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The Online Defamation Dilemma: Adapting an Age-old Doctrine to the Reality

Elizabeth Elving

THE ONLINE DEFAMATION DILEMMA: ADAPTING AN AGE-OLD DOCTRINE TO THE REALITY OF MODERN SPEECH

I. INTRODUCTION

In 2010, Samia El-Moslimany hosted Thanksgiving dinner at her Seattle, Washington home.[1] One of the guests was an acclaimed scientist and entrepreneur named Dr. Hayat Sindi.[2] Following the dinner party, El-Moslimany became convinced that Sindi was having an affair with her husband, and resolved to destroy her reputation.[3] With the help of her mother, Ann, El-Moslimany wrote a spate of social media posts accusing Sindi of, among other things, paying someone to ghostwrite her dissertation, lying about her age to qualify for youth-focused awards, and exaggerating her involvement in a major

1. Sindi v. El-Moslimany, 896 F.3d 1, 11 (1st Cir. 2018).
2. *Id.*
3. *Id.*

research project.[4] She emailed Sindi's colleagues and investors with accusations of academic fraud.[5] She commented on an article about Sindi on the *Washington Post*'s website, claiming Sindi had lied about her accomplishments.[6] She made leaflets repeating these grievances and handed them out at professional conferences.[7]

After years of this treatment, Sindi sued the El-Moslimanys for defamation.[8] In 2016, a jury found El-Moslimany's statements libelous and awarded Sindi more than $3 million in damages.[9] But although she had won, Sindi feared the attacks would continue. So she moved for a permanent injunction prohibiting El-Moslimany from repeating her claims.[10] Without such an order, Sindi argued, El-Moslimany would continue to harm her professional standing, business, and well-being.[11] The district court agreed, and enjoined the defendants "from publishing, 'orally, in writing, through direct electronic communications, or by directing others to websites or blogs reprinting' six statements that the district court concluded were defamatory."[12]

El-Moslimany appealed this decision to the First Circuit, which affirmed that her conduct was defamatory under applicable state law.[13] The court found that the challenged statements showed a reckless disregard for the truth,[14] that these falsehoods had been harmful to Sindi, and that the damages award was appropriate.[15] Nevertheless, it declined to uphold the injunction.[16] Barring the defendants from making statements in advance, the court held, was a "paradigmatic example of a prior restraint," and presumptively

4. *Id.*

5. *Id.*

6. Brief of Plaintiff-Appellee at 12-13, Sindi v. El-Moslimany, 896 F.3d 1, No. 16-2347 (1st Cir. Sept. 18, 2017) [hereinafter Brief of Plaintiff-Appellee].

7. *Id.* at 2.

8. *Sindi*, 896 F.3d at 11.

9. *Id.* at 12.

10. *Id.*

11. Brief of Plaintiff-Appellee, *supra* note 6, at 20.

12. *Sindi*, 896 F.3d at 12.

13. *Id.* at 15.

14. *Id.* at 18. The district court determined that Sindi, a prominent scientist, entrepreneur, and visiting scholar at Harvard, was at least a limited purpose public figure under the standard established in *Gertz v. Robert Welch, Inc.*, thus requiring that she meet the "actual malice" standard. 418 U.S. 323, 351 (1974). The actual-malice standard, established in *New York Times Co. v. Sullivan*, requires defamation plaintiffs who are public officials or public figures to show that the defendant knew their statements were false, or showed "reckless disregard of whether it is false or not." 376 U.S. 254, 279–80 (1964). Even under the heightened standard, the court concluded that Sindi had met her burden of proving defamation. *Sindi,* 896 F.3d at 18.

15. *Sindi,* 896 F.3d at 21.

16. *Id.* at 34.

unconstitutional.[17] The lower court's injunction, the First Circuit found, was too broad to meet that high constitutional bar.[18]

With this decision, the First Circuit weighed in on a debate that has troubled jurists for decades[19] and continues to divide courts today: whether a court can enjoin a defendant from making defamatory statements. The debate evokes an ancient tension between reputation and speech,[20] but is also a modern, practical dilemma. What relief can a court offer when, as in *Sindi*, a plaintiff proves defamation, but damages alone will not redress her harm?[21] Is an injunction ever an appropriate solution?

In her brief defending the lower court's decision, Dr. Hayat Sindi claimed that the injunction was valid because it was narrowly tailored to statements that were proven defamatory, and therefore, were not subject to constitutional protections.[22] Although it did not prevail in the First Circuit, this exception—dubbed the "modern rule"[23]—has gained a foothold among courts and scholars in recent decades.[24] This is a departure from the traditional view, sometimes

17. *Id.* at 31.

18. *Id.* at 33–34. The First Circuit ultimately vacated the injunction on the ground that it was overly broad, and in doing so, avoided the larger constitutional question of whether such injunctions were ever appropriate. *Id.; see infra* Section IV.B.

19. Eugene Volokh, *First Circuit Holds Most Anti-Libel Injunctions Are Unconstitutional*, VOLOKH CONSPIRACY (July 11, 2018, 7:17 PM), https://reason.com/2018/07/11/first-circuit-holds-most-modern-anti-lib/ [https://perma.cc/7CJH-TJV7]. In this article, Volokh describes the current divide in state and federal courts over whether injunctions for defamation "are permissible, at least if entered after a trial on the merits in which particular statements were found to be defamatory." *Id.* With its decision in *Sindi*, Volokh observed, the First Circuit placed itself on the "no injunction" side of the dispute. *Id.*

20. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:28: COUNTERVAILING FUNCTIONS OF FREE SPEECH (2d ed. 2020).

21. Doug Rendleman, *The Defamation Injunction Meets the Prior Restraint Doctrine*, 56 SAN DIEGO L. REV. 615, 618 (2019) (analyzing the differences between an injunction and a damages judgment in defamation cases to discern whether the former infringes unreasonably on the First Amendment). Rendleman's article begins by describing the defamation injunction question as "one of the most important issues in free speech today." *Id.* at 616.

22. Brief of Plaintiff-Appellee, *supra* note 6, at 22.

23. Steve Tensmeyer, *Constitutionalizing Equity: Consequences of Broadly Interpreting the "Modern Rule" of Injunctions Against Defamation*, 72 N.Y.U. ANN. SURV. AM. L. 43, 45 (2017).

24. *Id.* at 89 (stating that "[t]he modern view of injunctions against defamation is not only the most popular standard among lower courts that allow injunctions against defamation, but even the Supreme Court seems poised to accept it at least in part"). *See also* Connor Shaull, *Sticks and Stones and Permanent Muzzles: The First Amendment and the Constitutionality of Permanent Injunctions on Future Speech After Defamation Trials*, 103 MINN. L. REV. BLOG (Oct. 31, 2018), https://minnesotalawreview.org/2018/10/31/sticks-and-stones-and-permanent-muzzles-the-first-amendment-and-the-constitutionality-of-permanent-injunctions-on-future-speech-after-defamation-trials/ [https://perma.cc/99ZT-8RRB] (describing how the approach of limiting injunctions to

described as the "no-injunction rule," which categorically prohibits enjoining future speech as a remedy for defamation.

