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“EQUITY WILL NOT ENJOIN A LIBEL”: WELL, ACTUALLY, YES, IT WILL

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INTRODUCTION

“If there is one amendment, that is literally first among equals, then it is truly the First Amendment.”¹ The First Amendment prohibits prior restraints on speech, *i.e.*, judicial suppression of material that would be published or broadcast, on the grounds that it is libelous, defamatory, or harmful.² However, the imposition of subsequent liability for defamation does not abridge the freedom of speech protected by the First Amendment.³ It is this important distinction drawn by the United States Supreme Court—subsequent punishment vs. prior restraint—that denotes the permissible remedies and punishments in a court of law for defamation. One question remains unanswered by the Supreme Court: while the First Amendment allows for after-the-fact punishment for defamation in the form of money damages, or even imprisonment, does the First Amendment permit

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¹ Cailah E. Garfinkel, *The Importance of an Independent Judiciary and a Free Press*, 22 SUM DEL. LAW. 28 (2004).

² There are a few exceptions to the prohibition on prior restraint discussed *infra* Part I.

³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964).

permanent injunctions against published or spoken speech that has been found to be defamatory by a judge or jury?

Permanently enjoining defamatory speech is preventing speech before it happens. Traditionally, courts have consistently held that “equity will not enjoin a libel.”⁴ Put simply, money damages were the only remedy available in a defamation lawsuit. The prevalence of social media and Internet usage has changed the way our society voices opinions. Defamatory comments, opinions, and articles can be permanently placed in the virtual world with the click of a button. As a result of this instantaneous communication platform, the number of defamation lawsuits filed in the United States and around the world has significantly increased.⁵ In 2004, the Supreme Court granted certiorari in *Tory v. Cochran* to decide whether a permanent injunction is a constitutionally permissible remedy in a defamation case, “at least

⁴ *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001); *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) (“[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law.”); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1092 (C.D. Cal. 2012) (noting that “never in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case . . .”).

⁵ Ian Burrell, *Libel Cases Prompted by Social Media Posts Rise 300% in a Year*, INDEPENDENT (Oct. 19, 2014), <http://www.independent.co.uk/news/uk/home-news/libel-cases-prompted-by-social-media-posts-rise-300-in-a-year-9805004.html>; Roy Greensdale, *23% Increase in Defamation Actions as Social Media Claims Rise*, GUARDIAN (Oct. 2, 2014, 7:06 AM), <http://www.theguardian.com/media/greenslade/2014/oct/20/medialaw-social-media>; Teresa Thompson, *Internet Defamation Claims on the Rise as Online Reviews Impact the Bottom Line*, NETWORKED (Dec. 14, 2012), <http://www.networkedlawyers.com/internet-defamation-claims-on-the-rise-as-online-reviews-impact-the-bottom-line/>.

when the plaintiff is a public figure.”⁶ Unfortunately, the Court never reached the merits, as the plaintiff died after oral arguments.⁷

In the 2015 case *McCarthy v. Fuller*, the Seventh Circuit Court of Appeals became the second circuit court⁸ to permit a lower court to issue a permanent injunction in a defamation case.⁹ In her concurring opinion, Judge Diane Sykes recognized “[a]n emerging modern trend” that acknowledges the general rule that equity does not enjoin libel, but allows for the possibility of narrowly tailored permanent injunctive relief as a remedy for defamation as long as the injunction prohibits only the repetition of the specific statements found at trial to be false and defamatory.¹⁰ Judge Sykes sharply questioned this modern trend because a defamatory statement in one circumstance, time, or place,

⁶ *Tory v. Cochran*, 544 U.S. 734, 736–38 (2005) (“ . . . Johnnie Cochran’s death makes it unnecessary, indeed unwarranted, for us to explore petitioners’ basic claims, namely, (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case”). The Supreme Court did, however, vacate the injunction as an overbroad, prior restraint on speech. *Id.* at 738.

⁷ *Id.* at 734.

⁸ In a 2-1 decision, the Sixth Circuit—with very terse reasoning—reversed a district court’s decision *not to issue* an injunction against defamation. *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (Wellford, J. and Hull, J., dissenting).

⁹ *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015). Both the First and Second Circuits have declined to address the First Amendment arguments on the merits. *Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 174 (2d Cir. 2001) (striking down injunction as impermissibly vague, but declining to address First Amendment arguments); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 904 (1st Cir. 1993) (leaving for another day the determination whether a specific injunction constitutes an unlawful prior restraint). The Fifth Circuit in *Brown v. Petrolite Corp.* allowed a lower district court to enjoin an oil service company from further disseminating information related to tests and samples that were the subject of a defamatory report about plaintiff’s products. 965 F.2d 38, 51 (5th Cir. 1992). However, the Fifth Circuit held that the lower court could not enjoin “independent, reliable information that Petrolite may acquire in the future,” so it is unclear exactly how the Fifth Circuit views permanent injunctions against defamation. *Id.* The Fourth Circuit has held that injunctions on future speech are impermissible prior restraints. *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967).

¹⁰ *McCarthy*, 810 F.3d at 464 (Sykes, J., concurring).

might not be defamatory in another circumstance, time, or place.¹¹ She reiterated that permanently enjoining defamation does not account for “constantly changing contextual facts that affect whether the speech is punishable or protected.”¹²

Supreme Court precedent appears to support the conclusion that a permanent injunction against defamation violates the First Amendment. The Court in *Alexander v. U.S.* stated, “Permanent injunctions . . . that actually forbid speech activities[] are classic examples of prior restraints” because they impose a “true restraint on future speech.”¹³ The First Amendment right to free speech is not absolute; it “does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”¹⁴ In any given case, “courts must balance free speech rights against other strong social interests, including society's interest in preventing and redressing attacks on reputation.”¹⁵ This balance becomes particularly delicate in the context of defamation suits because, at its core, “the first amendment prohibits the state from interfering with the expression of unpopular, indeed offensive, views.”¹⁶

The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution, there is no such thing as a false idea.

¹¹ *Id.* at 465.

¹² *Id.*

¹³ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

¹⁴ *Gitlow v. People of State of N.Y.*, 268 U.S. 652, 666 (1925).

¹⁵ ROGER LEROY MILLER & FRANK B. CROSS, *THE LEGAL ENVIRONMENT TODAY: BUSINESS IN ITS ETHICAL, REGULATORY, E-COMMERCE, AND GLOBAL SETTING* 119 (7th ed. 2013).

¹⁶ *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1016 (4th Cir. 1973).

