferences about the definition of community in online defamation by looking at a court's choice-of-law analysis. The reasoning behind a court's decision as to which state's laws apply in a particular case may provide useful information about which community the court believes is most relevant in the case. For example, a federal district court, when deciding whether to apply New York or California defamation law in an online defamation case, noted that the most important factors to consider in the decision were the parties' place of

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<sup>63</sup> See *Miskin*, 660 N.W.2d at 593.

<sup>64</sup> *Id.* at 599.

<sup>65</sup> *Id.*

residence and the location where the tort occurred.<sup>66</sup> The court, observing that the defamatory statement was transmitted via the Internet, ruled that the proper location in which the injury occurred was, at the very least, national in scope.<sup>67</sup> Given that the court was willing to acknowledge the likelihood of injury to reputation on a national scale, this may provide support for a court to find a national or international community in online defamation cases.

Examining where the injury to reputation occurred is not a new concept in defamation law and many traditional defamation opinions have used similar criteria. In online defamation cases, the court inquiries often focus on where the plaintiff resides or works as a proxy for where the injury to reputation likely occurred. Occasionally, this will include where the publication of the defamatory statements occurred as well. Courts may look at where an e-mail was sent from or in what state a Web site was created. For the most part, these geographic criteria have been routinely carried over from traditional print and broadcast defamation cases into online defamation cases.

However, some courts in online defamation cases also seem to recognize the expansive geographic reach of the Internet and the specific concerns such reach can create in online defamation cases. As a result, in discussing community, they have examined where the defendant targeted the communication and where the greatest harm to reputation likely occurred if these were different from where the statements were published. For example, a Florida appellate court, sitting in an Internet defamation case, specifically acknowledged the potential for harm to the plaintiff's reputation in a community that was larger than the traditional rules would allow the court to recognize. Noting that the state in which the case was tried followed the 'common mind'

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<sup>66</sup> *Condit*, 317 F. Supp.2d at 352 (quoting *Lee*, 166 F.3d at 545).

<sup>67</sup> *Condit*, 317 F. Supp.2d at 353.

rule, the court said it was precluded from finding injury to reputation. This was because the community to which the statement was targeted – a group called Jews for Jesus – would not have viewed the statement that the Jewish plaintiff had accepted Jesus Christ as her savior as defamatory. However, the court acknowledged that Jewish non-members of the community could have come into contact with the communications and viewed the statements as defamatory given the reach of the Internet. But, the “common mind rule,” which looks at how the average member of the target audience viewed the statement, precluded the court from ruling in the plaintiff’s favor.

### **Plaintiff status**

As discussed in Chapter 5, the courts have relied heavily on the plaintiff status tests established in traditional print and broadcast defamation cases. Courts in online defamation cases have looked at several key factors established by the U.S. Supreme Court in *Gertz*. This includes an examination of the plaintiff’s access to the media. For example, several state courts hearing online defamation cases have turned to the D.C. Circuit’s *Waldbaum* test, which draws on *Gertz*, to determine whether a plaintiff is a limited-purpose public figure.

The Georgia Supreme Court applied the *Waldbaum* inquiry in an online defamation case, noting the comments posted online by the defendant were germane to the plaintiff’s role in a solid-waste controversy.<sup>68</sup> In another case, a Georgia appeals court reasoned that access to the media justified finding the director of animal services to be a limited-purpose public figure, noting he issued press releases, spoke to TV crews and shared his views with elected officials.<sup>69</sup>

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<sup>68</sup> *Mathis*, 573 S.E.2d at 382.

<sup>69</sup> See *Atlanta Humane Society*, 618 S.E.2d at 18.

One key difference between the courts' determination of plaintiff status in traditional print and broadcast cases and online defamation cases is the examination of the role of the Internet in the controversy. For example, many courts looked at the plaintiffs' use of the Internet prior to the defamatory statements as a part of their analysis of the plaintiffs' access to the media. Implicitly, this may suggest the courts' recognition of the Internet's role as a mass medium. A California court noted the plaintiff's use of its own Web site prior to the defamation lawsuit. The company relied on its site to post news releases on issues of concern to its stockholders as well as to tout the benefits that a new project would have for the company's future helped make it a limited-purpose public figure in an online defamation case.<sup>70</sup> This use of the Internet, the court observed, pre-dated the defamation lawsuit and even concerned the project that was subsequently criticized by the defendant.