This Comment recounts how the divide between the traditional and modern views emerged and details where it stands today. Ultimately, it recommends adopting a narrow form of the modern rule with some restrictions to allow for more flexibility in defamation cases without needlessly infringing on freedom of speech.

Section II traces the history behind the prior restraint doctrine, the formation of the modern rule, and how courts have managed the countervailing priorities of reputation and free speech. While often presented as a First Amendment matter,[25] the controversy dates back to the courts of early modern England, which produced the prior restraint doctrine and the maxim that "equity will not enjoin a libel."[26] American courts have adopted these doctrines, and applied them to varying degrees.[27]

Now that technology has utterly transformed the way that information spreads, more courts are reconsidering the once-ironclad no-injunction rule.[28] Section III examines how digital age innovation has disrupted the defamation versus free speech debate. The Internet and social media have transformed all forms of modern speech, including libel.[29] Section III considers if and how the traditional prior restraint doctrine can be applied to this radically new landscape, where victims of online libel are less likely to obtain damages, and Internet platforms are largely shielded from liability. As Section III explains, the lack of legal remedies for online defamation plaintiffs is one of the major arguments in favor of revisiting the traditional no-injunction approach that the prior restraint doctrine would seem to demand.

Section IV elaborates on the debate over the modern rule, both among legal thinkers and in the courts. This section describes several 21st century libel controversies where courts balanced the same priorities but reached different

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"statements which have been found in this and prior proceedings to be false and libelous" has "become known as the 'modern rule.'") (citations omitted).

25. *See* SMOLLA, *supra* note 20, § 1:28.

26. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 308 (2001) (explaining that the law in England at the time that the First Amendment was ratified was that libel could be punished after the fact, but not prevented through equitable relief).

27. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54–55 (1984).

28. *See* Eugene Volokh, *Injunctions Against Repeating Specific Libelous Statements*, WASH. POST (Dec. 21, 2015, 1:36 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/21/injunctions-against-libel/ [https://perma.cc/GJ3X-MV3V].

29. Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter,* 13 J. HIGH TECH. L. 430, 433 (2013).

conclusions. In particular, it focuses on the 2005 case where the U.S. Supreme Court declined to resolve the issue and the current split in the lower federal courts.

Section V recommends adopting a narrowly defined version of the modern rule. Comparing this notion to the controversy over online hate speech, Section V argues for a more flexible alternative to the absolutist no-injunction rule—one that allows for some restrictions on speech when a person's safety or livelihood is at risk. To protect the vital interest of free expression, this Comment recommends that any prospective relief be limited to assertions that have already been found defamatory. Once that threshold is met, plaintiffs should be required to show that they face substantial harm if the defendant continues to make those assertions, and that the proposed injunction will effectively prevent that harm, taking into account the nature of modern communication and the way that information spreads.

II. THE HISTORY OF THE PRIOR RESTRAINT DOCTRINE IN DEFAMATION LAW

For centuries, courts have recognized libel and slander as actionable wrongs.[30] In his *Commentaries*, William Blackstone described "injuries affecting a man's reputation or good name," as an "atrocious injury which is redressed by an action on the case."[31] Today, the *Restatement (Second) of Torts* defines defamation as a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[32] Whether someone is living in a small, insular community, or a global interconnected one, a bad reputation can have real personal and economic consequences.[33] If a plaintiff can show that a defendant harmed their reputation[34] with false and defamatory statements, they may be entitled to damages.[35]

30. Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J. L. & ARTS 17, 18 (2011) (stating that "[s]lander, the tort of defamation by spoken word, dates back to the ecclesiastical courts of the middle ages, when damning someone's reputation in the village square was worthy of pecuniary damage."). As Garfield's article describes, spoken defamation (slander) is less relevant with modern technological communication, where even brief, passing comments are so often exchanged in text. *Id.* at 17. As a result, modern defamation cases tend to involve mainly written statements (libel). *Id.* This Comment refers to libel and defamation somewhat interchangeably.

31. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BK. III, at 123.

32. Restatement (Second) of Torts § 559 (Am. L. Inst. 1975).

33. Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, ALI-ABA BUS. L. COURSE MATERIALS J. 17, 24 (2005).

34. 53 C.J.S. *Libel and Slander* § 231 (2019).

35. *Id.* § 284.

But what if damages are not enough? What if the defendant has limited assets, or (as was the case in *Sindi*) the plaintiff believes that a money judgment will not stop the defendant from libeling them again?[36] When the legal remedy falls short, some argue, a court may provide equitable relief by enjoining the defendant from repeating their harmful claims. This is where the importance of reputation collides with another fundamental tenet: freedom of speech.

The function of a defamation injunction is to preemptively bar a speaker from making certain statements in the future, which is the very nature of a prior restraint on speech.[37] In *Alexander v. United States,*[38] the U.S. Supreme Court defined prior restraints as "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[39] Applying the "prior restraint doctrine," state and federal courts have typically viewed such orders as unconstitutional.[40] But courts' history of balancing reputation and speech long predates the U.S. Constitution.[41] This history, and the principles that emerged from it, continue to inform the debate over the modern rule today.

A. The Star Chamber and English Common Law

In the tragedy *Othello,* Shakespeare writes, "Good name in man and woman . . . is the immediate jewel of their souls. . . . [H]e that filches from me my good name, robs me of that, which not enriches him, and makes me poor indeed."[42] As the line suggests, reputation was highly prized in England during Shakespeare's time. And the consequences of filching someone's good name were, accordingly, severe.[43] From the late 15th to the mid-17th centuries,

36. *See* Brief of Plaintiff-Appellee, *supra* note 6, at 20.

37. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 163 (2007).

38. 509 U.S. 544 (1993).

39. Eric. B. Einisman, Note, *Switching the Flip: Questioning the Government's Authority to Shut Down Communication Networks in Furtherance of Public Safety*, 31 CARDOZO ARTS & ENT. L.J. 181, 189–90 (2012) (quoting *Alexander*, 509 U.S. at 550).

40. Chemerinsky, *supra* note 37, at 163–64.

41. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) ("Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass growing by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.").

42. WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

43. Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 712–13 (2008).

English courts were overseen by the Star Chamber, a high court made up of common-law judges and advisors to the King.[44] The Star Chamber recognized libel as a crime and prosecuted it harshly.[45] Depending on the seriousness of the offense, a person found guilty of libel[46] might receive a fine, imprisonment, or in extreme cases "pillory and loss of his ears."[47] Beyond criminal punishment, the Star Chamber imposed licensing regulations, requiring that all printed materials be approved by a government censor before publication.[48] Enjoining future speech was part of this broader regime of censorship and judicial control of the press.

