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ROOM FOR ERROR ONLINE: REVISING GEORGIA'S RETRACTION STATUTE TO ACCOMMODATE THE RISE OF INTERNET MEDIA

Lisa Boggs*

INTRODUCTION

It started, as do many lawsuits, with a relationship gone sour: A Georgia man facing a DUI charge had fired his attorney, alleging a “half-hearted excuse for a defense” and requesting his \$3,000 flat fee be refunded.¹ The attorney declined to do so.² Nearly three years later, the former client began a series of postings on his personal website—a self-labeled “Political Forum”—in which he accused the attorney of bribing judges on behalf of drug dealers.³ At the close of one posting, the former client predicted that the attorney “will never make one single move against me or this website.”⁴

He was wrong, as it turned out. The attorney not only alleged libel, but prior to filing suit he also sent a letter demanding that the ex-client retract the offensive postings.⁵ The reason for the request seems clear at first: As in several other states,⁶ Georgia will bar punitive damages if the libel plaintiff fails to ask for a retraction.⁷

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1. *Milum v. Banks*, 642 S.E.2d 892, 893–94 (Ga. Ct. App. 2007).

2. *Id.* at 894.

3. *Id.* At one point, the website referred to the attorney as a “Drug Dealer Bribery Mule.” *Id.* The same posting concluded with the following: “Rafe, don’t you wish you had given back my three thousand dollar retainer when I asked you too, [sic] because I found out you were helping them set me up?” *Id.*

4. *Id.*

5. *Milum*, 642 S.E.2d at 894.

6. *See, e.g.*, CAL. CIV. CODE § 48a (West 2007); CONN. GEN. STAT. ANN. § 52-237 (West 2005); FLA. STAT. ANN. § 770.02 (West 2005); MASS. GEN. LAWS ANN. ch. 231, § 93 (West 2000); MINN. STAT. ANN. § 548.06 (West 2010). *Cf.* N.D. CENT. CODE § 32-43-03 (2008) (requiring libel plaintiffs to submit correction requests to maintain a libel action and also limiting damages to “provable economic loss” if the request comes more than ninety days after publication).

7. GA. CODE ANN. § 51-5-11(b)(2), (c) (2000).

Likewise, the defendant can avoid punitive damages if he makes the requested retraction.⁸

But should this sort of immunity—avoiding punitive damages via retraction—be available for this “Political Forum” and other websites?⁹ Georgia’s current retraction statute was written decades before the Internet, and thus it refers only to “newspaper[s] or other publication[s].”¹⁰ The Georgia Supreme Court in *Mathis v. Cannon* seemingly answered this question in 2002 by interpreting “publication” as covering Internet postings.¹¹ Thus, with one decision, the court declared that all online content—down to the most informal blog and message board¹²—receives a protection traditionally applied to large-scale, institutionalized news-gathering, media-like newspapers.¹³

While the majority praises its opinion as an egalitarian move to protect both lone blogger and media corporations alike,¹⁴ the *Mathis* dissent raises two key criticisms. First, allowing any Internet user to

8. *Id.* § 51-5-11(b)(1)(B), (c) (stating that the defendant shall be liable for actual damages if “the defendant, in a regular issue of the newspaper or other publication in question, within seven days after receiving a written demand, or in the next regular issue of the newspaper or other publication following receipt of the demand if the next regular issue was not published within seven days after receiving the demand, corrected and retracted the allegedly libelous statement in as conspicuous and public a manner as that in which the alleged libelous statement was published”).

9. As for the attorney and his ex-client, the retraction request opened the door for punitive damages, but the trial jury only awarded the attorney \$50,000 in general damages. *Milum*, 642 S.E.2d at 895, 898. The trial court had determined the attorney was a limited public figure and thus was required to prove that the ex-client had acted with actual malice if punitive damages were to be awarded. *Id.* at 896, 897. To the jurors, that burden was not met. *Id.* at 897. The Georgia Court of Appeals affirmed this ruling. *Id.* at 898.

10. GA. CODE ANN. § 51-5-11(b)(2) (2000). In 1939, the retraction statute applied to a “newspaper, magazine or periodical.” 1939 Ga. Laws 343, 344. By 1960, the statute had been reworded to “newspaper or other publication.” 1960 Ga. Laws 198, 199.

11. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002) (“[W]e construe the word ‘publication’ in . . . the retraction statute as meaning a communication made to any person other than the party libeled. Under this interpretation, the retraction statute applies to the words that Mathis wrote in his messages posted on [an online] bulletin board . . .”).

12. *See, e.g., Atlanta Humane Soc’y v. Mills*, 618 S.E.2d 18, 21 (Ga. Ct. App. 2005) (regarding alleged libelous statements made on an Internet message board about the Atlanta Humane Society’s policies with regard to euthanasia, adoption, and cruelty investigations, including a reference to the Humane Society’s director as “Mr. Kill”).

13. *See* 1939 Ga. Laws 343, 344 (restating the initial retraction statute, which applied to a “newspaper, magazine or periodical”).

14. *Mathis*, 573 S.E.2d at 385 (holding that interpreting “publication” to mean Internet content “supports free speech by extending the same protection to the private individual who speaks on matters of public concern as newspapers and other members of the press now enjoy”).

avoid punitive damages by retracting the libelous material “asks no self-censorship” of the users.¹⁵ Unlike newspapers or TV stations, which are held accountable by advertisers, consumers, and threats of litigation, individuals with their own Web content have the freedom to post false, defamatory statements, always knowing they can avoid punitive damages by retracting.¹⁶ Second, if the state legislature had intended for the retraction statute to cover Internet content, it could have revised the statute itself to specifically reference online materials.¹⁷ Instead, the court gave new meaning to the statute, and reached a result that consequently conflicts with several other states’ judicial interpretations of pre-Internet libel laws.¹⁸

This Note will address both of these criticisms by proposing a revision of Georgia’s retraction law. Part I examines retraction’s overall role in libel litigation and takes a closer look at Georgia’s statute as well as the *Mathis* decision.¹⁹ Part II compares *Mathis* to the approaches other states have taken regarding electronic-media retractions.²⁰ In particular, Part II examines California’s recent case law that only requires retractions when the publisher is involved in the rapid dissemination of news, as opposed to the casual Web poster.²¹ Finally, Part III proposes a revision to Georgia’s retraction statute that will both avoid blanket punitive damage immunity for online content, while also returning the statute’s focus to protecting news-gathering sources.²²

15. *Id.* at 389 (Hunstein, J., dissenting).

16. See Alice Horton, Note, *Beyond Control? The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1267 (2009) (“The Internet no longer requires technical computing language to navigate effectively; instead, the Internet is provided by the mere click of a mouse, and widespread broadband Internet access allows virtually anyone to become a publisher.”).

17. *Mathis*, 573 S.E.2d at 388 (Hunstein, J., dissenting).

18. See, e.g., *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. Dist. Ct. App. 2000) (holding that notice requirements in the libel statute are not applicable to a private individual who posted on an Internet message board); *It’s In The Cards, Inc. v. Fuschetto*, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) (holding that a retraction statute which references newspapers, magazines, and periodicals does not apply to an Internet message board).

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. See discussion *infra* Part II.A.3.

22. See discussion *infra* Part III.

I. RETRACTION AND ITS ROLE IN LIBEL LAW

A. Retraction's Emergence In Libel Cases

1. Evolving Burden of Proof for Libel

At common law, defamation²³ involves a communication that is a false statement of fact “of and concerning” another party.²⁴ The communication must be injurious to reputation,²⁵ and it must be “published,” or communicated to a third party.²⁶ Traditionally, defamation came in two forms: (1) libel, encompassing defamation that was written or could be read; and (2) slander, which covers spoken defamation.²⁷ However, as mass media has evolved, libel now typically covers not just the written word, but also the spoken word—heard via radio, television, and films.²⁸

Libel itself has evolved from common law into a matter of state law, with legislatures crafting their own definition of “defamation” as well as specifying the types of media in which libel can appear.²⁹ In

23. See RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing the essential elements of the tort of defamation as follows: “(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”).

24. See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 66 (3d ed. 1985) (stating that while the defamatory content does not have to directly name the plaintiff, the third party receiving the content must realize that it “concerns” the plaintiff).

25. RESTATEMENT (SECOND) OF TORTS § 559 (1977); accord MICHAEL F. MAYER, *THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY* 36 (1987) (listing examples of statements that courts have found defamatory, including accusations that an attorney is a swindler, a minister is unethical, and a businessman charges excessive prices).