Although the courts deciding online defamation cases have, for the most part, followed the test outlined in *Gertz* to determine whether plaintiffs are limited-purpose public figures, there have been some courts that have modified the *Gertz* analysis. These courts have examined a plaintiff's reliance on the Internet as a medium of mass communication prior to the defamation lawsuit to help determine plaintiff status.

## **Harm**

As discussed in Chapter 6, courts have begun to look at harm in online defamation cases in a manner similar to the way they have addressed harm in traditional defamation cases, applying the same constitutional and common law principles. Thus far, only two state appellate courts and one federal trial court have provided substantive discussion of harm in the context of online defamation cases. The discussions of harm seem to offer little recognition of the unique nature of

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<sup>70</sup> See *Ampex Corp.*, 27 Cal.Rptr.3d at 863.

the medium and the potential for differences in the types of harm that may emerge from defamatory statements published on the Internet, unlike the community and plaintiff status discussions. As a result, harm in online cases is most often judged using the same common law rules that courts apply in traditional print and broadcast defamation cases.

One of the first discussions of harm in an online defamation case came in the context of whether a court should reveal the identity of an anonymous poster who posted defamatory comments about a corporation online. In *Dendrite International, Inc. v. Doe, No. 3*, the appellate division of the New Jersey Superior Court affirmed the trial court's ruling that the plaintiff corporation must show harm resulting from a defamatory statement before it was entitled to discovery to obtain an anonymous speaker's identity.<sup>71</sup> Noting the court was looking for a more concrete showing of harm than Dendrite Corp. had made,<sup>72</sup> the judge wrote that linking the statements to a decline in stock price may have been acceptable if done by an expert.<sup>73</sup> Had Dendrite Corp. made such a showing as the harm, the court may then have allowed the identity of the poster to be revealed.

Harm has also been discussed in the context of a motion to dismiss in an online defamation case. In *Sunlight Saunas v. Sundance Saunas*,<sup>74</sup> the U.S. District Court for the District of Kansas, relying on the standards used in traditional print and broadcast defamation cases, noted that the plaintiff could successfully establish a link between the defamatory statements and their alleged

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<sup>71</sup> *Dendrite*, 775 A.2d at 759-760.

<sup>72</sup> Dendrite's verified complaint contained this allegation of harm: "Defendants' publication of these statements has caused irreparable harm to Dendrite for which Dendrite has no adequate remedy at law, and will continue to cause such irreparable harm unless restrained by this Court. In addition, as a proximate result of defendants' publication of these statements, Dendrite has sustained harm to its business reputation resulting in damages in an amount to be proven at trial, and Dendrite will continue to suffer additional damages in the future according to proof." *Id.* at 769.

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

<sup>74</sup> See *Sunlight Saunas*, 427 F. Supp.2d at 1032.

harm in one of three ways.<sup>75</sup> First, the business owner could show that people were deterred from associating with the business. A second method would allow the business owner to show the business's reputation had been lowered in the community. Finally, the business owner could show that his business suffered. If the plaintiff used one of the three methods, the court could make reasonable inferences as to damage based on the evidence presented.<sup>76</sup> In *Sunlight Saunas*, the court noted that the 'victim' could prove damage to business reputation based on evidence of lost sales.<sup>77</sup> Such evidence of harm, it ruled was enough to withstand a motion to dismiss.

Similarly, a Missouri appellate court has addressed harm in an online defamation case as well, explicating additional evidence of harm that would suffice for a plaintiff to succeed. In *Scott v. LeClerq*, the court ruled that third-party testimony related to harm to reputation by someone in the plaintiffs' professional field was enough to show harm in an online defamation case.<sup>78</sup> The third-party witness also testified that others who came into contact with the speech may have believed it, which could cause injury to the plaintiff's professional reputation.<sup>79</sup> As a result it seems that at least one court was willing to accept testimony as to harm from third-party witnesses who were not privy to the defamatory statements.