After the Star Chamber was abolished in 1641, the English common-law courts assumed control over defamation actions, issuing damages as a remedy.[49] The Court of Chancery, which handled equity cases, declined to hear libel claims,[50] and officially declared in the 1742 *St. James Evening Post Case* that courts of equity had no jurisdiction over defamation cases.[51] This formal distinction prompted the maxim, still cited today, that "equity will not enjoin a libel."[52]

The declaration that defamation should be handled strictly as a legal matter, not subject to prospective relief, came at a time when England was rejecting the brazen censorship that the Star Chamber represented.[53] The two ideas converged, and legal thinkers of the time began to describe the ban on prior restraints as essential to freedom of expression. In 1775, the theorist Jean-Louis de Lolme wrote that "[t]he liberty of the press . . . consists . . . in this,—that neither the courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed."[54] And Blackstone wrote in his Commentaries that the "liberty of the press is indeed essential to the nature of a free state; but this consists in

44. Cheryl E. Chambers, *From the Star Chamber to the Separation of Powers: Origins of U.S. Judicial Independence and the Rule of Law*, 90 N.Y. ST. B.J. 14, 16 (2018) (noting that although the Star Chamber was considered an "honorable and distinguished court" for much of its history, its strong ties to the king meant that it could also be "wielded as a political weapon.").

45. Veeder, *supra* note 41, at 568.

46. Notably, such an individual would not be found guilty by a jury of their peers. The Star Chamber handled both the factual and legal issues and made the determination of guilt itself. *See* Meyerson, *supra* note 26, at 309.

47. Veeder, *supra* note 41, at 565.

48. Tensmeyer, *supra* note 23, at 47.

49. Meyerson, *supra* note 26, at 310.

50. Tensmeyer, *supra* note 23, at 47.

51. Roach v. Garvan, 26 Eng. Rep. 683, 683 (1742).

52. Meyerson, *supra* note 26, at 308.

53. *Id.* at 310–11.

54. Tensmeyer, *supra* note 23, at 48 (citation omitted).

laying no previous restraints on publications."[55] These quotations articulate the notion that judicial restraint of statements that have not yet been printed threatens the vital freedom of the press. The same sentiment would reappear in American law, which enshrined press freedom in the Bill of Rights.

B. Prior Restraints and Defamation in the United States

Although the Star Chamber was long dead by the time the U.S. Constitution was enacted, its methods continued to haunt American courts. The First Amendment was influenced by the English rejection of licensing requirements,[56] and state court decisions applied the prior restraint doctrine throughout the 19th century. In 1882, a Louisiana court wrote that without protections against prior restraints, "the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."[57] In *Brandreth v. Lance* in 1839, a New York court referred to the Star Chamber in ruling that equitable remedies against libel infringed on press freedoms:[58]

> The Court of Star Chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libelers of important personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publications of such libels by injunction.59

The side-by-side phrasing casts defamation injunctions in the same light as these old draconian punishments; as an obsolete threat to personal liberty that no modern court should embrace.

Despite strong language in the state courts, the issue of prior restraints was rarely addressed at the federal level in the 19th century.[60] And it was not until 1931 that the Supreme Court found an injunction against future speech to be unconstitutional.[61] In *Near v. Minnesota,* a local newspaper had published

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55. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BK IV, at 151.

56. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 770 (1997) (proceeding to clarify that "[a]lthough it is clear that 'the prohibition of laws abridging the freedom of speech is not confined to previous restraints,' there is no doubt that prior restraints are regarded as a particularly undesirable way of regulating speech.").

57. State *ex rel.* Liversey v. Judge of Civ. Dist. Ct., 34 La. Ann. 741, 745 (La. 1882).

58. 8 Paige Ch. 24, 28–29 (N.Y. Ch. 1839) (acknowledging that the publication at issue was "unquestionably intended as a gross libel against the complainant personally," but that as a court of equity, the Chancery Court had "no jurisdiction or authority" to interfere, and that any remedy the plaintiff sought would have to come from "a court of law.").

59. *Id.* at 26 (citing 2 WILLIAM HUDSON, A TREATISE ON THE COURT OF STAR CHAMBER 224 (1791)).

60. *See* Chemerinsky, *supra* note 37, at 166–69.

61. *Id.* at 163–64.

unsupported accusatory and anti-Semitic claims about local officials.[62] The county attorney brought an action against the paper under a state law allowing the abatement of "malicious, scandalous, and defamatory" publications,[63] and the trial court issued an injunction barring the paper from publishing any more defamatory content.[64] But the U.S. Supreme Court struck it down, stating that preventing prior restraints was a "chief purpose" of the First Amendment.[65] That this point had never been made explicit before, the Court found, only affirmed the "deep-seated conviction that such restraints would violate constitutional right."[66] Before *Near*, the unconstitutionality of such injunctions was largely unspoken. Nonetheless, the majority opinion suggested, it had always been understood.

With *Near*, the Court formally adopted the prior restraint doctrine as part of First Amendment jurisprudence.[67] Like the New York Court in *Brandreth*, the majority's opinion invoked England's history of renouncing censorship, and held that freedom of expression must be protected, even if it means exposing defamed plaintiffs to further reputational harm.[68] These priorities reemerged twenty years later in the seminal *New York Times v. Sullivan*,[69] where the Court heightened the pleading standard for public officials suing for libel.[70] *Sullivan* constitutionalized the tort of defamation with the finding that the First Amendment limited plaintiffs' right to recover.[71] In the majority opinion, Justice Brennan wrote that despite its potential harms, libel must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[72]

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62. 283 U.S. 697, 701–03 (1931).

63. *Id.* at 702.

64. *Id.* at 705.

65. *Id.* at 713.

66. *Id.* at 718.

67. Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 6 (1989) ("Citing Blackstone as historical precedent, the *Near* Court formally introduced into American case law the concept of prior restraint as a separate and significant category of first amendment analysis.") (citation omitted).

68. *Near*, 283 U.S. at 713–14.

69. 376 U.S. 254, 256 (1964). In *Sullivan*, the local chief of police sued the New York Times for an advertisement criticizing his department's treatment of civil rights protesters. The Court found for the New York Times, holding that a public official could recover for defamation only if they could show that the defendant had acted with actual malice. *Id.* at 279–80.

70. *Id.* at 264–65. While the holding in *Sullivan* was limited to public officials, the Supreme Court would later expand this heightened standard to apply to all public figures in *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 160 (1967), and to limited purpose public figures in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

71. *Sullivan*, 376 U.S. at 264–65.

72. *Id.* at 270.

C. The Origin of the Modern Rule

The majority opinions in *Near* and *Sullivan* touted the primacy of free expression, but did not close the door on defamation injunctions altogether. The Court in *Near* did not hold that the no-injunction rule was absolute.[73] Nor did it define the scope of its application.[74] Legal thinkers have since been left to debate when, if ever, a court may prevent a party from repeating offensive remarks.[75] Some continue to advocate a bright line no-injunction rule, finding such remedies to be categorically unconstitutional.