26. See MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 976 (8th ed. 2006) (clarifying that “publication,” in regards to defamation, “has nothing to do with mass circulation or with putting a statement into print”); DAVID PRICE & KORIEH DUODO, *DEFAMATION LAW: PROCEDURE AND PRACTICE* 23 (3d ed. 2004) (defining a “publication” as “the communication of [a] defamatory matter by the defendant to at least one person other than the claimant”).

27. BLACK’S LAW DICTIONARY 927, 1392 (7th ed. 1999); see also MAYER, *supra* note 25, at 109.

28. See MAYER, *supra* note 25, at 109; WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 108 (13th ed. 2002); see also Carolyn Kelly MacWilliam, Annotation, *Individual and Corporate Liability for Libel and Slander in Electronic Communications, Including E-mail, Internet and Websites*, 3 A.L.R.6th 153 (2005) (discussing a failed attempt to classify Internet postings as slander rather than libel on the argument that they are communicated by a mechanical means rather than by traditional written publications).

29. FRANKLIN ET AL., *supra* note 26, at 972; 50 AM. JUR. 2D *Libel and Slander* § 326 (2011).

Georgia, for instance, libel is defined by statute as a “false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.”³⁰

Until 1964, libel primarily operated under the doctrine of strict liability: if a false, defamatory statement that clearly identified a party was published, damages would be allowed.³¹ However, with the United States Supreme Court decisions in *New York Times v. Sullivan*³² and *Gertz v. Welch*,³³ the landscape of libel law shifted significantly.³⁴ In *Sullivan*, the Court held that if a plaintiff is deemed a “public official,”³⁵ he may only collect damages after showing that the defendant, with “actual malice,” published defamatory content relating to the plaintiff’s official conduct.³⁶ Actual malice, as a burden of proof, requires that the defendant publish the defamation “with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁷

Ten years later, the Supreme Court held in *Gertz* that, while *private* individuals were not constitutionally bound to the same actual malice standard as *public* plaintiffs, they were nonetheless required to prove some level of fault (such as negligence, recklessness, or, if the state law chooses to go so far, even actual malice).³⁸ Further, only

30. GA. CODE ANN. § 51-5-1(a) (2000).

31. See MAYER, *supra* note 25, at 1.

32. 376 U.S. 254 (1964).

33. 418 U.S. 323 (1974).

34. See MAYER, *supra* note 25, at 1–6 (describing *New York Times v. Sullivan* and *Gertz v. Welch* as having initiated a “libel revolution”).

35. In 1967, the Supreme Court extended the “actual malice” standard for public officials to “public figures” as well. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (“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.”).

36. *Sullivan*, 376 U.S. at 283–84.

37. *Id.* at 279–80.

38. *Gertz*, 418 U.S. at 347–48. “Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.” *R.R. Co. v. Jones*, 95 U.S. 439, 441–42 (1877). “Recklessness” is “[c]onduct whereby the actor does not desire harmful consequence[s] but nonetheless foresees the possibility and consciously takes the risk,” or alternatively as a “state of mind in which a person does not care about the consequences of his or her actions.” BLACK’S LAW DICTIONARY 1277

showings of actual malice would trigger punitive damages for private individuals; unless the defendant knowingly published untrue material or acted recklessly as to its validity, the plaintiff could only be compensated for actual losses.³⁹

This abandonment of strict liability in favor of higher burdens of proof, as the Supreme Court explained, is intended to safeguard First Amendment freedoms; by making it harder for plaintiffs to bring about a libel suit, the media can tackle controversial stories without the crippling fear of libel litigation.⁴⁰ Thus, *Sullivan* and its progeny added a layer of constitutional concerns over what had been traditionally a matter for the states.⁴¹

2. Using Retraction to Limit Damages

These heightened burdens of proof lay the groundwork for the evidentiary role that retraction plays in libel litigation.⁴² In general, in a defamation context, a retraction is an unequivocal withdrawal of

(7th ed. 1999). Actual malice requires that the defendant publish the defamation “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 280. For more on the level of fault in libel cases, see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985) (addressing the requisite level of fault for punitive damages when the libelous material involves a private individual’s private concern). See also *infra* note 39.

39. *Gertz*, 418 U.S. at 349. This actual malice requirement for private individuals was later limited to only those matters involving public concerns. *Dun & Bradstreet*, 472 U.S. at 761, 763. In *Dun & Bradstreet*, the U.S. Supreme Court held that an erroneous credit report, which was distributed to only five subscribers, did not involve a matter of public concern. *Id.* at 751, 762. Hence, the plaintiff did not have to prove actual malice to receive punitive damages. *Id.* at 763.

40. *Gertz*, 418 U.S. at 340 (“Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”); *Sullivan*, 376 U.S. at 271–72 (holding that “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’” (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))). In *Sullivan*’s majority opinion, Justice Brennan went so far as to say that erroneous statements would actually make a positive contribution to public debate, as errors would make the truth stand out more clearly in contrast. *Sullivan*, 376 U.S. at 279 n.19.

41. RAYMOND T. NIMMER, *LAW OF COMPUTER TECHNOLOGY* § 14:8 (2010) (“[T]he Supreme Court has imposed constitutional limitations on the use of state law to protect reputation interests in favor of protecting the willingness of commentators to express viewpoints and debate issues”); see also OVERBECK, *supra* note 28, at 132 (“This [actual malice] language is among the most important ever written on mass media law in America.”).

42. See generally W.E. Shipley, *Validity, Construction, and Application of Statute Limiting Damages Recoverable for Defamation*, 13 A.L.R.2d 277 (1950) (discussing the connection between fulfilled retraction requests and showings of both good faith and absence of actual malice).

the defamatory content by that content's producer.⁴³ It has been argued that requiring a retraction request prior to the libel suit encourages both parties to remedy the situation themselves rather than fight over damages in court.⁴⁴ For traditional news media, such a requirement also serves as an incentive to correct what is ultimately false,⁴⁵ thus preserving the right to report freely⁴⁶ while mitigating any damage to an individual's reputation.⁴⁷

But more commonly, states fashion retraction statutes as a way to limit the damages⁴⁸ that are ultimately awarded.⁴⁹ More specifically, many of these statutes, including Georgia's,⁵⁰ will not allow plaintiffs to seek punitive damages—thus limiting them to only compensatory damages—unless they first request the libelous material be

43. Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 HASTINGS COMM. & ENT. L.J. 33, 34 (2007); see also STEVEN H. GIFIS, LAW DICTIONARY 447 (5th ed. 2003) (emphasizing that a retraction should be full and unequivocal, with no indication of hesitancy).

44. MAYER, *supra* note 25, at 133; Peled, *supra* note 43, at 34. See generally Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006) (discussing the challenges in using compensatory means to rectify reputational harm).

45. Peled, *supra* note 43, at 36 (“The aim of [retraction] statutes is, essentially, to protect [publishers’] interests by allowing them to evade the risk of monetary liability.”). But see Horton, *supra* note 16, at 1293 (noting that retracting “places the burden upon the plaintiff in a defamation action” to avoid or minimize damages).

46. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (holding “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” must be considered within any discussion of defamation).

47. Peled, *supra* note 43, at 34 (noting that retraction is preferable to tort actions because it can avoid the problem of calculating noneconomic losses to reputation).

48. Damages for defamation may be divided into three categories: (1) nominal damages, which are given to acknowledge the defamation in the absence of any actual injury; (2) compensatory damages, which equate with the actual injuries suffered by the defamation; and (3) punitive damages, which are regarded as punishment for the offender. Shipley, *supra* note 42, § 1(a).

49. See, e.g., CAL. CIV. CODE § 48a(1) (West 2007) (“[P]laintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast”); CONN. GEN. STAT. ANN. § 52-237 (West 2005) (“[U]nless the plaintiff proves . . . that the defendant, after having been requested by the plaintiff in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, the plaintiff shall recover nothing but such actual damage as the plaintiff may have specially alleged and proved.”); MASS. GEN. LAWS ANN. ch. 231, § 93 (West 2000) (“If within a reasonable time after receiving notice in writing from the plaintiff . . . the defendant . . . publishes a reasonable retraction, . . . the plaintiff shall recover only for any actual damage sustained.”); MINN. STAT. ANN. § 548.06 (West 2010) (“[T]he plaintiff shall recover no more than special damages, unless a retraction be demanded and refused”); N.D. CENT. CODE § 32-43-03 (2008) (“[A] person who, within ninety days after knowledge of the publication, fails to make a good faith attempt to request a correction or clarification may recover only provable economic loss.”).