However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.¹⁷

This Comment examines the modern trend allowing the issuance of permanent injunctions in defamation suits, despite the longstanding maxim prohibiting such. Parts I and II will discuss the Supreme Court's First Amendment jurisprudence as it relates to impermissible prior restraints and injunctions. Part II will discuss Supreme Court decisions that struck down attempts by lower courts and States to restrain speech. Part III analyzes recent state and federal court decisions allowing narrow, permanent injunctions in defamation cases, and argues that these decisions are erroneous and cannot be reconciled with Supreme Court precedent. Next, parts IV and V critically examine the Seventh Circuit's decision in *McCarthy v. Fuller* in which Judge Posner permitted an Indiana District Court to issue a narrow, permanent injunction as a remedy in a defamation lawsuit. Part V focuses on Judge Sykes' concurring opinion, and contends that her understanding of First Amendment jurisprudence—as opposed to the majority's—is correct. Lastly, part VI discusses policy considerations that buttress the argument that injunctive relief should not be available in defamation cases—mainly, that money damages are an adequate remedy and permanent injunctions chill the exercise of free speech.

I. HISTORICAL CONTEXT OF THE FIRST AMENDMENT AND PRIOR RESTRAINTS ON SPEECH

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁸ It is “no longer open to doubt that the liberty of the press and of speech[] is within the liberty safeguarded by the due process clause of the

¹⁷ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974)).

¹⁸ U.S. CONST. art. I.

Fourteenth Amendment from invasion by state action.”¹⁹ The Supreme Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of speech that impose a “previous” or “prior” restraint on speech.²⁰ A prior restraint on speech is an administrative or judicial order forbidding certain communications, publications, or other speech issued in advance of the time that such communications, publications, or other speech are to occur.²¹ Prior restraints are “the most serious and the least tolerable infringement on the First Amendment rights.”²² When a court enters a permanent injunction in a defamation action, such a remedy is unquestionably a prior restraint on speech because it prevents speech before it occurs.²³

However, the First Amendment’s prohibition on prior restraints is not absolute. In 1931, the Supreme Court narrated three exceptions to the prohibition on prior restraint: (1) the primary requirements of decency may be enforced against obscene publications; (2) the security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government; and (3) some overriding countervailing interest, such as when a nation is at war and such speech is hindering the peace effort.²⁴ Prior restraints, even within a recognized exception, will be extremely difficult to justify, but “the purpose for which a prior restraint is sought to be imposed ‘must fit within one of the narrowly defined

¹⁹ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

²⁰ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976).

²¹ George Blum et al., *Freedom from Prior Restraints and Censorship*, 16A AM. JUR. 2d CONST. L. § 472 (2015).

²² *Metro. Opera Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 176 (2d Cir. 2001).

²³ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (stating “permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints” because they impose a “true restraint in future speech.”); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (holding that the district court’s entering of three injunctive orders on planned publication was a “classic case of a prior restraint.”).

²⁴ *Near*, 283 U.S. at 716.

exceptions to the prohibition against prior restraints.”²⁵ These exceptions are intended to be very narrow in light of the fact that “it has been generally, if not universally, considered that it is the chief purpose of the First Amendment’s guaranty to prevent previous restraints upon publication.”²⁶

Thus, the First Amendment strongly disfavors injunctions that impose a prior restraint on speech.²⁷ Any prior restraint on expression comes to a court with a heavy presumption against its constitutional validity, and advocates have a weighty burden of showing justification for the imposition of such a restraint.²⁸ Against this backdrop, the Supreme Court has consistently refused to enjoin speech, finding that after-the-fact punishment in the form of criminal imprisonment, fines, or money damages is acceptable,²⁹ while prior suppression of speech by injunction is not.³⁰

II. THE TRADITIONAL RULE: PERMANENT INJUNCTIONS IN DEFAMATION CASES ARE UNCONSTITUTIONAL PRIOR RESTRAINTS ON SPEECH

Starting in 1800’s and continuing through the 20th century, courts held firm in their conviction that injunctions in equity could never restrain the publishing of defamatory speech, “however great the

²⁵ *Stuart*, 427 U.S. at 592.

²⁶ *Id.* at 588.

²⁷ *Metro. Opera Ass’n*, 239 F.3d at 178.

²⁸ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

²⁹ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 386 (1973) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)) (“[T]his Court has held that the First Amendment does not shield a newspaper from punishment for libel when with actual malice it publishes a falsely defamatory advertisement.”).

³⁰ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931) (“In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court’s order, but for suppression and injunction—that is, for restraint upon publication.”).

injury”³¹ and “even though such publications are calculated to injure the credit, business, or character of the person aggrieved . . . he will be left to pursue his remedy at law.”³² Injunctions against speech were not permitted in defamation cases under early English and American common law, and the Supreme Court has never departed from this precedent.³³

As early as 1839, the New York Court of Chancery (an equity court) refused to stop the publication of a pamphlet that would have defamed the plaintiff, holding that the publication of a libel could not be enjoined “without infringing upon the liberty of the press, and attempting to exercise a power of preventative justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.”³⁴ The Chancery court alluded to the ancient Court of Star Chamber in England³⁵ that had a habit of restraining speech by injunction.³⁶ Since the Star Chamber had been abolished, the Chancery court noted that only one court had issued an injunction in anticipation of libelous speech, and “no judge or chancellor . . . has attempted to follow that precedent.”³⁷ The court reasoned that, if the defendants persisted in defaming the plaintiffs, the victims were required to seek their remedies by a civil suit.³⁸

³¹ *Am. Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913).

³² *Id.*

³³ *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089–90 (C.D. Cal. 2012) (citing Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157 (2007)).

³⁴ *Brandreth v. Lance*, 1839 WL 3231 (N.Y. Ch. 1839).

³⁵ The Court of Star Chamber was an English court made up of judges and councilors that arose out of the medieval king’s council and supplemented the regular justice of the common law courts. It was used by Charles I to enforce unpopular political policies, and became a symbol of oppression to the parliamentary and Puritan opponents of Charles. It was abolished in 1641. *Court of Star Chamber*, BRITANNICA.COM, <http://www.britannica.com/topic/Court-of-Star-Chamber> (last visited Feb. 17, 2016).

³⁶ *Brandreth*, 1839 WL 3231, at *26.

³⁷ *Id.* at *27.

³⁸ *Id.* at *28-29.

The United States Supreme Court has time and time again struck down injunctions against defamation. The seminal case is *Near v. Minnesota ex rel Olson*, where a newspaper appealed a permanent injunction issued by the lower court after it determined that the newspaper was “chiefly devoted to malicious, scandalous, and defamatory articles” concerning certain individuals.³⁹ Minnesota law deemed a “nuisance” any malicious, scandalous or defamatory speech published by newspapers and other periodicals, and the Attorney General could sue for suppression by way of an injunction any newspaper it believed violated the law.⁴⁰ Because the suppression was accomplished by enjoining future publication, the Court reasoned that it “put the publisher under an effective censorship,” and was thus unconstitutional.⁴¹

This principle was echoed in *Organization for a Better Austin v. Keefe*, in which a group of pamphleteers was enjoined from protesting a real estate developer’s business practices.⁴² Pertinently, the Court held that, “the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights.”⁴³ Further, the Court noted, “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.”⁴⁴

Similarly, in *Vance v. Universal Amusement Co.*, the Court invalidated a Texas nuisance statute that authorized courts, upon finding that the defendant had shown obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing *any* films in the future, including motion pictures that had not been finally adjudicated to be obscene.⁴⁵ Absent “any

³⁹ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 706 (1931)

⁴⁰ *Id.* at 701–02.