Alternatively, some courts have accepted the premise that the offending speech can be enjoined after it has been adjudicated and found defamatory.[76] This idea has its roots in a 1950s obscenity case.[77] *Kingsley Books, Inc. v. Brown*[78] concerned a New York law that allowed local officials to seek injunctions against printed materials that had been deemed obscene.[79] When city officials sought an injunction against an adult bookstore, the store owner challenged the statute as unconstitutional.[80] Relying on *Near*, the store owner argued that the law "amount[ed] to a prior censorship of literary product and as such [was] violative of that 'freedom of thought, and speech' which has been 'withdrawn by the Fourteenth Amendment from encroachment by the states.'"[81] But as Justice Frankfurter noted in the majority opinion, protection from prior restraints was not unlimited:

> Just as *Near v. Minnesota*, . . . one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that "Liberty of speech, and of the press, is also not an absolute right," it likewise made clear that "the protection even as to previous restraint is not absolutely unlimited." To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.[82]

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73. *Near,* 283 U.S. at 708.

74. Scordato, *supra* note 67, at 2.

75. *Id.* at 3. *See also infra* Section IV.B (describing the current circuit split over the scope of prior restraints and the modern rule).

76. Tensmeyer, *supra* note 23, at 52.

77. *Id.* at 51.

78. 354 U.S. 436 (1957).

79. *Id.* at 437.

80. *Id.* at 439.

81. *Id.* at 440 (citation omitted).

82. *Id.* at 441 (citations omitted).

The state's obscenity law, like the libel cases, placed the Court between the Scylla and Charybdis[83] of offensive speech and censorship. The majority first established that being a prior restraint did not make the New York law facially invalid,[84] and then distinguished it from the challenged statute in *Near*. While the statute in *Near* would have allowed injunctions against future publications based on past content, the state law in *Kingsley* limited injunctions to publications that had already been ruled offensive.[85] Content that violated obscenity laws was not protected and could be subject to prior restraints.[86]

This obscenity exception was soon extended to defamation as well. Over the next few decades, the highest courts in Ohio,[87] Georgia,[88] Minnesota,[89] and Kentucky[90] all permitted injunctions on speech that had already been deemed defamatory.[91] By 2010, the practice was established enough[92] that the Supreme Court of Kentucky described it, in *Hill v. Petrotech Resources*, as the "modern rule."[93]

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83. Scylla and Charybdis are two monsters that appear in Greek mythology. In Homer's *Odyssey*, they existed on either end of a narrow waterway. Travelers could not avoid one of them without falling into the path of the other. *Scylla and Charybdis*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Scylla-and-Charybdis [https://perma.cc/Q5KQ-YUUV].

84. *Kingsley*, 354 U.S. at 441.

85. *Id.* at 445.

86. *Id.*

87. O'Brien v. U. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 755 (Ohio 1975) (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.").

88. Retail Credit Co. v. Russell, 218 S.E.2d 54, 62 (Ga. 1975) (finding that "the injunction before us is not a prior restraint offending the Federal or State Constitutions. The jury verdict necessarily found the statements of Retail Credit to have been false and defamatory, and the evidence authorized a conclusion that the libel had been repetitive.").

89. Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc. 352 N.W.2d 1, 11 (Minn. 1984) (finding that "[u]nder the recent decisions of this court and the United States Supreme Court, the permanent injunction below is not unconstitutional. . . . A judicial tribunal has, after full adversarial proceedings, found that defendant's criticism of ATS' equipment constituted 'false or misleading' product disparagement.").

90. Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308 (Ky. 2010) (finding that the "recognition that false, defamatory speech is unprotected by the First Amendment has resulted in the development of a modern, superseding rule concerning the enjoining of defamatory speech. Under the modern rule, once a judge or jury has made a final determination that the speech at issue is defamatory, the speech determined to be false may be enjoined.").

91. Tensmeyer, *supra* note 23, at 52.

92. Although the modern rule gained traction during this time, it was not universally adopted by state courts. As recently as 2014, the Supreme Court of Texas rejected the idea in *Kinney v. Barnes*, holding that "[t]rial courts are simply not equipped to comport with the constitutional requirement to chill protected speech in an attempt to effectively enjoin defamation. Instead, . . . damages serve as the constitutionally permitted deterrent in defamation actions." 443 S.W.3d 87, 99 (Tex. 2014).

93. 325 S.W.3d at 308–09.

One of the most impactful of these state decisions came in 2007, fifty years after *Kingsley* was decided.[94] In *Balboa Island Village Inn v. Lemen,* the owners of a restaurant sought equitable relief against a neighbor who had repeatedly smeared their business, falsely accusing them, among other things, of drug dealing, child pornography, and prostitution.[95] A permanent injunction from the trial court included a provision barring the neighbor from repeating a slew of defamatory claims, not all of which had been adjudicated.[96] The state court of appeals invalidated the part of the injunction that forbid repeating the statements as an infringement on the neighbor's right to free speech.[97]

Reviewing this decision, the California Supreme Court traced the evolution of the controversy, from government-controlled licensing in 15th century England,[98] to the eventual ban on prior restraints,[99] to the adoption of the doctrine in *Near*, and to the exception carved out in *Kingsley*.[100] Ultimately, the court agreed that the order as written was "overly broad," and the plaintiff had failed to show that compensatory damages would not be enough of a remedy. At the same time, the court acknowledged that a narrower injunction, limited to the statements that were "determined at trial to be defamatory," would *not* offend the state or U.S. constitutions.[101] The court concluded that a tailored injunction may not only be permissible, but even necessary, if it turned out that damages would not provide adequate relief.[102] This concern, that legal remedies alone cannot redress the harms of defamation, has accelerated the adoption of the modern rule, especially now that libel has largely moved online.

III. THE DEMAND FOR A NEW SOLUTION IN THE DIGITAL AGE

As Section II described, defamation law evolved over hundreds of years, with courts perennially struggling to balance freedom of expression with reputational threats. On the cusp of the new millennium, the invention of the Internet thrust this controversy into a new arena.[103] As Matthew S. Effland

94. 156 P.3d 339, 343 (Cal. 2007).

95. *Id.* at 342.

96. *Id.*

97. *Id.*

98. *Id.* at 349–51.

99. *Id.* at 343–44.

100. *Id.* at 345–46.

101. *Id.* at 346.

102. *Id.* at 362.

103. *See* ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW 15–17 (1999). Andrew L. Shapiro describes six characteristics that define digital media: many-to-many interactivity, flexibility, packet-

wrote in a 2001 *Florida Bar Journal* article, "[a]t its best, the Net is the ultimate conduit for free speech and expression; at its worst, the Net can be a character assassin's greatest weapon."[104] Conduit or weapon, the Internet has transformed the age-old act of libel so thoroughly that many wonder whether traditional defamation law still applies. At the same time, victims of Internet libel face a dearth of legal remedies that, some argue, justifies the use of injunctive relief.

A. Adapting the Prior Restraint Doctrine

New York Times v. Sullivan and its progeny were products of what is now considered "traditional media," [105] which was dominated by print, radio, and broadcast television.[106] In a traditional defamation case, the defendant would be an established media company, with the resources to defend against lawsuits, and pay damages if necessary. Plaintiffs tended to be newsmakers—politicians, celebrities, and people at the center of major stories. They were people that the public already had reason to be interested in.[107] This was the norm for most of the 20th century. As recently as the 1980s, 70% of all United States libel actions involved mass media publications.[108] But the Internet changed all of that.[109]

Today, even private people live public lives on the web, making them more vulnerable to personal attacks.[110] And blogs, message boards, and social media give anyone with an Internet connection "access to a limitless mouthpiece and

based distribution networks, interoperability, large bandwidth, and universality. *Id.* These characteristics fundamentally transformed the way that people interact and engage with the outside world. This has become even more true in the 20 years since Shapiro's book was published, with the rise of smartphones and social media, among other major technological developments.