### **What Considerations Are Important When Courts Try to Define the Notions of Community, Harm and Plaintiff Status in Online Defamation Cases?**

As courts continue to hear cases involving online defamation, they will likely have to continue to address the unique characteristics of the Internet as a communicative medium. Unlike newspapers, which are usually constrained by geographic boundaries, the Internet is a global

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<sup>75</sup> *Id.* at 1072.

<sup>76</sup> *Id.* (citing *Moran*, 985 P.2d at 133).

<sup>77</sup> *Sunlight Saunas*, 427 F.Supp.2d at 1072.

<sup>78</sup> See *LeClerq*, 136 S.W.3d at 194.

<sup>79</sup> *Id.*

medium. Unlike television, where broadcasts are controlled by a government-issued license, the Internet can be used by anyone with access to it through a computer – meaning millions across the world. Unlike traditional defamation, in which damages may be more easily traced to a speaker, the Internet allows speakers – who are frequently incapable of being easily ascertained – to quickly and effortlessly transmit and republish defamatory material. All of these factors, both singularly and acting in concert, will likely spur the court to craft unique guidelines for defamation resulting from the emerging medium.

### **Community: Geographic reach of the Internet**

If, as Chapter 4 has shown, the definition of community is sensitive to where the plaintiff lives and works, where the defamation was published and to what audience it was targeted, the Internet's global reach will most certainly come into play as the courts continue to craft a definition of community in online defamation cases. After all, as shown in Chapter 2, the Internet is a worldwide tool that allows millions of users to send text, video and audio signals in “real-time.”<sup>80</sup> It is a medium that was utilized by more than one billion communicators across the globe as of June 2006.<sup>81</sup> Further, it has become a medium through which people can both send and receive content.<sup>82</sup> As a result, the courts' traditional definition of community – the geographic notion based on coverage area that it applied in cases involving print and broadcast defamation – will likely have to change to accommodate the first truly global medium of mass communication.

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<sup>80</sup> See MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 20-30 (2d ed. 2005).

<sup>81</sup> See World Internet Usage and Population Statistics, at [www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm) (last visited Sept. 5, 2006).

<sup>82</sup> See Amanda Lenhart, *Bloggers i* (2006), at <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (last visited Sept. 6, 2006).

One solution may be to look at a number of factors when trying to determine community, including where a plaintiff lives, where a plaintiff works, where the statements were published and who was intended as the target audience. Such a “mixed methods” approach has been used by a few courts in both traditional and online defamation cases. In 1994, the Seventh Circuit applied a form of the mixed method approach in *Jean v. Dugan*, when refining the geographic approach used by earlier courts.<sup>83</sup> There, the appellate court looked at community in the context of a choice-of-law issue that required it to decide whether to apply Indiana or Illinois law. To decide which state’s law to apply in the case, the Seventh Circuit looked at where the plaintiff lived, where the plaintiff worked and where the publication was printed and distributed. The court then balanced the competing interests to determine where injury to reputation was the greatest. Such a mixed methods approach that balances the competing interests of both parties could likely be applied to define community in addition to determining whether the court has jurisdiction, or authority, to hear the case.

Another solution may be to take the “specific community” approach, which would look at sub-communities within the general population. The idea of specific community has been considered in both traditional and online defamation cases. For example, a federal trial court in New York implied in a traditional defamation case that although the plaintiffs’ reputations may not have been injured in the eyes of the general public, they could have been harmed in the eyes of the “art community.” The opinion reasoned that among traders, scholars, sellers and historians in the art world, a person’s reputation could be of high importance even though the general public would not be as concerned.<sup>84</sup> In the context of online defamation, the Florida courts dealt

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<sup>83</sup> See *Dugan*, 20 F.3d at 261.