50. GA. CODE ANN. § 51-5-11(b)(2), (c) (2000).

retracted.⁵¹ This aligns with the traditional treatment of punitive damages,⁵² which are typically limited to showings of actual malice.⁵³ In this sense, complying with the retraction request serves as evidence that the plaintiff did not publish libelous material knowingly or with a reckless disregard for the truth.⁵⁴

B. Georgia's Retraction Statute As Interpreted In Mathis

In Georgia, a libel plaintiff who seeks punitive damages is required to submit a written demand for the publisher to retract the allegedly defamatory statement.⁵⁵ Upon receipt of such a request, the defendant has seven days to comply.⁵⁶ If the defendant successfully completes this request, she avoids paying punitive damages (though she may still be found liable for compensatory damages).⁵⁷ The defendant may also use the retraction in her argument to mitigate damages.⁵⁸

All of this appears straightforward—except that the current statute, crafted fifty years ago,⁵⁹ requires the retraction to be placed in “a regular issue of the newspaper or other publication.”⁶⁰ As with nearly all retraction statutes in the United States,⁶¹ Georgia’s makes no

51. See, e.g., CAL. CIV. CODE § 48a(1) (West 2007); CONN. GEN. STAT. ANN. § 52-237 (West 2005); MASS. GEN. LAWS ANN. ch. 231, § 93 (West 2000); MINN. STAT. ANN. § 548.06 (West 2010). *But see* Rogers v. Florence Printing Co., 106 S.E.2d 258, 263 (S.C. 1958) (holding that, absent an express statutory provision, a retraction may mitigate libel damages, but it does not bar punitive damages).

52. For a discussion of the constitutional challenges mounted against punitive-damage limits in defamation statutes, see Shipley, *supra* note 42, § 3.

53. See Gertz v. Welch, Inc., 418 U.S. 323, 349 (1974). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (allowing punitive damages for a private plaintiff when the defamation involved a private concern).

54. Peled, *supra* note 43, at 35.

55. GA. CODE ANN. § 51-5-11(b)(2), (c) (2000).

56. *Id.* § 51-5-11(b)(1)(B). If the next regular issue is not published within seven days, the retraction must be published in the next regular issue after receiving the demand. *Id.*

57. *Id.* § 51-5-11(c) (stating that, upon proof that the plaintiff in a libel action made a request for a retraction and the defendant fulfilled such request within the stated time limit, “the plaintiff shall not be entitled to any punitive damages and the defendant shall be liable only to pay actual damages”).

58. *Id.* (“The defendant may plead the publication of the correction, retraction, or explanation, including the editorial, if demanded, in mitigation of damages.”).

59. 1960 Ga. Laws 198, 199.

60. GA. CODE ANN. § 51-5-11(b)(1)(B) (2000).

61. North Dakota remains the noteworthy exception, as its retraction statute specifically references electronic media. See N.D. CENT. CODE § 32-43-02 (2008) (“This chapter applies to all publications, including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information.”); see also discussion *infra* Part II.A.2.

specific reference to postings that appear on the Internet.⁶² What then, does this mean for defamatory content that shows up online?

The answer—perhaps belatedly—arrived in 2002, when the Georgia Supreme Court handed down its ruling in *Mathis v. Cannon*.⁶³ This case grew out of a dispute involving a solid waste facility in Crisp County.⁶⁴ Bruce Mathis was among a group of residents who openly criticized the financially struggling facility, as well as the company that hauled waste into the county for processing, TransWaste Services.⁶⁵ On Nov. 4, 1999, Mathis submitted online postings to a Yahoo! message board, in which he called TransWaste's executive, Thomas C. "Chris" Cannon, a "crook" and a "thief."⁶⁶

Cannon sued Mathis for libel,⁶⁷ asking for compensatory damages as well as \$1 million in punitive damages.⁶⁸ The trial court granted partial summary judgment on liability to Cannon, and the Georgia Court of Appeals affirmed.⁶⁹ But the Georgia Supreme Court reversed, finding that, among other issues,⁷⁰ Cannon could not claim

62. GA. CODE ANN. § 51-5-11 (2000).

63. 573 S.E.2d 376 (Ga. 2002).

64. *Id.* at 377. The facility "was designed to separate residential and commercial garbage or solid waste, sell the recyclable 'materials of value,' and produce commercial compost from the organic materials, with the residual waste being deposited in the county's landfill." *Id.* at 378.

65. *Id.* at 378–79. Mathis was a member of the Crisp Watchdogs, a group of Crisp County residents who "regularly attended [waste management] authority and commission meetings, asked critical questions, and made negative statements about the authority's operations and finances." *Id.* at 379. The Crisp Watchdogs also initiated a recall effort against three county commissioners. *Id.*

66. *Id.* at 379. Mathis' message at 11:14 p.m. included the following: "stop the trash flow cannon we would love u for it—our country not a dumping ground and sorry u and Lt governor are mad about it—but that is not going to float in crisp county—so get out now you thief." *Id.* Mathis posted a second message, titled "cannon a crook????", at 11:27 p.m., which stated, "explain to us why us got fired from the calton company please???? want hear your side of the story cannon!!!!!!!!!" *Id.* At 11:52 p.m. Mathis posted a third message titled "cannon a crook," in which he wrote, "if u deal with cannon u a crook too!!!!!!!!!" *Id.*

67. *Id.* at 377.

68. Richmond Eustis, *High Court Protects Internet Trash Talk*, FULTON COUNTY DAILY REP., Dec. 2, 2002, at 1, available at 2002 WLNR 15029612.

69. *Mathis*, 573 S.E.2d at 377.

70. The Georgia Supreme Court also concluded that Cannon was a limited-purpose public figure, and thus the trial court committed a reversible error because it failed to require Cannon to prove actual malice. *Id.* at 383. As the court observed:

In reviewing Cannon's role, we find that he was involved in the public controversy in Crisp County in at least three ways. First, he was a crucial actor in helping the [waste management] authority obtain the commitments from other county and city governments

punitive damages because he had failed to request a retraction as required in Georgia Code section 51-5-11.⁷¹

This decision, as Chief Justice Norman Fletcher explained in the majority opinion, rested on the meaning of “publication” in the statute.⁷² The Georgia Court of Appeals in 1984 had interpreted “newspaper and other publication” to mean “a written publication” produced by “print media.”⁷³ But the Georgia Supreme Court rejected that interpretation.⁷⁴ Rather, the court took a second look at the statutory language itself⁷⁵ as well as legislative intent.⁷⁶ It then reached the following conclusions. First, the General Assembly in 1960 adopted the phrase “other publication” to replace “magazine or periodical,” which suggests the legislature wanted the retraction

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. . . . Although he described his position as an independent contractor who functioned as “the garbage man of the deal,” it is difficult to distinguish between his efforts on behalf of the public authority and his efforts on behalf of his private company. Using his personal contacts with city and county officials developed from selling them heavy-duty equipment, Cannon solicited business for the authority; this solicitation helped generate business for TransWaste as the authority’s exclusive hauler. . . . Third, Cannon precipitated the financial crisis in November 1999 by filing a lawsuit against the authority and then temporarily halting deliveries to the solid waste recovery plant.

Id. at 382.

71. *Mathis*, 573 S.E.2d at 378; *see also* GA. CODE ANN. § 51-5-11(b)(2), (c) (2000).

72. *Mathis*, 573 S.E.2d at 383.

73. *Id.* at 384 (quoting *Williamson v. Lucas*, 320 S.E.2d 800, 802 (Ga. Ct. App. 1984)).

74. *Mathis*, 573 S.E.2d at 384.

75. *Id.* The court detailed its analysis as follows:

A review of the libel and slander code sections, of which the retraction statutes are a part, shows that the word “publication” is used in five different sections. O.C.G.A. [the Georgia Code] § 51-5-1 defines libel as “a false and malicious defamation of another” and requires that the “publication of the libelous matter is essential to recovery.” O.C.G.A. § 51-5-2 defines “newspaper libel” as a “false and malicious defamation of another in any newspaper, magazine, or periodical” and also requires the “publication” of the libelous matter as essential to recovery. O.C.G.A. § 51-5-3 explains what constitutes publication of libel: “A libel is published as soon as it is communicated to any person other than the party libeled.” O.C.G.A. § 51-5-10 refers to the “publication or utterance” of a statement. Finally, the retraction statute, O.C.G.A. § 51-5-11, uses the word in three places. Subsection (a) provides that the retraction statute applies in any “civil action for libel which charges the publication of an erroneous statement”; subsection (b) permits the defendant to prove that a retraction has been published “in a regular issue of the newspaper or other publication in question”; and subsection (c) permits the defendant to plead the “publication of the correction, retraction, or explanation” in mitigation.