104. Matthew S. Effland, *Digital Age Defamation: Free Speech v. Freedom from Responsibility on the Internet,* 75 FLA. B.J. 63, 63 (2001).

105. *Sullivan*, decided in 1964, involved an advertisement that had been published in a print newspaper. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

106. *See Newspapers Fact Sheet*, PEW RSCH. CTR. (July 9, 2019), https://www.journalism.org/fact-sheet/newspapers/ [https://perma.cc/6LTJ-SNWE]; *Digital News Fact Sheet*, PEW RSCH. CTR. (July 23, 2019), https://www.journalism.org/fact-sheet/digital-news/ [https://perma.cc/W9MP-JNR7]. The Pew Research Center tracks ongoing trends in American news and media consumption. Its published findings reflect a decline in consumption of some traditional media, and the growing influence of digital platforms from the 2000s onward. *Id.*

107. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (describing people who, because of their position or role in a particular controversy, are objects of special public interest).

108. David S. Ardia, *Freedom of Speech, Defamation, and Injunctions,* 55 WM. & MARY L. REV. 1, 11 (2013).

109. Ann C. Motto, *"Equity Will Not Enjoin A Libel": Well, Actually, Yes, It Will*, 11 SEVENTH CIR. REV. 271, 272 (2016).

110. Angelotti, *supra* note 29, at 467–69.

platform to share unfettered and unlimited free speech."[111] An individual with no resources beyond a smartphone can reach a massive global audience in seconds.[112] And a single damning detail can be reposted, republished, and retweeted, transforming its subject into an international pariah within hours.[113]

Where does the prior restraint doctrine fit into this world of viral content and global information sharing? The Supreme Court has yet to apply the centuries-old maxim to the digital age.[114] The two leading cases for its rejection of prior restraints, *Near v. Minnesota* and *New York Times Co. v. United States*,[115] involved print newspapers and took place at a time when Twitter and YouTube were beyond the realm of imagination. This ambiguity has sparked debate on how to apply traditional principles to the uncharted terrain of Internet libel.[116]

In a 2008 *Buffalo Law Review* article, Stephen A. Siegel frames this question as one of originalism versus pragmatism.[117] The prevailing view when the First—and later the Fourteenth—Amendments were ratified was that the Constitution restricted injunctions for defamation as part of its protection of free speech.[118] Originalists, Siegel writes, support the no-injunction rule because it aligns with the initial intent and prevailing views of the Founding and Reconstruction eras.[119] Pragmatists, on the other hand, are inclined to consider how the context has changed over time, and balance the threat of prior restraints against the plight of the "maligned plaintiff" facing economic and

111. *Id.* at 433.

112. Eugene Volokh, *Anti-Libel Injunctions*, 168 U. PA. L. REV. 73, 76 (2019) (2019) (describing the particular problem that this situation creates for online libel: "[T]he judgment-proof libeler, always a hazard, has become still more common—and more dangerous—in the Internet age. The Internet lets speakers publish libels to a potentially broad audience at little cost, and these libels can cause enduring damage.").

113. Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES (Feb. 12, 2015), https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html [https://perma.cc/65FR-3QVH].

114. Scordato, *supra* note 67, at 2.

115. Einisman, *supra* note 39, at 190–91.

116. Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2753 (2002) (describing how as people began to communicate anonymously in Internet chatrooms, they were increasingly faced with defamation from sources they could not identify, and how plaintiffs would try to get courts to compel the websites to reveal their identities). This early Internet problem speaks to the plight of online defamation plaintiffs. Not only are they frequently unable to recover damages from defendants, but they also may not be able to identify who the correct defendant is.

117. Siegel, *supra* note 43, at 726–27.

118. *Id.* at 726–27.

119. *Id.*

reputational harms as a result of continued attacks.[120] When the modern plaintiff is more likely to be maligned by a stranger on the Internet than a large media company, pragmatists may argue that a rigid no-injunction rule is no longer acceptable, as it would deprive too many libel victims of the only available relief.

Advocates of adapting the prior restraint doctrine may point to how media and communications have changed, profoundly, in a short amount of time. In a 2019 article for the *William and Mary Bill of Rights Journal*, Ariel L. Bendor and Michal Tamir[121] note some of the unprecedented features of Internet speech, including the lightning-fast turnaround from writing to posting, the lack of ethical or editorial guardrails, the permanent life of published content, and the potential for global reach.[122] Bendor and Tamir support revisiting the prior restraint doctrine, not because of a change in values, necessarily,[123] but because "[t]he development of the new media requires adapting and updating legal doctrines developed in the past."[124] They recount how prior restraints have long been applied to speech that is found to be obscene, or to protect privacy or national security,[125] and how courts have historically permitted prior restraints where the danger of repeating certain statements outweighs the potential threat to free expression.[126] They also note that restricting libel remedies to damages only might have its own chilling effect, discouraging smaller publishers and individuals from sharing information for fear of being sued.[127]

In response to these challenges, Bendor and Tamir recommend empowering courts to grant injunctions and removal orders concerning speech that appears on the Internet,[128] and requiring retraction and injunction requests as a condition for obtaining damages.[129] While such reforms may not have been embraced

120. *Id.* at 728. For non-originalists who find that the reality of modern defamation calls for a departure from the traditional no-injunction rule, Siegel recommends that additional safeguards be put in place to protect free speech concerns, requiring that "no injunction issue without a jury determination that the speech was defamatory; and that no injunction be enforced without a jury determination that the injunction was violated by speech that continues to be defamatory. By insisting on the inclusion of a jury in both the liability and enforcement proceedings, the insight of the Framers on the importance of a popular check on government regulation of speech may be retained." *Id.* at 663–64.

121. Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155 (2019).

122. *Id.* at 1157.

123. *Id.* at 1165.

124. *Id.* at 1176.

125. *Id.* at 1161–62.

126. *Id.* at 1164.

127. *Id.* at 1157–58.

128. *Id.* at 1176.

129. *Id.* at 1178.

under traditional defamation law, Bendor and Tamir contend that the new reality of modern communication demands a new approach.

B. Limited Remedies for Defamation Plaintiffs

The innovations of the digital age have enabled people to form connections, share information, and destroy one another's reputations like never before. In the 1990s, much of this activity took place in chatrooms and message boards, hosted by internet service providers (ISPs).[130] When "cyber-libel" occurred in these forums, some early victims tried to sue the ISPs for hosting the defamatory content.[131] Under traditional libel laws, this strategy made sense. As a platform for sharing information to a large audience, the ISP seemed equivalent to a newspaper, and there was no question that a newspaper could be sued for the things it published.[132] But ISPs, it turned out, did not fit so neatly into that category.