<sup>84</sup> See *McNally*, 764 F. Supp. at 838.

with the issue of specific community in a case dealing with defamatory statements posted on a religious group's Web site.<sup>85</sup> The state appellate court in *Rapp v. Jews for Jesus*, refused to recognize the plaintiff's construction of community, which essentially amounted to the general public.<sup>86</sup> Instead, the court said the proper community was the religious group to whom the Web site statements were directed – a group that would not have interpreted them in a defamatory manner.<sup>87</sup> One possible benefit to looking at specific communities may be the ability to add some predictability to the choice-of-law questions that often arise in Internet cases involving parties in different states or even nations. By using specific communities, courts may be able to develop a set of uniform Internet-specific guidelines to determine which jurisdiction's laws would apply to online defamation cases. Doing so may provide some level of protection for speakers, who would be able to better determine in advance of any litigation where they could be held liable for their communications.

The use of specific community creates some potential complications in Internet cases. First, it is possible to craft the definition of community in such a way that it creates small, insular groups for whom certain statements may have significantly different meanings than they would in the community at large. This concern was recognized in 1986 by a New York trial court, which ruled that the proper community in a defamation suit involving an Orthodox Jewish rabbi purportedly defamed by an article in *Time* was the magazine's readers. Focusing on the national magazine's readers, as opposed to the rabbi's small enclave, the court said, takes into account the bigger picture as to the meaning of the words in the eyes of the average reader.

In its decision, the court made an interesting observation about reputation and community:

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<sup>85</sup> See *Rapp*, 944 So.2d at 466.

<sup>86</sup> *Id.* at 465.

<sup>87</sup> *Id.*

While it is obvious that a person can only be injured in his community, i.e., with those who know him personally or by reputation, the corollary is also true that a person cannot be injured by the feelings of those he does not know and will never meet.<sup>88</sup>

Certainly it is plausible in the age of the Internet to imagine that a person can suffer injury from the statements of a person he does not know and may never meet. With the rise of MySpace, Facebook and You Tube, it is certainly possible for a person to launch an assault on another having never met the defamed party. In such a context, it is hard to believe that the defamed party could never be injured as a result of this conduct.

Another likely difficulty of recognizing specific communities for the purpose of online defamation is the implication it could have for determinations of plaintiff status. In small sub-communities, it seems the likelihood that a plaintiff would be a public figure within that small community increases. Conversely, should the courts decide to recognize a more global community in online defamation cases, it may become very difficult for anyone to obtain public-figure status.

#### **Plaintiff status: Ease of access to the Internet**

One of the hallmarks of a public figure, as established by the U.S. Supreme Court in *Gertz*, is access to the media. In fact, the high court stated:

The first remedy of any victim [sic] of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.<sup>89</sup>

Although it is still true that a private person may be less likely to call a press conference and expect the traditional media's attendance and subsequent publication of a rebuttal to defamation, it hardly seems to follow that a private person would be unable to access the Internet to respond

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<sup>88</sup> *Id.*

<sup>89</sup> *Gertz*, 418 U.S. at 344.

to defamatory communications leveled at him online. First, the Internet may level the playing field somewhat by putting the power of the rebuttal megaphone in the plaintiff's hand whereas traditional rebuttal often concentrates the power of reply in the hands of the institutionalized press. And even though it would be impossible to assure that a victim could reach all those who encountered a defamatory comment published via the Internet, the odds are likely greater given ability to respond quickly and the worldwide reach of the Internet. With any counter to defamation, the rebuttal audience is likely to be an incomplete representation of the original consuming audience, and this seems to be even more the case for plaintiffs defamed by newspaper, television stations and live speakers. In fact, given the highly specialized audiences present on the Internet, it may be easier to target the original consuming audience of any defamatory communication. As a highly unrestricted medium, the Internet certainly offers a private person the comparable ability to rebut defamatory allegations as the traditional mediums allow for public officials and public figures. Further, it gives the plaintiff a better shot at replying in kind using the same forum and same manner of communication, which is unlikely to happen in the traditional media. For example, a newspaper correction buried inside the paper can hardly compare to a front-page story that runs above the fold. Using chatrooms, e-mail, blogs and Web sites, though, the defamed is more likely to be able to control the placement of the rebuttal.