Id.

76. *Id.*

statute to apply to media beyond the print variety.⁷⁷ Second, both the Georgia statute and common law have defined “publication” as purely a communication to a third party, and therefore it should not be taken solely as a synonym for print media.⁷⁸ Third, restricting “publication” to print references “makes a distinction between media and nonmedia defendants that is difficult to apply and makes little sense when the speech is about matters of public concern.”⁷⁹ Finally, the Georgia Supreme Court concluded that the Georgia Court of Appeals’ definition leaves little room to accommodate new types of media.⁸⁰

Thus, the majority opinion held that the word “publication” refers to “a communication made to any person other than the party libeled.”⁸¹ Under this interpretation, the retraction statute would apply to any Internet posting, including Mathis’ message-board comments.⁸² According to the justices, it should make no difference whether the message-board comments in the case came from a private citizen like Mathis or a news conglomerate:

77. *Id.* (pointing to legislative history that in 1960 “the General Assembly adopted the phrase ‘other publication’ as a substitute for ‘magazine or periodical’ in the initial [1939] statute. This change suggests that the legislature intended for the retraction statute to apply to more than ‘newspaper libel’ as defined in O.C.G.A. § 51-5-2”).

78. *Id.*; see also GA. CODE ANN. § 51-5-3 (2000) (“A libel is published as soon as it is communicated to any person other than the party libeled.”).

79. *Mathis*, 573 S.E.2d at 384–85. The *Mathis* opinion cites U.S. Supreme Court Justice White’s concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. Id.* at 385 n.32. The relevant part of that opinion is as follows:

[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 (1985) (White, J., concurring).

80. *Mathis*, 573 S.E.2d at 385 (“For example, under [the Georgia Court of Appeals’] view the retraction statute would not apply to a story that appears only on the on-line version of a newspaper or an advocacy group’s monthly electronic newsletter to its members reporting on congressional voting.”). In their empirical assessment of tort law application to Internet cases nationwide, Professors Michael L. Rustad and Thomas H. Koenig term the approach taken in *Mathis* as “a straightforward extension of bricks and mortar tort principles to information technologies.” Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 117 (2003).

81. *Mathis*, 573 S.E.2d at 385.

82. *Id.*

Nothing in O.C.G.A. [the Georgia Code] § 51-5-11 precludes applying the retraction statute to individuals. To the contrary, if the purpose of punitive damages in libel actions is to punish the speaker, *it is fairer to prohibit punitive damages in actions brought against individuals, who may communicate a defamatory falsehood to one person, than to the traditional press, which publishes the defamatory statement to greater numbers of people.* Also . . . there is no guarantee that a retraction made by a newspaper, television station, or radio station would likely reach the same audience that heard the original defamatory statement. Therefore, a retraction posted on an Internet bulletin board is as likely to reach the same people who read the original message as any retraction printed in a newspaper or spoken on a broadcast.⁸³

While the majority apparently saw it as an act of fairness to grant individuals and media organizations the same protection from punitive damages,⁸⁴ Justice Hunstein's dissent lambasted that very idea: "In my view, the majority ruling which asks no self-censorship of an Internet poster is unconscionable in that it allows Internet users free reign to injure the reputations of others, even when the statements cross the bounds of propriety."⁸⁵ Justice Hunstein also took issue with the new interpretation of "publication," suggesting that if the Georgia legislature intended the statute to cover Internet content, it would have rewritten the statute.⁸⁶

83. *Id.* (emphasis added).

84. *See id.*

85. *Id.* at 389 (Hunstein, J., dissenting).

86. *Id.* at 388 ("Instead, in plain and unequivocal language the legislature limited the application of the retraction statute to defendants who regularly publish information by mandating that the libel defendant correct and retract the allegedly libelous statement in the 'next regular issue of the newspaper or other publication' following receipt of the demand for retraction." (citing GA. CODE ANN. § 51-5-11(b)(1)(B) (2000))).

II. OTHER APPROACHES TOWARD RETRACTION STATUTES

A. *Judicial Interpretations In Other States*

Whereas Georgia's *Mathis v. Cannon* decision granted immunity from punitive damages to any Internet "publication" willing to retract, other states have not been as generous.⁸⁷ Rather, the courts have not been as generous—for it is the courts that have had the task of applying their states' pre-Internet retraction statutes to an online world.⁸⁸ These statutes vary in their wording, with several applying only to defamatory statements published in a newspaper, magazine, or other printed periodical.⁸⁹ Even more statutes limit the retraction requirement to print and broadcast media,⁹⁰ while one statute simply uses the broad term "publication."⁹¹

1. *Wisconsin: Print Media Does Not Equate with Online Media*

Wisconsin is one state whose case law has gone in the opposite direction of *Mathis* by declining to apply its retraction statute to Internet message boards.⁹² In the 1995 case *It's In The Cards, Inc. v.*

87. See, e.g., *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173 (Fla. Dist. Ct. App. 2000); *It's In The Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wis. Ct. App. 1995).

88. See *Horton*, *supra* note 16, at 1300.

89. See, e.g., MINN. STAT. ANN. § 548.06 (West 2010) ("newspaper"); N.J. STAT. ANN. § 2A:43-2 (West 2010) ("newspaper, magazine, periodical, serial or other publication in this state"); OKLA. STAT. ANN. tit. 12, § 1446a (West 1993) ("newspaper or periodical").

90. See, e.g., ARIZ. REV. STAT. ANN. §§ 12-653.01–.05 (2003) (applies only to "libel in a newspaper or magazine, or of a slander by radio or television broadcast"); IDAHO CODE ANN. § 6-712 (2006) ("newspaper" and "radio or television broadcast"); IND. CODE ANN. §§ 34-15-3-3, -4-1 (West 2008) ("radio or television company," "newspaper," and "news service"); KY. REV. STAT. ANN. §§ 411.051, .061 (West 2006) ("newspaper, magazine, or periodical" and "radio or television broadcasting station"); MICH. COMP. LAWS ANN. § 600.2911(2)(b) (West 2000) ("radio or television broadcast," "publication," and "other libel"); MISS. CODE ANN. § 95-1-5(2) (West 2007) ("newspaper" and "broadcast or telecast"); MONT. CODE ANN. §§ 27-1-818 to -821 (West 2009) ("publication in or broadcast on any newspaper, magazine, periodical, radio or television station, or cable television system"); NEV. REV. STAT. ANN. § 41.336(1) (West 2000) ("libel in a newspaper, or of a slander by radio or television broadcast"); OHIO REV. CODE ANN. §§ 2739.03, .13–.14 (West 2009) ("broadcasting station" and "newspaper company"); OR. REV. STAT. ANN. § 31.210(1) (West 2003) ("newspaper, magazine, other printed periodical, or by radio, television or motion pictures").

91. MASS. GEN. LAWS ch. 231, § 93 (2000); see also NEB. REV. STAT. § 25-840.01 (2008) (referring simply to "any medium").

92. *It's In The Cards*, 535 N.W.2d at 14 (Wis. Ct. App. 1995). The Wisconsin retraction statute refers only to newspapers, magazines, or periodicals. WIS. STAT. ANN. § 895.05(2) (West 2006).

Fuschetto, the Wisconsin Court of Appeals ruled that the retraction statute only applied to newspapers, magazines, and periodicals, as explicitly stated in the law itself.⁹³ The court concluded that online message boards do not qualify as “periodicals,” since the latter term refers to publications that appear on a regular basis.⁹⁴ The online message boards, in contrast, are random acts of communication, analogous to posting a written notice on a public bulletin board.⁹⁵

It’s In The Cards further underscored the Wisconsin statute’s print-only application. First, the opinion noted that the retraction statute was not inclusive of all forms of written libel, as it did not mention personal letters, billboards, signs, or even broadcast media.⁹⁶ Second, the court recognized that the libel laws were enacted “before cyberspace was envisioned,” and therefore “were written to manage physical, printed objects, not computer networks or services.”⁹⁷

Thus, whereas a message board poster in Georgia can avoid punitive damages for an online libel merely because the plaintiff failed to ask for a retraction,⁹⁸ there would be no such “escape hatch” for a Wisconsin poster in similar circumstances. The Wisconsin plaintiff would not be required to seek a retraction before suing for online libel—and in turn, the defendant would not automatically avoid or lessen punitive damages by issuing such a retraction.⁹⁹

93. *It’s In The Cards*, 535 N.W.2d at 14. The court ruled that the plaintiff did not have to seek a retraction of the online content prior to filing suit. *Id.* The case involved two sports memorabilia dealers whose argument regarding a postponed trip spilled over into communications posted on SportsNet, a national network for memorabilia dealers. *Id.* at 13.