In the 1991 case, *Cubby, Inc. vs. CompuServ Inc.*, a plaintiff sued an ISP for alleged libel that occurred on one of its sites.[133] The District Court for the Southern District of New York held that the provider, CompuServ, was not liable because it was not *publishing* the content, but merely *distributing* it.[134] By this logic, the ISP was less like a newspaper, and more like the newsstand it was sold on. If the provider did not even know what content it was sharing, the court reasoned, it could not be liable for it.[135]

That reasoning was put to the test four years later in *Stratton Oakmont, Inc. v. Prodigy Services Co.*[136] In *Stratton Oakmont*, a securities investment firm sued the online service company Prodigy after accusations of fraud appeared on one of its message boards.[137] Prodigy argued that it was just a database and distributor of information, and not liable under *Cubby*.[138] The Supreme Court of Nassau County disagreed, noting that Prodigy exercised some "editorial control" over what appeared on its site by deleting content that it found offensive.[139] For that reason, Prodigy could be sued as a publisher.[140]

130. O'Brien, *supra* note 116, at 2746.
131. *Id.* at 2755.
132. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
133. 776 F. Supp. 135, 138 (S.D.N.Y. 1991).
134. *Id.* at 141.
135. *Id.*
136. 1995 WL 323710 (N.Y. Supp. 1995).
137. *Id.* at *1.
138. *Id.* at *4.
139. *Id.* at *2.
140. *Id.* at *4.

If this decision had been more widely adopted, online defamation cases today might look very different. But the following year, Congress drafted legislation that would abrogate *Stratton Oakmont*, and give ISPs immunity over content that third parties publish on their sites.[141] This legislation was enacted in 1996 as Section 230 of the Communications Decency Act (CDA).[142] Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[143] Because these intermediaries were not considered "publishers," they were not legally responsible if some of the content they hosted was found to be offensive or defamatory.[144] The Supreme Court upheld Section 230 in *Reno v. ACLU*, which struck down a number of the CDA's other provisions on First Amendment grounds.[145]

Section 230 has since become one of the most impactful statutes on Internet speech. By shielding websites from civil liability, supporters argue, the law enables seemingly boundless innovation and entrepreneurship.[146] In a 2015 *Washington Post* op-ed, technology expert David Post wrote that "[n]o other sentence in the U.S. Code . . . has been responsible for the creation of more value" than Section 230.[147] Post credits the statute with the success of Amazon,

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141. Connor Moran, *Injunctive Relief: Must Nonparty Websites Obey Court Orders to Remove User Content?*, 7 WASH. J. L. TECH. & ARTS 47, 48 (2011).

142. 47 U.S.C. § 230(c)(1) (1996).

143. *Id.*

144. Allison E. Horton, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet,* 43 VAL. U. L. REV. 1265, 1288 (2009). Horton describes that the intent of the CDA was to impose regulations protecting children from the pervasive pornography on the Internet, but that Section 230 was meant to establish that operators of Internet services were not liable for the things their users said. *Id.* at 1285. The article goes on to describe the subsequent case law confirming that the immunity applied to both ISPs and third-party users. *Id.* at 1285–89.

145. Reno v. ACLU, 521 U.S. 844, 877 (1997). Since being upheld in *Reno*, Section 230 has remained a controversial and politically charged law, with calls to reform or repeal it coming from both sides of the aisle. Isobel Asher Hamilton, *Here's What Could Happen to Section 230—the Internet Law Donald Trump Hates—Now the Democrats Have Both Houses*, BUS. INSIDER (Jan. 9, 2021), https://www.businessinsider.com/future-of-section-230-democrats-both-houses-2021-1 [https://perma.cc/KQ8D-Y9H3].

146. Derek Khanna, *The Law That Gave Us the Modern Internet—and the Campaign to Kill It*, ATLANTIC, (Sept. 12, 2013), https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/ [https://perma.cc/VK44-QN2N] (stating that Section 230 "gave birth to the social web" and "functioned as a permission slip for the whole Internet that says: 'Go innovate.'").

147. David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, WASH. POST (Aug. 27, 2015, 12:05 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/ [https://perma.cc/UJW7-USSK].

Google, Facebook, and other online ventures that have in large part made the Internet what it is today.[148] On the other hand, critics say the shield of Section 230 has enabled the proliferation of harmful content online.

Among the many ripple effects of Section 230 is a narrowing of options for online defamation plaintiffs. In *Sullivan,* the Supreme Court protected public discourse by making it harder for some to succeed on a libel claim.[149] Now that the public forum has moved online, Section 230 makes a similar exchange. If the companies hosting third party content cannot be sued for the things people post, then the only available defendants are often the third-party posters themselves. The typical online libeler is likely to be judgment-proof; unable to pay any damages a jury might award.[150] And because Section 230 prevents web platforms from being parties,[151] a plaintiff may not compel a website operator to remove defamatory content.[152] Barring the libeler from repeating their statements in the future may be the best relief a maligned plaintiff can hope for.

This predicament is a product of technological innovations that were unfathomable when traditional libel laws were developed. Some argue these laws must be revisited in light of this change,[153] while others maintain that anything short of a rigid no-injunction rule would be too close to censorship and risk a chilling effect. Section IV examines the present divide over this question in the courts.

IV. THE CONTROVERSY OVER THE MODERN RULE

In recent decades, courts have been more inclined to depart from the traditional no-injunction rule in defamation cases.[154] But even as the modern rule becomes more widely accepted, some continue to criticize it as unconstitutional, or simply ineffective.[155] The U.S. Supreme Court has not yet resolved the issue, and the lower federal courts are split.

148. *Id.*

149. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

150. Horton, *supra* note 144, at 1305–06. (noting that although the intent of Section 230 is not to bar online defamation suits altogether, "with a great number of responsible parties potentially judgment-proof and foreclosure from recovery by immunity granted online providers, the CDA has created little, if any, tangible recovery for online defamation victims through self-help methods.").

151. FED. R. CIV. P. 65 (preventing injunctions against nonparties).

152. Moran, *supra* note 141, at 48–49.

153. Angelotti, *supra* note 29, at 465.

154. *See supra* Section III.

155. *See* Motto, *supra* note 109, at 281–86.

A. A Missed Opportunity in the Supreme Court

In 2005, *Tory v. Cochran* brought the modern rule in front of the U.S. Supreme Court.[156] This was a pivotal year for Internet speech. The *Huffington Post* was founded, fueling debate on digital-first journalism and the future of print.[157] And Facebook, just a year from its dorm room launch, was gaining millions of users on multiple continents.[158] These and other tech companies, signaled a new kind of communication, and a new arena for the free speech debate. With *Tory*, the Supreme Court had a chance to answer a key First Amendment question at a critical time: whether future speech could be enjoined once it had been deemed defamatory.[159] But it was not to be.