As discussed in Chapter 5, courts have slowly seemed to recognize the Internet's power to amplify an individual speaker's message, often examining a plaintiff's Internet use prior to the alleged online defamation to determine whether a plaintiff is a limited-purpose public figure. For example, in one case, a Tennessee appellate court noted, as a factor supporting limited-purpose public figure status, the plaintiff's use of an Internet newsgroup to make claims about his skills

prior to the occurrence of the defamatory communications being posted online.<sup>90</sup> Similarly, a corporation's use of its Web site to promote a product was used by a California appellate court to justify the company's status as a public figure in an online defamation case stemming from comments about that product.<sup>91</sup> It seems quite possible that a plaintiff's previous use of the Internet may become a significant factor as courts determine access to the media, which ultimately plays a role in establishing plaintiff status.

In addition to having the potential to change how courts view limited-purpose public figures, the Internet also has the potential to impact whether plaintiffs are considered all-purpose public figures. All-purpose public figures, defined in Gertz as those people who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,"<sup>92</sup> are categorized as such based on their widespread notoriety. The Internet, with its e-mail, instant messaging and real-time ability to share information to a nearly unlimited number of people across vast geographic spaces, creates the opportunity for a nobody to become a somebody nearly overnight. Traditionally, it has taken time and effort for someone – usually a celebrity or athlete – to become an all-purpose public figure. In *Buckley v. Little*, the Second Circuit goes to great lengths to characterize the numerous actions taken by well-known conservative columnist William F. Buckley before finding him to be an all-purpose public figure.<sup>93</sup> However, courts may soon have to answer whether a person can become an all-purpose

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<sup>90</sup> See *Hibdon*, 195 S.W.3d at 48.

<sup>91</sup> See *Ampex Corp.*, 27 Cal.Rptr.3d at 863.

<sup>92</sup> *Id.*

<sup>93</sup> *Buckley*, 539 F.2d at 885. "From the time Buckley first wrote his book *God and Man at Yale* he has inspired considerable comment and he has been much in the public eye, founding in 1955 and editing *The National Review* which in 1968-69 as a fortnightly had a circulation of about 100,000 copies per issue and has an even larger circulation now. Since 1964 Buckley has been the author of a syndicated newspaper column, '*On the Right*,' appearing three times weekly in 250 newspapers in 1968-69 and in about 350 newspapers today. Beyond this he has a weekly television show entitled '*Firing Line*,' carried first by commercial television and subsequently by public

public figure via the Internet in a short time, based purely on someone else's action – a question similar to the one they have struggled to deal with when categorizing plaintiffs as involuntary public figures.

### **What First Amendment Theories Are Important When Courts Try to Define the Notions of Community, Harm and Plaintiff Status in Online Defamation Cases?**

As discussed in Chapter 3, U.S. courts do not singularly rely on one First Amendment theory to protect speech. Instead, the combination of marketplace of ideas, checking value, self-governance and self-fulfillment theories play a role in American jurisprudence. Thus, it seems only natural that a multitude of theories would come into play in the courts' Internet jurisprudence as well. Although the courts may not explicitly mention any particular theory in their online defamation cases, many of the ideas underlying the theories discussed in Chapter 3 can be found in online defamation cases.

#### **Marketplace of ideas**

Originating in the writings of John Milton<sup>94</sup> and John Stuart Mill,<sup>95</sup> the concept of a marketplace of ideas has become the First Amendment theory most relied upon by the U.S. Supreme Court. The theory, as it has developed, essentially posits that in a market of competing ideas, the notions of truth, or their closest approximations, shall rise to the surface through a

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broadcasting and radio. The evidence is that his column, '*On the Right*,' was the third most widely-sold column of political commentary in 1968 and 1969 and is second only to Jack Anderson's column today. Buckley is a lecturer, the author of a number of books and articles, and was chairman and part owner of the Star Broadcasting group, which owns radio and television stations and a book publishing company. He was the unsuccessful Conservative Party candidate for mayor of New York in 1965 and served for three years on an advisory committee of the United States Information Agency; in 1973 he was a public member of the United States delegation to the 28th General Assembly of the United Nations. At one time he was also a candidate for the Yale University Board of Trustees. He is a frequent guest on television and radio programs and is recently a successful novelist." *Id.* at 885-886.