94. *Id.* at 14.

95. *Id.* (“Posting a message to the SportsNet bulletin board is a random communication of computerized messages analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals.”).

96. *Id.*

97. *Id.* The court further noted that:

[i]t is the responsibility of the legislature to manage this technology and to change or amend the statutes as needed. Therefore, we conclude that extending the definition of ‘periodical’ . . . to include network bulletin board communications on the SportsNet computer service is judicial legislation in which we will not indulge.

Id. at 15.

98. See discussion *supra* Part I.B.

99. WIS. STAT. ANN. § 895.05(2) (West 2006) (requiring the plaintiff to give the defendant a “reasonable opportunity” to correct the allegedly libelous material and also limiting the defendant to actual damages if a timely correction is published); *It’s In The Cards*, 535 N.W.2d at 14 (excluding online sources from the Wisconsin retraction statute).

Even more noteworthy than the different case law is how the difference itself came about, with two courts interpreting similar statutes. The Wisconsin statute refers to newspapers, magazines, and periodicals.¹⁰⁰ In turn, the Georgia law refers to newspapers or other publications.¹⁰¹ *Mathis* seemingly turned on whether an Internet communication was considered a “publication”¹⁰²—a nebulous, catch-all term that stands in stark contrast to the specific media examples given in the Wisconsin statute.¹⁰³ Yet both statutes were written prior to the Internet’s advent, and thus any words selected at that time clearly did not anticipate the World Wide Web.¹⁰⁴ Wisconsin and Georgia courts thus shared the same problem—how to apply laws from the print era to the burgeoning online universe—but judicial interpretation led to different solutions.¹⁰⁵

2. North Dakota: The Statute with the “Magic Words”

While states like Wisconsin and Georgia have wrestled to analogize print references to online sources,¹⁰⁶ North Dakota stands alone with a retraction law that specifically encompasses Internet sources.¹⁰⁷ The North Dakota libel law refers to “all publications, including writings, broadcasts, oral communications, *electronic transmissions*, or other forms of transmitting information.”¹⁰⁸

100. WIS. STAT. ANN. § 895.05(2) (West 2006) (“Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter.”).

101. GA. CODE ANN. § 51-5-11(b)(1)(B) (2000) (stating that the defendant will not be liable for actual damages if a retraction is published within seven days “in a regular issue of the newspaper or other publication”).

102. *Mathis v. Cannon*, 573 S.E.2d 376, 383 (Ga. 2002).

103. WIS. STAT. ANN. § 895.05(2) (West 2006); *see also supra* note 100.

104. The Georgia statute was amended to include “other publication” in 1960, more than thirty years before the advent of the Internet. 1960 Ga. Laws 198, 199. As for the Wisconsin statute, “[t]he magnitude of computer networks and the consequent communications possibilities were non-existent at the time this statute was enacted.” *It’s In The Cards*, 535 N.W.2d at 14.

105. *See Horton*, *supra* note 16, at 1300 (noting that the current status of defamation law on the Internet presents “new problems emerging from recent, but apparently unsuccessful, attempts by courts to remedy the issues through judicial interpretation”).

106. *See discussion supra* Part II.A.1.

107. N.D. CENT. CODE § 32-43-02 (2008).

108. *Id.* (emphasis added). This section of the statute gives general definitions of what is covered under libel law, while the following section lists the actual requirements for retraction: “A person may

Such wording did not come about by chance. In 1995, North Dakota's legislators adopted the Uniform Correction or Clarification of Defamation Act (hereinafter UCCDA), a draft model law approved by the American Bar Association.¹⁰⁹ The UCCDA's authors hoped that once it was widely adopted, it would result in more uniformity in state court decisions regarding retraction.¹¹⁰ That, however, has yet to happen, as North Dakota remains the only state to have made the adoption.¹¹¹

3. Florida and California: Applying the "Rapid Dissemination of News" Standard

Having elected against adopting the UCCDA, Florida is now among the states struggling with broadcast and print-oriented libel

maintain an action for defamation only if the person has made a timely and adequate request for correction or clarification from the defendant or the defendant has made a correction or clarification." *Id.* at § 32-43-03.

109. Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of the Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 943 (1995). Calvert provides a succinct summary of the UCCDA's origin:

The UCCDA was formally adopted by the National Conference of Commissioners on Uniform State Law in August, 1993, and subsequently was accepted by the American Bar Association's House of Delegates in February, 1994. The UCCDA provides in relevant part that if a potential libel plaintiff fails to demand, in good faith, a correction or clarification of the allegedly libelous statement or statements within ninety days after knowledge of publication—or if the publisher runs a sufficient correction or clarification once such a demand has been made—then the plaintiff is limited to recovering damages for provable economic loss, such as lost wages or out-of-pocket expenses. Recovery for all other forms of damages—including general and reputational damages—is barred if the plaintiff fails to ask for a correction or clarification within ninety days after knowledge of publication or if the publisher prints such a correction or clarification.

Id.; see also Wendy Tannenbaum, *Model Defamation Reform Slow to Catch On*, NEWS MEDIA & L., Apr. 1, 2003, at 1, available at 2003 WLNR 6905734 (stating that the UCCDA was intended to help correct or clarify an alleged defamation quickly while avoiding costly litigation).

110. Tannenbaum, *supra* note 109. A careful search by the author of published opinions uncovered little to no case law regarding North Dakota's retraction statute since 1995.

111. Tannenbaum, *supra* note 109. Perhaps one reason for state legislatures' trepidation is a fear of placing too much pressure on journalists:

From the media's point of view, the concern is that there will be intense pressure to publish a "correction" quickly in order to abort a potential libel suit. The [UCCDA] may encourage hasty judgments about the statement's accuracy and, in the process, sacrifice a reporter's reputation and the media's credibility on the altar of expediency.

M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 145–46 (1995); see also Calvert, *supra* note 109, at 943 (noting that the UCCDA has been derisively dubbed as the "Defaming Publishers Relief Act").

statutes.¹¹² Yet unlike the Georgia Supreme Court in *Mathis*, Florida's judiciary has directly rejected a blanket application of its statute to *all* Internet postings.¹¹³

According to Florida's libel statute, the plaintiff must give a "newspaper, periodical, or other medium" five days' notice before bringing a libel suit against the defendant.¹¹⁴ In 2000, the Florida District Court of Appeal determined that "newspaper, periodical, or other medium" excluded Internet postings made by a private individual on a computer service operated by a third party.¹¹⁵ That decision, *Zelinka v. Americare Healthscan, Inc.*, explicitly declined to define "other medium" as inclusive of online sources; rather, it held that the libel statute in general applied only to "media defendants," described as those "engaged in the dissemination of news and information through the news and broadcast media"¹¹⁶ To the *Zelinka* court, a private individual who "merely made statements" on a Yahoo! message board was not involved in the "dissemination of news" and thus was not a media defendant.¹¹⁷ Therefore, had the message board poster in *Mathis* been in Florida instead of Georgia, he would not have qualified as a "media defendant" and hence could have been sued for libel without any notice, much less a request for a retraction.

112. FLA. STAT. ANN. § 770.01 (West 2005) (referring to defamatory statements in a "newspaper, periodical, or other medium"); *see also Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1173 (Fla. Dist. Ct. App. 2000) (applying Florida's libel statute to an alleged defamatory statement on an Internet message board).

113. *See Zelinka*, 763 So. 2d at 1175.

114. Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

FLA. STAT. ANN. § 770.01 (West 2005).

115. *Zelinka*, 763 So. 2d at 1175.

116. *Id.* (citing *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. Dist. Ct. App. 1997)). The *Zelinka* court followed a string of Florida cases that had concluded the retraction statute does not apply to non-media defendants. In *Davies v. Bossert*, the Florida District Court of Appeal declared that the user of a citizen's band radio was a non-media defendant because he had greater time to ascertain the truth of his declarations compared to a mass-media entity. 449 So. 2d 418, 421 (Fla. Dist. Ct. App. 1984). Six years later, the same grounds were cited in *Gifford v. Brucker*, which found the defendant (the purchaser of a banner towed by an airplane) a non-media entity. 565 So. 2d 887, 888–89 (Fla. Dist. Ct. App. 1990).