⁴¹ *Id.* at 712.

⁴² *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971).

⁴³ *Id.* at 418.

⁴⁴ *Id.* at 419.

⁴⁵ *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed,” such an injunction could not be upheld.⁴⁶

Many constitutional law scholars have gleaned from the aforementioned Supreme Court holdings that injunctions on future speech, even if preceded by the publication of defamatory material, are unconstitutional.⁴⁷ Indeed, it would seem that this was the Court’s firm conclusion in *Near*: even though the newspaper’s speech was chiefly devoted to malicious, scandalous and defamatory material, permanently enjoining future speech—even under those circumstances—was unconstitutional.⁴⁸ The Seventh Circuit adhered to this long-standing tradition as recently as 2007 in *e360 Insight v. The Spamhaus Project*.⁴⁹ Concluding that the district court abused its discretion in entering a permanent injunction against defamation, the Seventh Circuit stated, “[W]e note that there are sensitive First Amendment issues presented in the context of permanent injunctions in defamation actions. ‘Permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.’”⁵⁰ Without reaching an opinion on the injunction’s constitutional validity, the *e360* court firmly reiterated that the only remedy in defamation lawsuits is an action in damages.⁵¹ Yet, many trial courts are starting a new trend, issuing permanent injunctions against specific statements that have been found to be defamatory by a judge or jury.

⁴⁶ *Id.* at 317.

⁴⁷ See Brief of Amici Curiae Professors Erwin Chemerinsky et al. in Support of Defendants-Appellants and Reversal, *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015) (Nos. 14-3308, 15-1839), 2015 WL 4264749 [hereinafter Chemerinsky & Lidsky Brief].

⁴⁸ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712 (1931).

⁴⁹ *e360 Insight v. The Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007).

⁵⁰ *Id.* at 605–06 (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). The Court ultimately “expressed no opinion on the constitutional validity” of narrow, injunctive relief, but instead vacated the injunction as overbroad. *Id.* at 606.

⁵¹ *Id.*

III. THE MODERN TREND AWAY FROM THE TRADITIONAL RULE: COURTS (ERRONEOUSLY) BEGIN TO ALLOW NARROW, PERMANENT INJUNCTIONS IN DEFAMATION CASES

The traditional rule that equity will never enjoin a libel is quickly becoming a maxim of the past. Today, some state and federal courts are willing to enter narrow, permanent injunctions in defamation cases where there has been a jury determination of the libelous nature of certain statements.⁵² In 1991, the Third Circuit determined that a permanent injunction in a defamation case was impermissible under Pennsylvania law, and noted that Missouri was the only state to allow such a remedy for “the better part of this century.”⁵³ However, since then, several state supreme courts and federal courts have followed Missouri’s lead.

In *Balboa Island Village Inn, Inc. v. Lemen*, a California trial court issued a permanent injunction prohibiting the defendant from making defamatory statements about plaintiff’s business.⁵⁴ The Supreme Court of California, on appeal, held that the injunction issued by the trial court was overly broad “but that defendant’s right to free speech would not be infringed by a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory.”⁵⁵

In *O’Brien v. University Community Tenants Union*, a landlord secured a jury determination that certain statements made by a blacklisted tenants’ group were libelous, and then sought and obtained an injunction against further libel.⁵⁶ The Supreme Court of Ohio

⁵² *Wagner v. Equip. Co. v. Wood*, 893 F. Supp. 2d 1157 (D.N.M. 2012); *see Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302 (Ky. 2010); *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007), *as modified* (Apr. 26, 2007); *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1 (Minn. 1984); *O’Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975); *Retail Credit Co. v. Russell*, 234 Ga. 765 (Ga. 1975);

⁵³ *Kramer v. Thompson*, 947 F.2d 666, 678 (3d Cir. 1991).

⁵⁴ *Lemen*, 156 P.3d. at 341.

⁵⁵ *Id.*

⁵⁶ *O’Brien*, 327 N.E.2d at 753.

affirmed the injunction, categorically finding that “[o]nce speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper.”⁵⁷

In *Retail Credit Co. v. Russell*, the Georgia Supreme Court affirmed a permanent injunction prohibiting the defendant from republishing libelous statements.⁵⁸ The court reasoned that the injunction was not a prior restraint because, before the lower court issued the injunction, it was adequately determined that the speech at issue was not protected by the First Amendment.⁵⁹

Lastly, in *Wagner Equipment Co. v. Wood*, the District of New Mexico upheld an injunction prohibiting Defendant buyers from further defaming the Plaintiff’s logging operations business.⁶⁰ Defendants “undertook an email campaign to slander Plaintiff’s name in the business community, making ‘several false and defamatory statements’” injuring Plaintiff’s business reputation.⁶¹ The district judge reasoned that because defamation is unprotected speech, the “‘special vice’ of a prior restraint is non-existent where an injunction is granted only as to statements previously adjudicated to be false.”⁶²

The reasoning in all four of these cases is erroneous. The *Balboa* and *O’Brien* courts incorrectly relied on the Supreme Court’s holding in *Kingsley Books, Inc. v. Brown*⁶³ as a basis for concluding that a permanent injunction in a defamation case does not violate the First Amendment. In *Kingsley*, pamphleteers challenged a New York criminal statute allowing the authorization of an injunction *pendente*

⁵⁷ *Id.* at 755.

⁵⁸ *Retail Credit Co. v. Russell*, 234 Ga. 765 (Ga. 1975).

⁵⁹ *Id.* at 778–79.

⁶⁰ *Wagner v. Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1164 (D.N.M. 2012).

⁶¹ *Id.* at 1159.

⁶² *Id.* at 1161.

⁶³ *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 346 (Cal. 2007), as modified (Apr. 26, 2007); *O’Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975).

lite while the matter at issue was being tried and adjudicated.⁶⁴ The Supreme Court upheld the statute as constitutional.⁶⁵ *Pendente lite* is Latin for “while the action is pending,” and such an injunction remains in force—to preserve the status quo—only until the associated case is decided.⁶⁶ An injunction *pendente lite* is, by definition, extinguished when the associated case is decided,⁶⁷ and functions similar to a temporary restraining order or a preliminary injunction.⁶⁸ Additionally, *Kingsley* fits within one of the narrow exceptions to the First Amendment’s ban on prior restraints: “the primary requirements of decency may be enforced against obscene publications.”⁶⁹ Thus, *Kingsley*’s reasoning is arguably inapplicable to cases involving *permanent* injunctions on future publication of *defamatory* (non-pornographic) statements.

The *Wagner* and *Retail Credit* decisions were also flawed. First, both courts justified entering a permanent injunction by, in part, concluding that defamation is “unprotected speech.”⁷⁰ This is incorrect. True, the Supreme Court has held that certain categories of expression receive *less* protection under the First Amendment—including obscenity,⁷¹ defamation,⁷² and fighting words.⁷³ But the Supreme Court in *R.A.V. v. City of St. Paul, Minnesota* noted that, “Our decisions since the 1960’s have narrowed the scope of the

⁶⁴ *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440 (1957).