<sup>94</sup> See JOHN MILTON, *AEROPAGITICA* (J. Suffolk ed., 1968) (1644).

<sup>95</sup> See JOHN STUART MILL, *ON LIBERTY* (D. Spitz ed., 1975) (1859).

robust exchange of ideas. Not surprisingly, courts have often linked the marketplace theory to Internet cases.

In *ACLU v. Reno*, a federal trial court viewed the ease of access to the Internet, and the lack of gatekeepers, as an opening up of the marketplace of ideas, which facilitates speech from non-mainstream speakers:

In the medium of cyberspace, however, anyone can build a soap box out of [W]eb pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.<sup>96</sup>

Courts must also recognize that, as a ‘virtual village green,’ the Internet’s large and diverse audience will greatly affect the tort of defamation, which once focused on speech distributed in a somewhat limited manner. Communities that were once small and insular can now have far-reaching access on a global spectrum. As the Delaware Superior Court noted:

[S]peakers on [I]nternet chat rooms and blogs can speak directly to other people with similar interests. A person in Alaska can have a conversation with a person in Japan about beekeeping in Bangladesh, just as easily as several Smyrna residents can have a conversation about Smyrna politics.<sup>97</sup>

Reputation, then, it would seem, becomes not merely how your neighbor down the street perceives you, but also how the person across the globe with whom you regularly conduct business also perceives you. In a global marketplace, it is possible that injury to a person’s reputation means more than possibly losing his job in the community in which he lives. With nearly instantaneous worldwide communication, it could mean that he is no longer employable within his field. Thus, the marketplace of ideas theory, working in conjunction with the courts’ recognition of an international marketplace, would weigh heavily in favor of a more global

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<sup>96</sup> *Reno*, 31 F. Supp.2d at 476.

<sup>97</sup> *Cahill*, 884 A.2d at 456.

framework for the definition of community in online defamation cases. Using a global framework would not require that the community consist of every single person in the world; instead it may be that the global community looks at an international version of a “specific community.” Such a framework for community was envisioned, if not implemented, by the Florida appellate court in *Rapp v. Jews for Jesus*, where the court realized that others of the Jewish faith may have thought less of the plaintiff after an organization’s Web site published that she had accepted Jesus as her savior.

The courts have also recognized the role played by the Internet in allowing a variety of speakers to contribute to the debate on public issues. One federal trial court noted the benefits of the Internet in contrast to limitations presented by the traditional mainstream mediums:

Despite the protection provided by the First Amendment, unconventional speakers are often limited in their ability to promote such speech in the marketplace by the costs or logistics of reaching the masses, hence, the adage that freedom of the press is limited to those who own one.<sup>98</sup>

Viewing the Internet as the mass communication medium of the average person seems to suggest, given the courts’ reliance on access to media as a criterion in the public-figure analysis, that as more people become regular speakers on the Internet, more plaintiffs will also be categorized as limited-purpose public figures in online defamation cases:

As a threshold matter, we note the enormous impact of the Internet on commerce and the marketplace of ideas. Indeed, ‘[f]rom the publishers’ point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.’ Such broad access to the public carries with it the potential to influence thought and opinion on a grand scale.<sup>99</sup>

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<sup>98</sup> *Reno*, 31 F. Supp.2d at 476.

<sup>99</sup> *Oja v. U.S. Army Corps of Engineers* 440 F.3d 1122, 1129 (9th Cir. 2006) (*quoting Reno*, 521 U.S. at 844).