117. *Zelinka*, 763 So. 2d at 1175.

Like Florida, California's judiciary also shied away from a limited interpretation of the retraction statute.¹¹⁸ Although the California statute lists the specific types of media it covers—namely, radio broadcasts in addition to newspapers¹¹⁹—a recent court decision suggests that online material may be covered by the retraction statute only if the publisher's main focus is the rapid dissemination of news.¹²⁰

In *Condit v. National Enquirer, Inc.*, a federal court interpreting California law observed that the legislature passed the retraction statute to protect publishing enterprises that engage “in the immediate dissemination of news.”¹²¹ The case involved the *Enquirer's* story about a former congressman's wife verbally assaulting her husband's suspected mistress.¹²² The court concluded that the *Enquirer*, which published the story both online and in print, was not covered by the retraction statute because it did not focus on the *rapid* dissemination of news and thus had time to verify the truth of its allegations.¹²³ The protection from punitive damages provided by retractions, reasoned the court, should only be available to enterprises that “cannot always check their sources for accuracy and their stories for inadvertent publication errors.”¹²⁴

118. See generally *Condit v. Nat'l Enquirer, Inc.*, 248 F. Supp. 2d 945 (E.D. Cal. 2002).

119. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

CAL. CIV. CODE § 48a(1) (West 2007).

120. *Condit*, 248 F. Supp. 2d at 955.

121. *Id.*

122. *Id.* at 948. The case involved the wife of former California Congressman Gary Condit, who gained notoriety when one of his interns, Chandra Levy, disappeared. *Id.* Some time before July 26, 2001, *The National Enquirer* reported on its website that Mrs. Condit had phoned Levy and verbally attacked her for five minutes. *Id.* Mrs. Condit alleged that local authorities debunked the report of a call, but the *Enquirer* nonetheless posted the story, which gained national attention. *Id.*

123. *Condit*, 248 F. Supp. 2d at 960.

124. *Id.* at 955 (“Section 48a extends protection in recognition of the necessity to disseminate news while it is new, even if untrue, but whose falsity there is neither time nor opportunity to ascertain.”).

The ruling in this case aligns with the result reached nearly twenty years earlier in *Burnett v. National Enquirer, Inc.*¹²⁵ The *Enquirer's* defense included a claim that it had retracted an allegedly defamatory statement about comedian Carol Burnett (which appeared in print only), and thus was immune from punitive damages.¹²⁶ The court disagreed, finding that the tabloid, even in its print form, was not considered a magazine or periodical under the libel statute:

It does not subscribe to the Associated Press or United Press International news services. . . . It provides little or no current coverage of subjects such as politics, sports or crime, does not attribute content to wire services, and in general does not make reference to time. Normal “lead time” for its subject matter is one to three weeks. Its owner allowed it did not generate stories “day to day as a daily newspaper does.”¹²⁷

In short, the *Burnett* court concluded that providing immunity from punitive damages, via a timely retraction, should only be allowed for those who generate content on a twenty-four-hour cycle or run a daily deadline.¹²⁸ The *Enquirer* does neither, and so it could not use retraction as a shield against punitive damages.¹²⁹

B. Retraction's Unique Role In Protecting A Free Press

Burnett v. National Enquirer, Inc. and *Condit v. National Enquirer, Inc.* both noted that the tight turnaround and pressure of daily deadlines could result in potential factual errors.¹³⁰ Hence, both

125. 144 Cal. App. 3d 991, 1001, 1004 (1983).

126. *Id.* at 997–98. In this well-known case, comedian Carol Burnett had sued the *Enquirer* (the same tabloid defendant in *Condit*) over a short print item that described her as acting inebriated during a dinner with Henry Kissinger. *Id.* at 996–97. The appellate court found that Burnett was not inebriated on the night in question and that she was only introduced to Kissinger by a friend as she was leaving the restaurant. *Id.* at 998–99.

127. *Id.* at 1000.

128. *Id.*

129. *Id.*

130. *Condit v. Nat'l Enquirer, Inc.*, 248 F. Supp. 2d 945, 955 (E.D. Cal. 2002); *Burnett*, 144 Cal. App. 3d at 1000. Although the opinion in *Burnett* specifically cited the *Enquirer* for not having a daily deadline, it further stated that the standard is not limited to daily dissemination, but rather “immediate

courts reasoned, retraction's "escape hatch" from punitive damages is necessary so that newsgatherers can swiftly compile the facts needed to educate the public, without the fear of litigation that results from unintentional misstatements.¹³¹

The question then arises: Why should only entities involved in the "rapid dissemination of news"¹³² be privy to this punitive-damage immunity? After all, as the majority in *Mathis* pointed out, applying the retraction statute to all Internet postings "supports free speech by extending the same protection to the private individual who speaks on matters of public concern as newspapers and other members of the press now enjoy."¹³³ This egalitarian approach focuses on a retraction's ability to mitigate the immediate damage caused by the alleged defamation—by encouraging quick corrections, a person's reputation will suffer less.¹³⁴ Furthermore, scholars argue that a timely retraction published in an equally prominent place ensures that corrections will more likely reach the original audience, once again

dissemination of news on the ground that the Legislature could reasonably conclude that such enterprises . . . cannot always check their sources for accuracy and their stories for inadvertent publication errors." *Burnett*, 144 Cal. App. 3d at 1004 (quoting *Field Research Corp. v. Super. Ct. of S.F.*, 453 P.2d 747, 750 (Cal. 1969)). Twenty years later, *Condit* cited this language from *Burnett*. *Condit*, 248 F. Supp. 2d at 955.

131. *See* *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'"); *see also* Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 166 (observing that the Framers of the Constitution believed the press would play an important watchdog role).

132. *See Condit*, 248 F. Supp. 2d at 959 (quoting *Field Research Corp. v. Super. Ct. of S.F.*, 453 P.2d 747, 751 (Cal. 1969)).

133. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002). The opinion goes on to say that the ruling "strikes a balance" in an age when "'anyone, anywhere in the world, with access to the Internet' can address a worldwide audience of readers in cyberspace." *Id.* at 386 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997)). Other courts have made similar points in the past. In 1950, the Supreme Court in California (the same state where *Condit* was decided) expressed concern that giving newspapers and radio protection from punitive damages via retraction "will in effect allow these two favored means of publication to escape, in most instances, scot free, since the plaintiff will not be able to prove the exact special pecuniary loss he has suffered." *Werner v. Cal. Associated Newspapers*, 216 P.2d 825, 838 (Cal. 1950).

134. *See* Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster"*, 9 B.U. J. SCI. & TECH. L. 407, 430 (2003) (encouraging a case-by-case analysis to determine how much the retraction has actually lessened damages).

lessening any reputation damage.¹³⁵ Finally, as the Internet allows everyone to be his or her own reporter and publisher, scholars suggest that these users will ultimately be wary enough of defamation laws in general, so that they will be encouraged to investigate leads and publish reports responsibly.¹³⁶

Despite the seeming fairness of treating all Internet postings the same under this egalitarian approach, it misses key realities. First, defamatory material on the Internet can be quickly dispersed, meaning that a single retraction on the source's site could prove meaningless in reaching the majority of the original audience.¹³⁷ As one scholar noted: "Once a message enters cyberspace, millions of people worldwide can gain access to it. Any posted message or report can be republished by . . . forwarding it instantly to a different location, leading to potentially endless replication."¹³⁸

Second, anonymity is prevalent among the Internet, which can make it difficult for parties to send the retraction request to the correct publisher within the statutory time limit.¹³⁹ On top of the obvious mystery of not knowing whom to sue, defamed parties may find it difficult to compel an Internet service provider (ISP) to release

135. See Benjamin Barron, *A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 91 (2007) ("A retraction is also more likely to reach the same audience as the defamatory statement . . ."). But see *Mathis*, 573 S.E.2d at 385 (concluding there actually is no guarantee that any retraction will reach the same audience, and reasoning that an Internet retraction is just as useful because it is "as likely to reach the same people who read the original message as any retraction printed in a newspaper or spoken on a broadcast").

136. Barron, *supra* note 135, at 126 ("[A]s a normative matter, defamation liability should deter individuals incapable of responsibly reporting from publishing injurious facts about others. If the standard of responsible journalism is universally applied, people will be more likely to turn damaging information over to individuals or entities with access to greater investigative resources.").

137. If someone posts a defamatory statement somewhere on the Internet, that statement can be instantly read by others, copied and pasted somewhere else on the Internet, and then read by thousands more. Because the resulting damage inflicted upon the defamed person or entity cannot be contained in one area on the Internet, issuing an effective reply or retraction statement would be nearly impossible, making the damage even more severe.

Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1466 (2006).

138. Odelia Braun, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U. L. REV. 325, 327 (2002).

139. See Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343, 353–54 (2006) (noting that bloggers in several recent defamation cases had posted their comments anonymously).

the poster's name.¹⁴⁰ In *Doe v. Cahill*, for instance, the Delaware Supreme Court held that defamed parties are required to first survive a motion to dismiss, then post an online notification that the anonymous poster is subject to a subpoena.¹⁴¹

Most significantly, however, newsgatherers have historically been singled out as a group with a unique role in American governance. While courts have not gone so far as to classify newsgatherers as a category demanding special treatment,¹⁴² members of the press have received specially crafted protections in the past, such as shield laws.¹⁴³ Furthermore, as Justice Potter Stewart declared, the press has traditionally been the "Fourth Estate" that acts as a check on the three branches of government.¹⁴⁴ This special role, Justice Stewart claimed, meant that the government should not hinder the press' ability to "do battle against secrecy and deception."¹⁴⁵ The ruling in *Sullivan* falls in line with this approach. By setting forth the higher actual malice standard of proof for public officials who claim libel, it provided the "breathing space" that would encourage reporters to root out the truth.¹⁴⁶

140. *Id.* at 355.

141. *See Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

142. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) (commenting that the Framers did not contemplate a "special" or "institutional" privilege for the press); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding in a divided vote that a newspaper reporter does not have a First Amendment privilege to refuse to disclose his confidential sources when subpoenaed to appear in front of grand juries). *But see generally* David F. Partlett & Russell L. Weaver, *Remedies, Neutral Rules and Free Speech*, 39 AKRON L. REV. 1183 (2006) (examining the press' special legal protections).

143. Uglan, *supra* note 131, at 125. Professor Uglan notes that Maryland became the first state to pass a shield law to protect journalists' confidentiality agreements in 1896. *Id.* at 175. A shield law is defined as a "statutory privilege which allows a newsgatherer to decline to reveal sources of information." 81 AM. JUR. 2D *Witnesses* § 526 (2010).

144. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

145. *Id.* at 636.

146. *N.Y. Times v. Sullivan*, 376 U.S. 254, 272 (1964); *see discussion supra* Part I.A.1.

III. REVISING GEORGIA'S RETRACTION STATUTE

A. *Realigning Retraction As A Protection For The Fourth Estate*

Like the actual malice standard, retraction is uniquely qualified to provide “breathing space” to the Fourth Estate, by removing the fear of crippling punitive damages for libelous statements that inadvertently slip through in the rush to provide the public with news. Such “breathing space,” however, is not necessary for an individual who does not face a similar time constraint, and thus has the opportunity to weigh the veracity and consequences of what she will communicate. Indeed, to echo Justice Hunstein’s dissent in *Mathis v. Cannon*, allowing such individuals the retraction “escape hatch” from punitive damages discourages them from prudent self-censorship and instead gives them “free reign to injure the reputations of others.”¹⁴⁷

The need, therefore, is not for a reading of Georgia’s retraction law that applies to all Internet postings,¹⁴⁸ but rather a law specifically written to apply to any publications—print or online—that are made during the “rapid dissemination of news.” This standard, as developed in case law, should be adopted as the statutory standard that determines when retraction requests are mandatory for punitive damages. In the case of Georgia’s statute, the phrase “regular issue of the newspaper or other publication”¹⁴⁹ could be trimmed to merely “publication,” while the defendant could be stipulated as a “rapid disseminator of news.” The days of *Mathis*, in short, should be numbered.

B. *Change Is A Good Thing: Making The Call To Abandon Mathis*

The *Mathis* interpretation of Georgia’s retraction law calls for the term “publication” to encompass all Internet postings, whether they come from individual posters or mass media sources.¹⁵⁰ Hence, the *Mathis* court found the problem to be the statute’s silence on online

147. See *supra* note 85 and accompanying text.

148. See discussion *supra* Part I.B.

149. See GA. CODE ANN. § 51-5-11(b)(1)(B) (2000).

150. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002); see also discussion *supra* Part I.B.

references, and solved the problem by redefining “publication” to cover all online material.¹⁵¹

A better approach, however, would be to fill that silence by revising the statute altogether. On several occasions, Georgia’s General Assembly has done just that. In 1957 the retraction statute was altered from “newspaper, magazine or periodical” to a “regular issue” of a “newspaper or publication.”¹⁵² Three years later, in 1960, the law was again modified to say “regular issue” of a “newspaper or other publication.”¹⁵³ The *Mathis* court stated that the adoption of “other publication” in lieu of “magazine or periodical” suggests the legislature intended for the statute to cover more than just print sources.¹⁵⁴ That may be so, but in the 1950s online message boards and blogs produced by single individuals were, safe to say, far from any legislator’s mind.¹⁵⁵ If the retraction law specifies the *types* of media it covers, then changing media will inevitably call for changing laws—though legislatures may forever be playing catch-up.¹⁵⁶

C. Function Versus Form: Shifting The Georgia Statute’s Focus To The Condit Approach

1. Aligning the Statute to Protect the “Rapid Dissemination of News”

To avoid this game of catch-up, the Georgia retraction statute should turn its focus away from the type of publisher (print versus

151. See Horton, *supra* note 16, at 1297–98 (observing that the *Mathis* decision, though touching on Internet postings specifically, in essence broadened the retraction statute so that all libel plaintiffs must ask for a retraction before seeking punitive damages).

152. 1958 Ga. Laws 54, 54; 1939 Ga. Laws 343, 344.

153. 1960 Ga. Laws 198, 199.

154. *Mathis*, 573 S.E.2d at 384.

155. The Internet did not come into widespread use until 1995, when the U.S. government transferred its management to independent organizations. See generally Julie J. Rehmeyer, *Mapping a Medusa: The Internet Spreads Its Tentacles*, 171 SCI. NEWS 387 (2007).

156. See, e.g., Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1344 (2009) (suggesting that evolving standards with online social networks will affect future privacy law); Liebman, *supra* note 139, at 348 (pointing to the 1996 Communications Decency Act, which freed Internet service providers from liability for their users’ content, as an example of Congress reacting to the rise of Internet communication).

Internet) or even the size of the publisher (newspaper, TV station, blogger), and instead discriminate by the publisher's *function*.¹⁵⁷ As Professor Erik Ugland observes, the Framers of the Constitution did not enact the First Amendment to protect certain types of press, but rather to protect the function of self-expression itself.¹⁵⁸ And as stressed in the seminal *New York Times v. Sullivan* case, defamation law should maintain that “*debate on public issues*” be uninhibited,¹⁵⁹ regardless of the form in which it appears.

The question then becomes which functions of self-expression should fall under retraction law. In other words, when would a publisher (either online or print) be in need of the “escape hatch” from punitive damages? The answer is supplied in case law from Florida and California.¹⁶⁰

Of the two states, Florida offers the broader definition of the functions that require retraction protection. In *Zelinka v. Americare Healthscan, Inc.*, the Florida District Court of Appeal merely limited the retraction statute to “media defendants” that disseminate information through traditional news and broadcast means.¹⁶¹ The message board poster in *Mathis*, as a single individual,¹⁶² does not fulfill this function and would obviously be excluded from this protection. However, *Zelinka* remains unclear about what ultimately constitutes a “media defendant”: it left open the idea that “someone who maintains a web site and *regularly* publishes internet ‘magazines’ on that site might be considered a ‘media defendant.’”¹⁶³

157. Ugland, *supra* note 131, at 123. Interestingly, Professor Ugland refers to this functional approach as “egalitarian,” as it “emphasizes the function served by newsgatherers, and not their social or professional status or credentials.” *Id.*

158. *Id.* at 170 (“It was not the unique skill, identity, or character of printers that the Framers sought to protect; it was the function they served and the vehicle they provided for individuals’ expression that warranted protection.”); accord *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 799–800 (1978) (finding that the First Amendment’s Press Clause “focuses specifically on the liberty to disseminate expression broadly” rather than the form of the dissemination).

159. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

160. See *Condit v. Nat’l Enquirer, Inc.*, 248 F. Supp. 2d 945 (E.D. Cal. 2002); *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173 (Fla. Dist. Ct. App. 2000); *Burnett v. Nat’l Enquirer, Inc.*, 144 Cal. App. 3d 991 (Cal. Ct. App. 1983).