⁶⁵ *Id.* at 443.

⁶⁶ *Pendente lite*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/pendente%20lite> (last visited Feb. 17, 2016).

⁶⁷ *Kingsley*, 354 U.S. at 439.

⁶⁸ The Court itself in *Kingsley* referred to the injunction as “temporary.” *Id.* at 443 (“In the one case [the bookseller] may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction.”).

⁶⁹ *Id.* at 440.

⁷⁰ *Wagner v. Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1161–62 (D.N.M. 2012); *Retail Credit Co. v. Russell*, 234 Ga. 765, 778 (Ga. 1975).

⁷¹ *Roth v. United States*, 354 U.S. 476 (1957).

⁷² *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁷³ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

traditional categorical exceptions for defamation . . . and for obscenity.”⁷⁴ Significantly, the Court said,

We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity ‘as not being speech at all.’ What they mean is that these areas of speech can, consistently with the First Amendment, be *regulated because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution⁷⁵

Thus, the reasoning in *Wagner* and *Retail Credit* that defamation is entirely unprotected is wrong.⁷⁶ Defamation is *not* entirely unprotected by the First Amendment. Defamation does not, by its definition, *ipso facto* allow courts to suppress future speech by way of injunction.

The *Wagner* and *Retail Credit* courts also inaccurately relied on the Supreme Court’s decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* to conclude that injunctions against defamation are permissible.⁷⁷ The ordinance at issue in *Pittsburgh* forbade newspapers from publishing help-wanted advertisements in sex-designated columns.⁷⁸ The purpose of the ordinance was to

⁷⁴ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992).

⁷⁵ *Id.* at 383–84 (1992) (emphasis in original) (citations omitted).

⁷⁶ *See New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (extending constitutional protection to an entire class of defamatory falsehoods that are uttered without actual malice); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

⁷⁷ *Wagner v. Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1160–61 (D.N.M. 2012); *Retail Credit Co. v. Russell*, 234 Ga. 765, 778–79 (Ga. 1975).

⁷⁸ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

proscribe discrimination in employment on the basis of sex and other classes.⁷⁹ The Pittsburgh Commission issued a decision and order finding that the Pittsburgh Press violated the ordinance, and required Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex.⁸⁰ The Court held that the Pittsburgh Commission's order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, did not infringe the First Amendment.⁸¹

First, it should be noted that *Pittsburgh Press* was not dealing with an injunction at all, suggesting, like *Kingsley*, that its facts are inapplicable in answering the question of whether permanently enjoining defamatory speech is permissible. Second, the Supreme Court upheld the Commission's order entirely because the speech at issue was commercial in nature.⁸² It is well known that purely commercial speech receives less protection under the First Amendment than noncommercial speech, and regulations restricting advertising about illegal products or services, or that is deceptive, can be freely regulated.⁸³ Third, the ordinance at issue in *Pittsburgh Press* can correctly be characterized as a "regulation" of harmful speech and, as discussed *supra*, the Supreme Court has held that regulating harmful speech is acceptable in many circumstances.⁸⁴ The *Pittsburgh Press* court noted that discrimination in employment is illegal

⁷⁹ *Id.* at 378.

⁸⁰ *Id.* at 379.

⁸¹ *Id.* at 391.

⁸² *Id.* at 382 ("Our inquiry must therefore be whether the challenged order falls within any of these exceptions.").

⁸³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563–64 (1980).

⁸⁴ *Id.*; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992).

As the press has evolved from an assortment of small printers into a diverse aggregation including large publishing empires as well, the parallel growth and complexity of the economy have led to extensive regulatory legislation from which the publisher of a newspaper has no special immunity. Accordingly, this Court has upheld application to the press of the National Labor Relations Act . . . the Fair Labor Standards Act, and the Sherman Antitrust Act. *Pittsburgh Press*, 413 U.S. at 382–83 (citations omitted).

commercial activity under the ordinance and stated, “We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”⁸⁵ The ordinance merely affected the “make up” of the help-wanted section.⁸⁶ In contrast, issuing a permanent injunction against defamatory speech is not a regulation; it is a blanket prohibition in perpetuity under all contexts. Lastly, the Court pointed out that no suggestion was made that “the Ordinance was passed with any purpose of muzzling or curbing” speech,⁸⁷ and the Pittsburgh Press was still free to publish the advertisements in a non-discriminatory manner. Conversely, a permanent injunction is issued with the overt purpose of “muzzling or curbing” speech, and it prohibits publishing such speech under *any* circumstance.

The pitfalls of these four decisions underscore that the modern trend to allow narrow, permanent injunctions in defamation cases cannot be based in Supreme Court precedent or accurate interpretations of such. Fortunately, most courts have resisted the trend, standing by the wisdom of precedent and by the age-old maxim that equity will not enjoin a libel.⁸⁸ However, in December 2015, the Seventh Circuit became the second federal circuit to join the modern movement in allowing narrow, permanent injunctions in defamation cases.

⁸⁵ *Id.* at 388.

⁸⁶ *Id.* at 383.

⁸⁷ *Id.*

⁸⁸ *Lan Sang v. Ming Hai*, 951 F. Supp. 2d 504, 531 (S.D.N.Y. 2013) (“For almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases Accordingly, while Plaintiff may continue to seek money damages, the Court will not entertain her request for a permanent injunction.”) (citations omitted); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087 (C.D. Cal. 2012); *Kramer v. Thompson*, 947 F.2d 666, 679 (3d Cir. 1991) (concluding that the “jury determination exception” in defamation cases was impermissible under Pennsylvania law); *Kinney v. Barnes*, 443 S.W. 3d 87,91–92, 94–99 (Tex. 2014) (holding that a permanent injunction as a remedy in a defamation case is an impermissible prior restraint on speech under the Texas constitution, which the court noted is governed by First Amendment standards).

IV. *MCCARTHY v. FULLER*: THE SEVENTH CIRCUIT BECOMES THE SECOND CIRCUIT TO ALLOW NARROW, PERMANENT INJUNCTIONS IN DEFAMATION CASES

In 1956, Catholic Sister Mary Ephrem launched a new program of devotions called Our Lady of America.⁸⁹ Defendant Patricia Fuller (“Fuller”), formerly known as Sister Therese, joined Our Lady of America that same year.⁹⁰ In 1993, Sister Ephrem founded Our Lady of America Center in Indianapolis, directing the Center until her death in 2000, whereupon she willed all of her property, and the Center, to Fuller.⁹¹ In 2005, plaintiff Kevin McCarthy (“McCarthy”), a lawyer and Catholic layman, and Albert Langsenkamp, another member of the Catholic Church, met Fuller and committed to help her promote the Center’s work.⁹² The three worked together agreeably for approximately two years, until 2007 when they had a falling out.⁹³ Langsenkamp and McCarthy established the Langsenkamp Family Apostolate, and both claimed to be the authentic promoters of devotions to Our Lady of America and to be the rightful owners of all the documents and artifacts accumulated by Fuller and Sister Ephrem.⁹⁴ Shortly thereafter, a retired postal inspector, Paul Hartman, assisted Fuller in “launching a campaign to smear McCarthy’s and Langsenkamp’s reputations.”⁹⁵ A bitter lawsuit ensued, and McCarthy and Langsenkamp sued Fuller and Hartman for defamation in the Southern District of Indiana.⁹⁶

⁸⁹ *McCarthy v. Fuller*, 810 F.3d 456, 457 (7th Cir. 2015).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 458. McCarthy also sued for conversion and fraud, and Fuller and Hartman counterclaimed for theft, and copyright and trademark infringement, but those issues are not relevant to this Comment.