The ability to influence thought and opinion also brings along with it the ability to cause significant harm on a much larger scale. The D.C. district court recognized this concern as it began to deal with the intricacies of creating jurisprudence for the new medium:

The near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to computers and thus to the Internet have created ever-increasing opportunities for the exchange of information and ideas in ‘cyberspace.’ This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene and pornographic materials, and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape.<sup>100</sup>

As courts continue to consider harm as it applies in online defamation cases, the marketplace of ideas theory would suggest that courts must weigh the harm caused by speech online against the value of providing a new medium in which the everyday person can communicate to the world in much the same fashion as the institutional media. As the Ninth Circuit observed:

[T]he publication of defamatory and private information on the web has the potential to be vastly more offensive and harmful than it might otherwise be in a more circumscribed publication. Accordingly, in search of cogent principles, we compare the Internet to other media with great care.<sup>101</sup>

To properly gauge the injury to reputation caused by online defamation, the courts will likely have to discuss the notions of defamatory meaning and the opinion privilege<sup>102</sup> in cyberspace. Much of this marketplace jurisprudence recognizes significant differences between the Internet and traditional mediums, suggesting the courts might find theoretical support should they decide

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<sup>100</sup> See *Blumenthal*, 992 F. Supp. at 44.

<sup>101</sup> *Oja*, 440 F.3d at 1129.

<sup>102</sup> Opinion speech, speech that does not contain false factual assertions, is protected from liability by the First Amendment, a doctrine that is rooted in the “fair comment” protection in common law. See *Milkovich*, 497 U.S. at 20-22.

to craft different parameters for online defamation than for traditional print and broadcast defamation.

### **Self-governance, checking value and self-fulfillment**

Many of the decisions discussing the role of the Internet in the marketplace of ideas also draw on concepts popularized by other First Amendment theories that could be used as support should the courts eventually craft unique rules for online defamation cases. The Delaware Superior Court, for example, has recognized the value the Internet has in a self-governing society:

The [I]nternet is a unique democratizing medium unlike anything that has come before. The advent of the [I]nternet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate.<sup>103</sup>

Again, one could argue that those who participate in public debate via the Internet are more likely to become limited-purpose public figures by availing themselves of a medium that allows for nearly instantaneous rebuttal while serving as a global bully pulpit for the discussion of matters of public concern. Additionally, recent decisions have noted the potential of the Internet to create informed citizens – the very goal to which Justice Brennan spoke in *Times v. Sullivan* and to which the courts, including the Fourth Circuit, have alluded in subsequent defamation cases:

The Internet allows unparalleled access to information, thereby enhancing opportunities for freedom of expression and holding tremendous promise for virtually all types of research.<sup>104</sup>

Furthermore, the Third Circuit has recognized the ability of the Internet to shift power away from the traditionally dominant parties – the media, big business, government – and allow citizens to

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<sup>103</sup> *Cahill*, 884 A.2d at 455.

<sup>104</sup> *Urofsky*, 216 F.3d at 433.

be heard on issues in much the same way that Jerome Barron's right of access to the media would have:

Recognizing the potential for viewpoint dissemination, political groups have taken their message to the Internet en masse. Media watchdog sites provide an alternative to a specific political view in significant numbers. Internet news sites have sprouted specifically to provide independent, local news. Finally, interactive possibilities on the Internet such as message boards and chat rooms permit virtually unlimited viewpoint dissemination from a multitude of independent 'sources.'<sup>105</sup>

Such a shift in the power structure of communication can be evidenced by the number of defamation lawsuits that now pit large corporations against former employees or John Doe defendants.<sup>106</sup> As Lyrissa Lidsky noted in her 2000 article:

Moreover, John Doe's online comments can have real-world effects. While the financial bulletin boards ordinarily give notice to subscribers that the messages posted are merely the opinions of the author and that they should not be relied on to trade, people do, of course, use them to trade. If John Doe is a scrupulous critic of a particular corporation and its CEO, the Internet is a powerful tool for him to begin a dialogue about the corporation and to convey his criticisms to a receptive audience.<sup>107</sup>

Thus, the assessment of harm may too have to change, as simply measuring the economic damage caused by an individual to a corporation may no longer be the most viable way to gauge actual injury to reputation in a global community.