Ulysses Tory was a disgruntled former client of famed attorney Johnnie Cochran.[160] Claiming that Cochran owed him money, Tory began picketing outside of Cochran's office, writing him threatening letters, and complaining to the local bar association.[161] Cochran sued, and the California Superior Court issued a broad permanent injunction, barring Tory from making statements about Cochran or his law practice in "any public forum."[162] After the state appeals court affirmed the injunction, Tory petitioned for certiorari, asking "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."[163] The Supreme Court granted cert, but Cochran died several days after oral arguments.[164] Cochran's death did not moot the case, as the order remained in effect.[165] But the Court found it was now unnecessary to address whether such a prior restraint was permissible.[166] Instead, it held that the lower court's order lacked plausible justification after Cochran's death.[167] On that narrower ground, the Supreme Court vacated the injunction.[168]

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156. 544 U.S. 734, 736 (2005).

157. *HuffPos*t, ENCYC. BRITANNICA, https://www.britannica.com/topic/The-Huffington-Post [https://perma.cc/8QVB-EDYZ].

158. Ami Sedghi, *Facebook: 10 Years of Social Networking, In Numbers*, GUARDIAN (Feb. 4, 2014, 9:38 AM), https://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics [https://perma.cc/EBX2-NKPV].

159. David McCarthy, *Equity Will Not Enjoin Libel: Was an "Iron Law" Saved by the Death of Johnnie Cochran?,* 21 J. DUPAGE CNTY. B. ASS'N 1, 4 (2009).

160. *Tory*, 544 U.S. at 735.

161. *Id.*

162. *Id.* at 736.

163. *Id.*

164. McCarthy, *supra* note 159, at 25.

165. *Tory*, 544 U.S. at 736.

166. *Id.* at 737–38.

167. *Id.* at 738.

168. *Id.*

Scholar Erwin Chemerinsky, who represented Ulysses Tory before the Supreme Court, claimed that the Court's decision "clearly reaffirms that any injunctions against speech, in a defamation case, have to be narrowly drawn."[169] In a *Syracuse Law Review* article two years later, Chemerinsky asserted that *all* injunctions against speech are unconstitutional.[170] According to Chemerinsky, attempting to carve defamatory speech out of the prior restraint doctrine only confuses the issue.[171] An injunction against speech is a prior restraint, he contends, whether the speech is protected or not.[172] By that logic, any ruling barring future statements, even if narrowly tailored to the offending claims, should not be available as a remedy.[173] In the article, Chemerinsky acknowledges the growing concerns brought on by the Internet and the rise of judgment-proof bloggers, recognizing that in such cases, "[p]erhaps damages will be unavailable as the defendant will not have assets or maybe the plaintiff will just want the false, injurious speech to stop."[174] Nonetheless, he maintains, this trend alone does not outweigh the evils of censorship, and cannot be used to justify a judicial bar on future speech.[175]

As predicted, the years following the Supreme Court's decision in *Tory* saw a rapid rise in online defamation litigation. Libel suits against bloggers increased by 216% between 2006 and 2009.[176] Many of these suits were between private individuals, rather than public figures and media companies, as had previously been the norm.[177] This led to suits in which a private plaintiff (unburdened by the actual malice standard[178] required of public figures) could successfully prove libel, but with little hope of collecting damages.[179] In a 2013 article, law professor David S. Ardia argues that this new landscape invites a rethinking of the doctrine of prior restraints.[180] Where Chemerinsky presents the no-injunction rule as a longstanding bastion against censorship, Ardia

169. *High Court Overturns Restraining Order on Protester's Speech*, REP. COMM. FOR FREEDOM PRESS (May 31, 2005) (citation omitted), https://www.rcfp.org/high-court-overturns-restraining-order-protesters-speech/ [https://perma.cc/9KU7-5DWF].

170. Chemerinsky, *supra* note 37, at 173.

171. *Id.* at 163.

172. *Id.* at 163–64.

173. *Id.* at 163.

174. *Id.* at 158.

175. *Id.* at 171.

176. James C. Goodale, *Communication and Media Law: Can You Say Anything You Want on the Net*?, 242 N.Y. L.J. 3, 3 (2009).

177. Ardia, *supra* note 108, at 12–13.

178. In *Sullivan*, the Supreme Court defined "actual malice" as a known falsehood or reckless disregard for the truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

179. *Id.*

180. Ardia, *supra* note 108, at 16–18.

frames it as more of a relic—the product of an old colonial fear of English repression.[181] As an alternative, Ardia advocates for a narrowly tailored version of the modern rule.[182] So long as these injunctions are carefully limited to defamatory speech, he argues, they could save online defamation plaintiffs from being left without a remedy.[183]

Chemerinsky and Ardia's positions represent how legal thought has diverged on this question since the Supreme Court declined to resolve it.[184] These competing viewpoints have also been tested in the federal courts.

B. The Current Circuit Split

The question of whether to permit injunctions against defamatory speech has divided the lower federal courts for decades. In the 1990 case, *Lothshuetz v. Carpenter,* the Sixth Circuit allowed for a "narrow and limited injunction" prohibiting a defendant from repeating libelous statements to prevent continued harm to the plaintiff.[185] The following year, the Third Circuit considered whether the Pennsylvania Constitution permitted "an exception to the rule that equity will not enjoin a defamation in cases where there already has been a jury determination that the defendant's statements were libelous[.]"[186] The Third Circuit accepted the reasoning behind the exception, and noted its growing popularity in the state courts.[187] But it had to apply the law of Pennsylvania, which was "firmly bound to the traditional rule."[188] Because of the "extraordinary reverence and solicitude with which the Commonwealth of Pennsylvania has viewed the right of free expression," the Third Circuit rejected the modern alternative.[189] The Fifth and Ninth Circuits have also expressed some openness to this more relaxed interpretation, while the D.C. Circuit, and the First, Second, and Fourth Circuits have maintained the traditional no-injunction standard.[190]

A closer look at two recent cases, both involving online defamation but reaching different conclusions, sheds light on where this controversy stands in

181. *See supra* Section I.

182. Ardia, *supra* note 108, at 66.

183. *Id.* at 83–84.

184. *Id.* at 10–14; Chemerinsky, *supra* note 37, at 163–64.

185. 898 F.2d 1200, 1208 (6th Cir. 1990). This point came from a dissenting opinion by Judge Wellford, but because he was joined by another judge on this portion of the opinion, his view allowing the injunction became the opinion of the court on that portion of the case. *See id.* at 1206.

186. Kramer v. Thompson, 947 F.2d 666, 676 (3d Cir. 1991).

187. *Id.* at 676–79.

188. *Id.* at 678.

189. *Id.*

190. Tensmeyer, *supra* note 23, at 50–52.

the federal courts today. In both cases below, the issue of the injunction's validity had not been properly raised on appeal.[191] But in a sign of the question's importance,[192] both courts waived this procedural requirement and reviewed it anyway.[193]

i. Applying the Modern Rule

In *McCarthy* v. *Fuller*, members of a Catholic organization repeatedly maligned a fellow member through a series of blog posts and emails to church leaders.[194] The court found their remarks to be defamatory, and issued a permanent injunction barring the defendants from re-publishing them, "as well as any similar statements that contain the same sorts of allegations or inferences, in any manner or forum."[195] The Seventh Circuit vacated the permanent injunction, noting that the phrase "any similar statements" could include speech that had not been found defamatory, [196] and was still protected by the First Amendment.[197] But this ruling was limited to the specific order under review.[198] If the lower court's injunction had extended only to the defamatory statements themselves, the court held, it would have been appropriate.[199] More broadly, the majority rejected the rigid no-injunction rule, finding that it would "make an impecunious defamer undeterrable,"[200] and accepted the reasoning behind the modern rule.