Jurors returned a verdict on March 11, 2014, finding both Fuller and Hartman liable for defamation *per se*, and awarded \$100,000 in actual damages and \$50,000 in punitive damages to McCarthy, and \$50,000 in actual damages and \$1 million in punitive damages for Langsenkamp.⁹⁷ The following month, McCarthy and Langsenkamp filed a Motion for Injunction Against Further Defamation with the district court.

A. District Court Holding

The District Court granted McCarthy and Langsenkamp's motion for permanent injunction against further defamation by the Defendants.⁹⁸ In a mere footnote, District Judge Lawrence "recognize[d] that there are First Amendment implications in enjoining speech,"⁹⁹ but nevertheless summarily granted Plaintiffs' motion, and amended the judgment to include injunctive relief, because Defendants' response was filed late and exceeded the page limit set forth in the Court's Local Rules.¹⁰⁰ The court did not conduct a First Amendment analysis, nor did Judge Lawrence analyze whether a permanent injunction was appropriate under the applicable four-factor test that all Plaintiffs are required to satisfy in order to be granted a permanent injunction.¹⁰¹

⁹⁷ McCarthy v. Fuller, 2014 WL 4248469 (S.D. Ind. Mar. 22, 2014) (verdict and settlement summary).

⁹⁸ McCarthy v. Fuller, No. 1:08-cv-994-WTL-DML, 2014 WL 4672394, at *7 (S.D. Ind. Sept. 18, 2014), *rev'd and remanded*, 810 F.3d 456 (7th Cir. 2015).

⁹⁹ *Id.* at *7 n.7.

¹⁰⁰ *Id.*

¹⁰¹ See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant injunctive relief: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

The permanent injunction stated:

It is hereby ordered, adjudged and decreed that Defendants Fuller and Hartman . . . are hereby permanently enjoined from publishing the following statements, as well as any similar statements that contain the same sorts of allegations or inferences, in any manner of forum¹⁰²

The judgment further ordered that Defendant Hartman take down the website operated by him at ourladyofamerica.blogspot.com.¹⁰³

Defendants appealed, among other things, the entry of the permanent injunction.¹⁰⁴

¹⁰² *McCarthy*, 810 F.3d at 460.

¹⁰³ *Id.*

¹⁰⁴ As discussed *supra* in Section II, the Supreme Court has passed down three narrow exceptions to the ban on prior restraints of speech. None of those exceptions apply to the statements at issue in *McCarthy*. The injunction banned Defendants' statements that:

McCarthy suggested that Jim Whitta's name be forged on a quit claim deed; Plaintiffs bribed various members of the Clergy (including Catholic Priests, Bishops, Archbishops, Cardinals and Popes); McCarthy physically threatened Fuller or otherwise committed any wrongful act against Fuller; Plaintiffs are con-men, crooks, forgers, thieves, racketeers, or otherwise stole or converted property from Fuller or engaged in any conspiracy against Fuller with any Catholic clergy, lawyer (canon or civil) or investigator, or any Catholic lay person promoting the devotion; Plaintiffs stole any statue (including the Latrobe statue), crucifix, plaque, medallions, pins, gold coinage, website (including the ourladyofamerica.com and ourladyofamerica.org web-sites) and/or proceeds from Fuller's Key Bank Stock; Langsenkamp was involved in a car chase in which he chased Fuller around Fostoria; Plaintiffs used the name "Ron Norton" in an inflammatory email exchange that was first published by Hartman at his website, ourladyofamerica.blogspot.com; and McCarthy, without the knowledge or consent of Fuller, caused a will to be drafted for Fuller in which she left the Devotion to McCarthy.

Id. at 460.

B. The Appeal to the Seventh Circuit

Focusing almost exclusively on the breadth of the injunction issued by the lower court, the Seventh Circuit vacated the injunction, leaving it to the district judge to decide whether to issue a new injunction consistent with Judge Posner's criticisms.¹⁰⁵ The Seventh Circuit had four main concerns with the injunction issued by the district judge: (1) the jury did not specifically find *which* statements, of the nine listed on the jury instruction, were defamatory;¹⁰⁶ (2) the District Judge enjoined statements that the jury never even considered;¹⁰⁷ (3) the indefiniteness of the preamble's language did not provide guidance for the injunction's boundaries;¹⁰⁸ and (4) in summarily granting the Plaintiffs' motion and failing to consider Defendants'—admittedly, waived and late—arguments, the lower court failed to consider the public interest in issuing a broad permanent injunction.¹⁰⁹

One jury instruction listed each of the nine statements that plaintiffs claimed were made by the defendants and were defamatory.¹¹⁰ Judge Posner found it fatal to the injunction that the jury was not asked which of these statements had been made by the defendants and, of those statements, which were defamatory.¹¹¹ Since the jury did not indicate which statements in the jury instruction it found to be defamatory, the lower court had no basis for enjoining statements that tracked this jury instruction.¹¹² The district judge also enjoined statements that the jury was never even asked to consider.¹¹³ For example, the judge permanently enjoined Defendants from stating

¹⁰⁵ *Id.* at 463.

¹⁰⁶ *Id.* at 460.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 461.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 459–60.

¹¹¹ *Id.* at 460.

¹¹² *Id.*

¹¹³ *Id.*

that Plaintiffs had “committed any wrongful act against Fuller,” and from calling the Plaintiffs “con-men, crooks, forgers, thieves, racketeers, or [saying that they] otherwise stole or converted property from Fuller or engaged in any conspiracy against Fuller with any Catholic clergy, lawyer (canon or civil) or investigator, or any Catholic law person promoting the devotion.”¹¹⁴ Perhaps most offensive to the First Amendment, the lower court also ordered Defendant Hartman to take down his website, without making a finding that *everything* published on the website defamed the Plaintiffs.¹¹⁵

Not surprisingly, the Seventh Circuit’s greatest criticism was the language of the injunction’s preamble, enjoining “any similar statements that contain the same sorts of allegations or inferences, in any manner or forum.”¹¹⁶ Judge Posner concluded that the injunction’s preamble was a patent violation of the First Amendment.¹¹⁷ The court held that Federal Rule of Civil Procedure 56 requires injunctions to be specific about the acts that they prohibit.¹¹⁸ Vague language like “similar” and “same sorts” does not provide guidance to the scope of the injunction.¹¹⁹ The court further conceded that forbidding statements not yet determined to be defamatory, and the order requiring Hartman to take down his website—which would prevent him from posting any non-defamatory messages on his blog—would unconstitutionally enjoin lawful speech.¹²⁰ The remainder of Judge Posner’s First Amendment analysis, however, was minimal. He quickly dismissed the argument that defamation can never be enjoined because doing so would constitute a prior restraint on speech¹²¹ by

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 461.