161. *Zelinka*, 763 So. 2d at 1175; see also discussion *supra* Part II.A.3.

162. See discussion *supra* Part I.B.

163. *Zelinka*, 763 So. 2d at 1175 (emphasis added).

Zelinka, therefore, focuses on the publisher disseminating information “regularly.” The California cases further hone the requisite frequency of publications. In *Burnett v. National Enquirer, Inc.*, the court concluded that only those media sources that faced an immediate constraint of time were allowed punitive-damage immunity via retraction.¹⁶⁴ Specifically, the opinion denied retraction protection to the *Enquirer* because it lacked “current coverage,” “made no reference to time,” and had a normal lead time of one to three weeks.¹⁶⁵

Condit v. National Enquirer, Inc., in turn, combined *Burnett*’s “time constraint” and *Zelinka*’s “information dissemination” to define the “rapid dissemination of news” function.¹⁶⁶ Here, any publisher whose primary role is to publicize the story at a rapid pace will need the protection provided by retraction: should a publisher make an honest mistake in the rush to disseminate news, it will have the chance to retract and thus avoid punitive damages.¹⁶⁷ At the same time, an individual online poster—like the defendant in *Mathis*—would not be offered such protection, since he does not face a similar time restraint and thus has the leisure to ponder the nature of comments as well as their potential consequences.¹⁶⁸ Protecting the “rapid dissemination of news” function would therefore bolster newsgatherers’ ability to report freely and quickly, while simultaneously encouraging other publishers to continue their own self-censorship.

2. Embracing All Forms of Media with the “Rapid Dissemination of News” Standard

Such a standard as “rapid disseminator of news” would no doubt cover most of the traditional, institutionalized newsgatherers. Websites belonging to The Atlanta Journal-Constitution, The New

164. See *Burnett*, 144 Cal. App. 3d at 1000, 1005; see also discussion *supra* Part II.A.3.

165. *Burnett*, 144 Cal. App. 3d at 1000; see also discussion *supra* Part II.A.3.

166. *Condit v. Nat’l Enquirer, Inc.*, 248 F. Supp. 2d 945, 955 (E.D. Cal. 2002); see also discussion *supra* Part II.A.3.

167. *Condit*, 248 F. Supp. 2d at 955.

168. See *supra* notes 65–66 and accompanying text.

York Times, or CNN would easily qualify, as each is a longtime member of the mainstream media that updates its content daily, at a minimum.¹⁶⁹ Indeed, having a statute cater primarily to journalists would not be unprecedented, as many states have passed shield laws to protect reporters from revealing their sources.¹⁷⁰

But even if journalists were the primary beneficiaries, such a statute will not and should not shut out all smaller newsgathering organizations, or even the single online poster.¹⁷¹ Mainstream journalists, after all, do not have an elevated status in free expression.¹⁷² Rather, “dissemination of news” should cover those who perform a “*press function*—seeking out news of public interest for the purpose of disseminating it to an audience.”¹⁷³ There are two elements involved: (1) offering the information to the public at large;¹⁷⁴ and (2) running the information through journalistic standards so that it is fit to be read by the public.¹⁷⁵ Such standards include an editorial filter as well as verification of facts.¹⁷⁶

With such a standard, some online material will be considered a rapid dissemination of news, including blogs that practice editorial

169. The Atlanta Journal-Constitution is a daily newspaper, available at www.ajc.com. The New York Times is a daily newspaper, available at www.nytimes.com. CNN is a basic-cable news network, available at www.cnn.com.

170. See *supra* note 143 and accompanying text.

171. Uglund, *supra* note 131, at 137–38 (“Because all people have the ability to serve this investigative function—whether or not they have any relevant training, experience or credentials—these prerogatives should not belong to a preferred class.”).

172. See *supra* note 142 and accompanying text.

173. Uglund, *supra* note 131, at 137 (emphasis added); see also Troiano, *supra* note 137, at 1451 (referring to the “journalistic function” as “sharing news with the public”).

174. See, e.g., *O’Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1468 (2006) (defining “reporters” as persons gathering news for dissemination to the public online).

175. See Liebman, *supra* note 139, at 351.

176. *Id.* Judging for journalistic standards by the material produced will prove more efficient than judging the characteristics of the source itself. First, the nature of the material will be a good indicator of whether there is a time constraint. For instance, consistently publishing late-breaking stories clearly indicates that “rapid dissemination” is a common occurrence. More importantly, however, setting a standard for the source would prove problematic. As Professor Uglund stated:

Looking to membership in professional associations might help, but because journalists are not licensed like doctors and lawyers, many qualified journalists might not seek such memberships. Education is another possibility, but certainly there are excellent reporters and editors who do not have journalism degrees. Employment could likewise be the operative criterion. . . . But this definition eliminates anyone supplying news who does not receive a paycheck, including many freelancers and most bloggers.

Uglund, *supra* note 131, at 136–37.

control and verification of facts.¹⁷⁷ But many blogs and other online sources would not qualify,¹⁷⁸ and these are the sources that should not receive punitive damage immunity via retraction. To do otherwise would be to grant the same level of protection to all sources, regardless of whether they take precautions (such as verification and editorial control) to filter out unintended falsehoods.

Finally, and perhaps most significantly for legislatures playing catch-up, the rapid dissemination of news standard can survive any technological developments in the type of media that convey information in the requisite fashion. Instead of having to repeatedly rewrite the law to include all the forms of media that could apply—as the UCCDA¹⁷⁹ attempted to do—these emerging media will be judged, as they arise, by whether they are used to quickly communicate carefully verified news to the public. The retraction statute, to borrow a technology term, will be “future-proofed.”

CONCLUSION

Refocusing Georgia’s retraction statute to cover only rapid disseminators of news would render *Mathis v. Cannon* moot, and for good reason. *Mathis* applies the retraction requirement to all online content—from a media giant’s home page to a one-man blog¹⁸⁰—and thus allows any source to avoid punitive damages by simply pulling down the offensive material. While the decision purports to put all sources of information on the same playing field and grant the same “escape hatch” from punitive damages,¹⁸¹ it fails to recognize key realities about modern communication that the rapid dissemination of news standard addresses head-on.

177. Ugland, *supra* note 131, at 137 (noting that “there is nothing to prevent a non-traditional journalist or an ambitious do-it-yourselfer” from applying professional journalism standards).

178. *See* Liebman, *supra* note 139, at 352 (finding that only a minority of bloggers spend extra time verifying facts, and that “just over a third of bloggers engage in activities similar to those of print journalists, . . . [including] verifying the information that they post”).

179. *See* discussion *supra* Part II.A.2.

180. *See Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002).

181. *See supra* notes 81–83 and accompanying text.

First, *Mathis* erases salient distinctions between newsgatherers and other communicators, purporting instead to treat the traditional press the same as an individual poster on a message board.¹⁸² The punitive-damage immunity, however, has to be earned: the information source must not only police itself for inaccuracies,¹⁸³ but it must be under time constraints that would make an error excusable.¹⁸⁴ Thus, rewriting the retraction statute to allow a punitive damage immunity for sources involved in the rapid dissemination of news and that also perform editorial checks and controls would make these sources “earn” this qualified immunity. At the same time, the retraction statute would help maintain a “robust” press by freeing it from the shadow of litigation for unintentional errors.¹⁸⁵

The second reality that *Mathis* fails to consider is the persistent evolution of communication methods, choosing instead to stretch the understanding of the current statute’s use of “publication.”¹⁸⁶ By codifying the rapid dissemination of news standard, such a statute can be applied to any new media that arises, because its function, not its form, is being assessed.¹⁸⁷

Finally, for all of its egalitarian assertions of treating all communicators the same,¹⁸⁸ *Mathis* ignores the reality that people nonetheless need to be held accountable for harming reputations online.¹⁸⁹ Granting punitive-damage immunity via retraction to all online communicators discourages responsible self-censorship, whereas a switch to the rapid dissemination of news standard will guarantee that the online world will no longer be a free-for-all for off-color comments and damaging remarks.¹⁹⁰ Just as with print, you are bound by what you say on the Web—so speak wisely, and well.

182. See *supra* notes 81–83 and accompanying text.

183. See discussion *supra* Part III.C.2.

184. See discussion *supra* Part III.C.1.

185. See discussion *supra* Part I.A.1.

186. See discussion *supra* Part III.C.2.

187. See discussion *supra* Part III.C.1.

188. See *supra* notes 81–83 and accompanying text.

189. See discussion *supra* Part II.B.

190. See discussion *supra* Part III.C.2.