### **Future Research**

This dissertation summarized and analyzed how U.S. courts define community, harm and plaintiff status in defamation cases. It began by looking at the courts' approach to traditional print and broadcast defamation and concluded by looking at more recent cases involving online defamation. Because courts are only beginning to address these issues in the area of online

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<sup>105</sup> See *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 467-468 (3rd Cir. 2004).

<sup>106</sup> See Lidsky, *supra* note 1, at 880-885.

<sup>107</sup> *Id.* at 884.

defamation, the potential for future research is great given the large number of viable research questions remaining, including:

- Are any characteristics (profession, Internet savvy, subject matter, education level, age) more likely than others to play a role in the court's determination of plaintiff status in online defamation cases?
- Are plaintiffs more likely to be considered public figures in online defamation cases than in traditional defamation cases?
- Are there any correlations between courts' approaches to jurisdictional questions in online defamation and their approaches to defining community in online defamation cases?
- How does the economic harm suffered by victims of online defamation compare to that suffered by victims of traditional defamation?
- How does the reputational harm suffered by victims of online defamation compare to that suffered by victims of traditional defamation?

These research questions involve various methodologies that would build on the legal methodology used in this dissertation. Although this study relied solely on legal research, that is analyzing cases, future research could include both quantitative and qualitative methods. Surveys of libel defendants and plaintiffs as well as quantitative content analysis of court decisions could provide data for quantitative research. Qualitative methods could include focus groups and in-depth interviews with those involved in defamation litigation.

Expanding the scope of the research to include other elements and factors common to defamation cases could also be useful. Research could be done to analyze the application of the single publication rule<sup>108</sup> in traditional print and broadcast defamation cases versus online defamation cases. Similarly one might look at how courts have applied statutes of limitations to both traditional and online defamation cases.

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<sup>108</sup> The single publication rule limits the plaintiff in a libel suit to one claim for each mass publication, not for every book or copy in a press run. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

Because online defamation cases involve speech that crosses traditional geographic borders, there is great potential for international research. Some of the key court cases involving the Internet, although beyond the scope of this dissertation, have been decided by courts in England, Australia and other countries. Those decisions provide some indication that international law may some day play a strong role in deciding online defamation cases. Thus, looking at online defamation cases in other countries may prove instructive.

### **Conclusion**

As discussed in Chapter One, the Internet has become a large component of our nation's mass communication media. By 2007, it was estimated that 334.5 million North Americans were using the Internet, which represents about 69 percent of the population.<sup>109</sup> Thus, it is not surprising that online defamation cases have also become a component, albeit recent, of our nation's defamation litigation.<sup>110</sup> The courts have slowly begun to grapple with the complexities of Internet defamation, including dealing with jurisdictional issues and anonymous speech issues in cases where they have crafted a different set of rules for the new medium. More recently, courts have begun to address other definitional issues, including community, harm and plaintiff status. Most notably, it appears that some courts have begun to recognize the implications of the Internet on the definitions of community, plaintiff status and harm in online defamation cases although many courts continue to use the rules created in traditional print and broadcast defamation cases. The courts' recent jurisprudence in online defamation and the First

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<sup>109</sup> See Internet Users and Population Stats for the Americas. Internet World Stats: Usage and Population Statistics, at [www.internetworldstats.com](http://www.internetworldstats.com) (Last modified March 19, 2007).

<sup>110</sup> For the most part, Internet defamation cases are a development of the past decade, with the courts first beginning to address online defamation in the 1990s. See, e.g. *Cubby*, 776 F. Supp. at 135; *Stratton Oakmont*, unpublished at 1995 WL 323710; *Zeran*, 129 F.3d at 327.

Amendment perspectives incorporated by the courts in other Internet expression cases seems to leave room to create a new framework for online defamation.

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