¹¹⁶ *Id.* at 461, 463.

¹¹⁷ *Id.* at 463.

¹¹⁸ *Id.* at 461 (citing FED. R. CIV. P. 56).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 462.

¹²¹ *Id.*

concluding that such a rule “would make an impecunious defamer undeterrable.”¹²²

Whether the permanent injunction issued by the district court was a violation of Fuller and Hartman’s First Amendment rights was fiercely debated on appeal. The Seventh Circuit implicitly adopted the rule that a narrow and limited injunction is allowed to prohibit a defendant from reiterating the same, specific libelous statements.¹²³ Constitutional law professors and scholars Erwin Chemerinsky¹²⁴ and Lyriisa Barnett Lidsky¹²⁵ filed an Amicus Brief in support of the Defendants and in favor of reversal. Chemerinsky and Lidsky concluded without hesitation that the First Amendment does not permit permanent injunctions against defamatory speech.¹²⁶ To no prevail, the Amici urged the Court to follow the “long-held rule” that equity will not enjoin libel, and maintained that “[i]njunctive orders against libelous speech, after a final judicial determination, are prior restraints and cannot withstand the rigorous scrutiny due such orders.”¹²⁷

¹²² *Id.*

¹²³ *Id.* (noting that, “Most courts would agree . . . [with the Sixth Circuit] that defamatory statements can be enjoined . . . provided that the injunction is no ‘broader than necessary to provide relief to plaintiff while minimizing the restriction of expression.’”) (citing *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 346 (Cal. 2007), *as modified* (Apr. 26, 2007)).

¹²⁴ Professor Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke of Professor of First Amendment Law, at the University of California, Irvine School of Law. He has frequently argued matters of constitutional law in front of the nation’s highest courts, including United States Supreme Court decisions involving injunctions in defamation cases. Chemerinsky & Lidsky Brief, *supra* note 47 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563–64 (1980)..

¹²⁵ Professor Lyriisa Barnett Lidsky is the Stephen O’Connor Professor of Law and Associate Dean for International Programs at the Levin College of Law at the University of Florida. Professor Lidsky is the author of a casebook entitled *First Amendment Law*. She has also written extensively on issues of Internet free speech and defamation. *Id.*

¹²⁶ *Id.* at 4.

¹²⁷ *Id.*

C. Judge Sykes' Concurring Opinion

Judge Diane Sykes concurred in judgment insofar as the injunction was vacated for its indefinite and overbroad language.¹²⁸ She disagreed, however, with allowing the lower court to re-issue a narrower injunction.¹²⁹ In this specific case, she thought the court was ill equipped to fashion a constitutionally acceptable injunction because the jury did not make a statement-specific finding on defamation.¹³⁰ The “equivalent of a general verdict that defendants are liable for defamation” does not contain the necessary findings to support the issuance of a permanent injunction.¹³¹ Additionally, outside the bounds of this specific case, Judge Sykes rejected the “emerging modern trend” that allows for the possibility of narrowly tailored permanent injunctive relief as a remedy for defamation as long as the injunction prohibits only the repetition of the specific statements found at trial to be false and defamatory.¹³²

V. CRITICISMS OF *MCCARTHY*'S REASONING: JUDGE SYKES GOT IT RIGHT

The reasoning in *McCarthy* shared many of the same flaws as the state and federal trial courts discussed *supra* in Section III. Like the Ohio Supreme Court in *O'Brien* and the California Supreme Court in *Balboa*, the *McCarthy* majority mistakenly relied on *Kingsley Books, Inc. v. Brown* to conclude that, while the “Supreme Court . . . has not yet addressed the issue, . . . it has permitted injunctions preventing other types of scurrilous speech.”¹³³ As Judge Sykes correctly pointed out, temporarily enjoining dissemination of obscene

¹²⁸ *McCarthy v. Fuller*, 810 F.3d 456, 463 (7th Cir. 2015) (Sykes, J., concurring).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 464–66.

¹³³ *Id.* at 462 (majority opinion).

material is different from permanently enjoining defamatory speech.¹³⁴ She stated, “Defamation is materially different from obscenity. There’s a meaningful distinction between [temporarily] enjoining the distribution of a particular pamphlet once it’s been found to be obscene and enjoining a person *in perpetuity* from uttering particular words and phrases.”¹³⁵ Judge Sykes’ reasoning is directly on point with Supreme Court precedent. In *Kingsley*, Justice Frankfurter reconciled his holding with *Near* because the New York law in *Kingsley* was “concerned solely with obscenity,” whereas the Minnesota law in *Near* concerned matters “deemed to be derogatory.”¹³⁶ It is evident that the Supreme Court has traditionally treated obscenity and defamation differently, as reflected by the fact that one of the three very narrow exceptions to the ban on prior restraints is focused solely on obscene material.¹³⁷

Judge Sykes also argued that defamation is inherently contextual in that a statement that is defamatory in one circumstance, time, or place, might not be defamatory in another circumstance, time, or place.¹³⁸ Permanent injunctions do not take into account these contextual factors that change how speech is characterized.¹³⁹ Even a permanent injunction limited to the exact words found to be defamatory in one context might prohibit speech that would not be actionable in another. A defamatory statement today, when spoken tomorrow in a different time and in a particular context, may not be defamatory for a number of reasons, and thus entitled to full constitutional protection.¹⁴⁰ For example, the injunction in *McCarthy* permanently prevented Defendants from stating, “McCarthy physically threatened Fuller or otherwise committed any wrongful act

¹³⁴ *Id.* at 465 (Sykes, J., concurring).

¹³⁵ *Id.*

¹³⁶ *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957).

¹³⁷ *Supra* section I.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 356 (Cal. 2007), *as modified* (Apr. 26, 2007) (Kennard, J., concurring and dissenting).

against Fuller.”¹⁴¹ This statement is incredibly broad, and it does not take a vibrant imagination to think of a context where such statements, if uttered, would not be defamatory—say, if McCarthy showed up at Fuller’s home and physically threatened her with a baseball bat.¹⁴² That is the problem with permanent injunctions: they *permanently* prevent reiterating defamatory statements, even when reiterating the statement would not constitute defamation.

In their Amici Brief, Chemerinsky and Lidsky expanded on Judge Sykes’ point that defamation is inherently contextual. They stated, “The richness of the English language and the myriad ways of expressing any given thought make it impossible for a trial court to craft an injunction against future defamatory speech that is both effective and that does not also bar the publication of constitutionally protected speech.”¹⁴³ In essence they argue that, for an injunction to be effective, it will be overly broad because its parameters will be impossible to determine, while a specific, narrowly tailored injunction will be ineffective because defendants can just use different words to get around it.¹⁴⁴ What is stopping a defendant, permanently enjoined from uttering certain statements, from avoiding the injunction’s terms by making the same point using different words?¹⁴⁵ This situation, Chemerinsky and Lidsky argue, results in what is called a “revolving-door injunction.”¹⁴⁶ The plaintiff will then return to court to get a new

¹⁴¹ *McCarthy*, 810 F.3d at 459.

¹⁴² Chemerinsky and Lidsky illustrated a similar situation in their Amici Brief: [A] statement that was once false may become true later in time. Suppose a court, after finding that a defendant defamed a plaintiff by saying that the plaintiff blackmailed her, issues a permanent injunction against the defendant’s repeating any similar statements. If the plaintiff subsequently begins blackmailing the defendant, the defendant would remain enjoined from saying so, even though the statement would be true and hence constitutionally protected.

Chemerinsky & Lidsky Brief, *supra* note 47, at *16

¹⁴³ *Id.* at *4–5.

¹⁴⁴ *Id.* at *12.

¹⁴⁵ *Id.* at *14.

¹⁴⁶ *Id.* at *14–15.

injunction prohibiting the more recent statements from being uttered.¹⁴⁷ If the modern trend continues to expand, revolving-door injunctions will become particularly common since the Internet allows for the rapid publication of opinions, and courts will potentially be forced to modify injunctions over and over. Thus, permanent injunctions do not take into account changed circumstances or contextual factors, rendering both broad and narrow injunctions unconstitutional prior restraints, and ineffective remedies for a defamed plaintiff.

VI. POLICY CONSIDERATIONS AGAINST ISSUING INJUNCTIONS

A. *Money Damages Are Adequate to Compensate Defamed Plaintiffs*

In *McCarthy v. Fuller*, the Seventh Circuit observed that permanently enjoining defamation might be required in some cases.¹⁴⁸ Surprisingly, Judge Posner defended this holding almost exclusively on the assumption that plaintiffs would (potentially) be left remediless against insolvent defendants.¹⁴⁹ Disagreeing with the customary rule that equity will not enjoin a libel, Judge Posner stated, “The problem with such a rule is that it would make an impecunious defamer undeterrable.”¹⁵⁰ “He would continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment.”¹⁵¹ As applied to the facts of *McCarthy*, Judge Posner held that it was “beyond unlikely” that Fuller and Hartman could pay the judgment against them.¹⁵² “They will be broke, and if defamation can

¹⁴⁷ *Id.*

¹⁴⁸ *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

never be enjoined, they will be free to repeat all their defamatory statements with impunity.”¹⁵³

Apparently, the *McCarthy* majority was concerned that McCarthy and Langsenkamp (and other plaintiffs in the future) would have no remedy because all they would obtain is an uncollectible money judgment.¹⁵⁴ This reasoning is curious, however, because *many* defendants—in tort and contract lawsuits, for example—are, or become, judgment proof,¹⁵⁵ and the usual remedy for defamation has always been damages.¹⁵⁶ Indeed, the Supreme Court has repeatedly compensated plaintiffs whose constitutional rights have been violated with monetary damages.¹⁵⁷ Moreover, in lawsuits outside the realm of defamation where plaintiffs often request injunctive relief (e.g., copyright infringement cases), few courts are willing to consider insolvency as a factor in determining whether an injunction should be issued.¹⁵⁸

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (Noting that when tort claims are large enough to litigate, many Americans are judgment proof, lacking sufficient assets to pay the judgment in full).

¹⁵⁶ See *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation.”); *Karhani v. Meijer*, 270 F.Supp.2d 926, 930 (E.D. Mich. 2003); *Kessler v. General Servs. Admin.*, 236 F.Supp. 693, 698 (S.D.N.Y. 1964), *aff’d per curiam*, 341 F.2d 275 (2d Cir. 1964) (refusing to enter an injunction against libel because, “As a general rule, a court will not issue an injunction to restrain torts against the person, since the remedy at law is adequate.”).

¹⁵⁷ *Hafer v. Melo*, 502 U.S. 21 (1991) (damages resulting from § 1983 violations against individuals); *Carey v. Piphus*, 435 U.S. 247 (1978) (damages awards under Civil Rights Act of 1871 governed by principle of compensation); *Bivens v. Six Unknown Fed. Narcotics Agent*, 403 U.S. 388 (1971) (action for damages directly under Fourth Amendment).

¹⁵⁸ See *Weinstein v. Aisenberg*, 758 So. 2d 705, 706 (Fla. Dist. Ct. App.) *dismissed*, 767 So. 2d 453 (Fla. 2000) (“Even where the party seeking injunctive relief alleges that the opposing party may dissipate bank assets, a judgment for money damages is adequate and injunctive relief is improper, notwithstanding the possibility that a money judgment will be uncollectible.”).

This is not to say that a reputation has a price tag; to the contrary, sometimes money damages, no matter how high, can never make a plaintiff whole again. But “the law often relies on monetary damages to partially recompense a loss even when those damages cannot perfectly repair the damage done.”¹⁵⁹ Fox Sports Broadcaster Erin Andrews was recently awarded \$55 million in damages—an award she likely will never receive in full.¹⁶⁰ Andrews’ stalker, defendant Michael David Barrett, surreptitiously videotaped her through a peephole in the privacy of Andrews’ own hotel room and posted nude videos of her on the Internet for millions of viewers to see.¹⁶¹ \$28 of the \$55 million judgment was assigned to Barrett individually (the rest was assigned to the hotels that were negligent in protecting Andrews’ privacy).¹⁶² Many journalists have surmised that if Andrews receives any money from Barrett, it will likely be a very small amount.¹⁶³ Similarly, in wrongful death cases, courts frequently place a “price tag” on the plaintiff’s harm, when in reality no amount of money can remedy the wrongful loss of life.¹⁶⁴ Andrews was demeaned, embarrassed, and violated when nude photographs were posted, without her consent, on the Internet. The loved ones of a wrongfully killed individual are undoubtedly permanently wounded. And defamed plaintiffs, like McCarthy and Langsenkamp, may never get their good reputation back. Nevertheless, money damages have

¹⁵⁹ *Smith & Nephew, Inc. v. Interlace Medical, Inc.*, 955 F. Supp. 2d 69, 78 (D. Mass. 2013).

¹⁶⁰ Stacey Barchenger, *Erin Andrews Lawsuit: How Much of \$55M Judgment Will She Get?*, TENNESSEAN (Mar. 9, 2016), <http://www.tennessean.com/story/news/2016/03/09/how-much-55m-judgment-erin-andrews-get/81500906/> (“Barrett is what is known in the legal realm as ‘judgment proof;’ meaning he has no assets from which Andrews can collect money.”); Michael McCann, *Will Erin Andrews be Paid the \$55M She Was Awarded in Lawsuit?*, SPORTS ILLUSTRATED (Mar. 7, 2016), <http://www.si.com/more-sports/2016/03/07/erin-andrews-wins-55-million-hotel-lawsuit>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* (noting that the average award for the wrongful death of an adult female is \$3 million).

always compensated in-compensable harms, and the First Amendment's protection should not turn on whether a defendant is judgment proof. The *McCarthy* reasoning wrongly implies that the right to be free from prior restraints on speech stops at cases with insolvent defendants.¹⁶⁵ In light of the dangers of infringing First Amendment rights, the scale should tilt in favor of money damages over an injunction.

B. The Public Interest is Disserved When Courts Issue a Permanent Injunction in Defamation Cases: The Potential Chilling of Free Speech

Perhaps the most obvious consequence of this modern trend is the potential chilling of free and legitimate speech. Unlike subsequent punishment for defamation or harmful speech activity, the prior restraint of speech before it occurs deprives the public of information that should otherwise be disseminated. Each time a court enters a permanent injunction in a defamation case in favor of *one* plaintiff, *everyone's* constitutional right to free speech is eroded. The Seventh Circuit permitted the district court to issue a narrow, permanent injunction against only the specific statements that have been found to be defamatory.¹⁶⁶ Whether an injunction could permissibly be issued, according to the *McCarthy* majority, turned on the breadth of the injunction and what exactly it enjoined.¹⁶⁷ However, a permanent injunction, no matter how specific, sweeps free speech within its confines making the breadth of the injunction immaterial under a First Amendment analysis.

In refusing to issue a temporary restraining order against defendant's distributing offensive pamphlets, the Eastern District of Michigan in its 2003 decision *Karhani v. Meijer* recognized that the breadth of the injunction played no role in the Supreme Court's

¹⁶⁵ *McCarthy v. Fuller*, 810 F.3d 456, 466 (7th Cir. 2015) (Sykes, J., concurring).

¹⁶⁶ *Id.* at 463 (majority opinion).

¹⁶⁷ *Id.*

decision in *Organization for a Better Austin v. Keefe*.¹⁶⁸ The plaintiff in *Karhani* attempted to persuade the court that the temporary restraining order was permissible because it was extremely limited in its scope.¹⁶⁹ The district court was unconvinced, observing that the Supreme Court in *Keefe* “was simply concerned with the impermissible restraint on First Amendment speech caused by the prior restraint imposed by the state courts.”¹⁷⁰ Indeed, like the preamble of the injunction at issue in *McCarthy*, the broad language of the injunction issued in *Keefe* proved fatal. In *Keefe*, the Illinois trial court entered an injunction enjoining petitioners from passing out pamphlets, leaflets or literature “of any kind”.¹⁷¹ Unlike the Seventh Circuit in *McCarthy*, though, the *Keefe* and *Karhani* courts did not remand to the district court with the possibility to fabricate a narrower injunction.¹⁷² Instead, the Supreme Court firmly concluded that “[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court,”¹⁷³ and vacated the injunction.

Similarly, in *Kinney v. Barnes*, the Texas Supreme Court held that requesting an injunction on future speech was “the essence of prior restraint[.]”¹⁷⁴ The plaintiff in *Kinney* filed a defamation lawsuit regarding defamatory online posts and requested a permanent injunction on any similar future statements.¹⁷⁵ The Texas Supreme Court refused to prohibit future speech based on adjudication that

¹⁶⁸ *Karhani v. Meijer*, 270 F. Supp. 2d 926, 933 (E.D. Mich. 2003).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971) (emphasis added).

¹⁷² *Id.* at 420; *Karhani*, 270 F.Supp.2d at 930.

¹⁷³ *Keefe*, 402 U.S. at 419 (emphasis added).

¹⁷⁴ *Kinney v. Barnes*, 443 S.W.3d 87, 93 (Tex. 2014).

¹⁷⁵ *Id.* at 89.

certain statements were defamatory because doing so would impermissibly threaten to chill protected speech.¹⁷⁶

Injunctions are an incredibly powerful tool. Injunctions frequently have consequences so sweeping that they shut down operating businesses or otherwise dramatically affect the rights of the parties involved in an irreversible manner. “Put simply, injunction proceedings are high stakes poker.”¹⁷⁷ The Supreme Court has reiterated that courts must “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”¹⁷⁸ The public consequences are most severe in the First Amendment context, as this modern trend has the effect of potentially chilling lawful and legitimate speech.

CONCLUSION

On March 29, 2016, Fuller filed a petition for certiorari with the United States Supreme Court.¹⁷⁹ Her petition was denied on April 25.¹⁸⁰ Our society relies on the Internet as its main platform for communication. The intense debates surrounding net neutrality in the upcoming presidential elections show how important many people believe it is to preserve every citizen’s right to communicate freely online. But more Internet communication likely means more defamation lawsuits.¹⁸¹ Thus, it is imperative that the Supreme Court

¹⁷⁶ *Id.* at 101.

¹⁷⁷ Mark D. Bradshaw, White Paper, *Injunctions—A Practical Guide to One of the Law’s Most Powerful Tools*, STEVENS & LEE (Jan. 1, 2002), <http://www.stevenslee.com/injunctions-a-practical-guide-to-one-of-the-laws-most-powerful-tools/>.

¹⁷⁸ *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

¹⁷⁹ *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015), *petition for cert. filed*, (U.S. Mar. 29, 2016) (No. 15-212).

¹⁸⁰ *Fuller v. Langsenkamp*, 136 S.Ct. 1726 (2016).

¹⁸¹ *See, e.g.*, Laura Parker, *Jury Awards \$11.3M over Defamatory Internet Posts*, USA TODAY (Oct. 11, 2006, 10:53 AM), <http://usatoday30.usatoday.com/news/nation/2006-10-10-internet-defamation->

determine whether injunctions against defamation violate the First Amendment's prohibition on prior restraints.

As this Comment highlights, the Supreme Court has repeatedly struck down injunctions against harmful speech.¹⁸² Prior restraints are the least tolerable infringements on First Amendment rights. Thus, this modern trend does not appear to comport with precedent. Moreover, as Chemerinsky and Lidsky make clear from a practical point of view, injunctions against defamation—no matter how narrow or broad—just do not work. The context-dependence of defamation renders injunctive relief against it both ineffective and blatantly unconstitutional. Lastly, public policy (and tradition) dictates that money damages are adequate to remedy a defamed plaintiff. Judge Posner's concern about the infamous undeterrable, insolvent defendant cannot justify the entrance of a remedy that infringes First Amendment rights. The American judicial system has long used money damages to compensate uncompensable harms including wrongful death and violations of citizens' constitutional rights. And, most importantly, injunctions against defamation have the effect of chilling free speech. There is a profound national interest in the uninhibited debate of issues. The imperfection of our legal system requires us to protect defamation, not because it is inherently worth protecting, but so we can ensure that legitimate and lawful speech is not mistakenly penalized.¹⁸³ Thus, the modern trend to issue permanent injunctions against defamation must be stopped.

case_x.htm (positing that this case could represent a coming trend in court fights over online messages).

¹⁸² See *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931).

¹⁸³ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, COLL. OF WILLIAM & MARY LAW SCH., SCHOLARSHIP REPOSITORY 707 (1978).