In a concurrence, Judge Sykes acknowledged a "modern trend" of courts adopting this alternative, but cautioned against it.[201] She cited the historical presumption against prior restraints, and questioned the validity of a defamation exception.[202] The obscenity exception upheld by the Supreme Court in *Kingsley*, Judge Sykes noted, did not necessarily extend to defamation, which

191. McCarthy v. Fuller, 810 F.3d 456, 461 (7th Cir. 2015).

192. The Seventh Circuit in *McCarthy* stated that given the public interest at stake, it was obliged to review the injunction's validity even though the appellant had effectively waived the issue by failing to raise it in a timely way. *Id.* In *Sindi*, the defendant's attorneys had not properly challenged the injunction's validity on appeal, but the First Circuit nevertheless considered the question, describing it as critical and likely to arise again. Sindi v. El-Moslimany, 896 F.3d 1, 27 (1st Cir. 2018).

193. *Id.*

194. 810 F.3d at 457–58.

195. *Id.* at 460.

196. *Id.* at 461–62.

197. *Id.* at 461.

198. *Id.* at 462.

199. *See id.* at 462–63.

200. *Id.* at 462.

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

202. *Id.* at 464 (Sykes, J., concurring).

is inherently contextual.[203] And a rule that effectively enjoined speech only for judgment-proof defendants, she wrote, "wrongly implies that a core liberty secured by the First Amendment—the right to be free from prior restraints on speech—does not protect people who lack the means to pay a judgment."[204] When the First Circuit took up the same question four years later in *Sindi*, its reasoning aligned more with this concurrence than with the Seventh Circuit majority.[205]

ii. Rejecting the Modern Rule

In *Sindi*, as in *Tory* and *McCarthy,* the trial court had no trouble concluding that defamation had occurred.[206] The defendant, El-Moslimany, had executed a long and relentless online smear campaign against a prominent scientist that she believed was having an affair with her husband.[207] The district court issued a permanent injunction barring El-Moslimany from publishing certain words and claims that she had used to defame the plaintiff.[208] But although this order, unlike the one in *McCarthy*, was tailored to the offending statements, [209] the First Circuit vacated it on appeal.[210] Like the concurrence in the Seventh Circuit, the First Circuit majority found that because defamation is so contextual, there is no way to guarantee that a bar on future statements will not affect protected speech.[211] Because the lower court's order did not account for contextual variation, it did not withstand the strict scrutiny standard traditionally applied to prior restraints.[212]

Ultimately, the First Circuit did not rule that it was *impossible* for any defamation injunction to meet that standard, only that the injunction before it did not.[213] The majority opinion described how the Supreme Court had held in the past that prior restraints were permissible only when they furthered "the essential needs of the public order,"[214] and that a party seeking a prior restraint must show that "the 'evil that would result from' the offending publication is

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

204. *Id.* at 466 (Sykes, J., concurring).

205. *See supra* Section II.

206. Sindi v. El-Moslimany, 896 F.3d 1, 16–18 (1st Cir. 2018).

207. *See supra* Section I.

208. *Sindi*, 896 F.3d at 12.

209. Brief of Plaintiff-Appellee, *supra* note 6, at 22.

210. *Sindi*, 896 F.3d at 11.

211. *Id.* at 33.

212. *Id.* at 33–34.

213. *Id.* at 35.

214. *Id.* at 32 (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968)).

'both great and certain and cannot be mitigated by less intrusive measures.'"[215] Given such a heavy burden, the First Circuit concluded, a post-trial injunction was "a bridge too far."[216]

By limiting their decisions to the injunctions at issue, the First and Seventh Circuits avoided the same question that the Supreme Court avoided in *Tory*: "whether the First Amendment will ever tolerate an injunction as a remedy for defamation."[217] But while the Seventh Circuit majority held that a more narrowly tailored injunction would have been acceptable, the First Circuit adopted a more traditional view that an injunction against future speech is presumptively unconstitutional, even if it focuses on specific defamatory claims.

In reaching different conclusions, the First and Seventh Circuits cited many of the same concerns, including the fear of infringing on protected speech, the limited remedies available to plaintiffs, and the difficulty of tailoring an effective injunction. The following section attempts to address these concerns, proposing that such a remedy should be granted only for speech that has been deemed defamatory, and only when it serves a practical purpose in the context of the digital age.

V. CRAFTING EFFECTIVE INJUNCTIONS FOR MODERN DEFAMATION

Today, free speech and reputation are neighboring battlegrounds in America's culture wars. Freedom of speech is a core national value championed across the ideological spectrum. As such, it can be deployed to support wildly divergent beliefs. At a time when Americans are intensely polarized on seemingly every issue, the First Amendment is often misunderstood and invoked haphazardly to silence critics or defend unpopular views.[218]

Meanwhile, after decades of living online, Americans have developed new fears around the value, and fragility, of reputation.[219] It has become commonplace to see public figures brought to account by resurfaced social

215. *Id.* (quoting CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994)).

216. *Id.* at 36.

217. *Id.* at 30.

218. AJ Willingham, *The First Amendment Doesn't Guarantee You the Rights You Think It Does*, CNN (Sept. 6, 2018 7:36 PM), https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html [https://perma.cc/PU63-28JP].

219. Mary Madden & Aaron Smith, *Reputation Management and Social Media*, PEW RSCH. CTR. (May 26, 2010), https://www.pewresearch.org/internet/2010/05/26/reputation-management-and-social-media/ [https://perma.cc/TDV2-AFW5].

media posts, or shamed by personal information that is revealed online.[220] And private people have a harder time outliving past mistakes that have been digitally documented and preserved.[221] These developments have, in some cases, exposed wrongdoing and forced powerful people to face consequences they had long evaded.[222] But, some argue, they have also made it easier to damage reputations for frivolous or malicious reasons.[223] Anxiety about reputation has inspired debates over censorship, due process, and so-called "cancel culture," which are all, to some degree, also debates about free speech.[224]

Any decision about enjoining libel will be made in this turbulent climate. The following recommends one way to approach this dilemma today, balancing the legitimate interests on both sides.

A. The Modern Rule as a Threshold Requirement

Now, as much as ever, a rigid no-injunction rule is appealing in its simplicity. It reflects the absolutist perspective that free speech must be protected at all costs.[225] Today, when online speech spills over into real-world tragedy, some absolutists are quick to reaffirm this belief, insisting that these are the necessary sacrifices to live in a free and open society. This mindset

220. Hillel Italie, *Everywhere and Nowhere: The Many Layers of 'Cancel Culture,'* AP NEWS (July 26, 2020), https://apnews.com/article/nfl-george-packer-media-football-social-media-9090804abf933c422207660509aeef22 [https://perma.cc/3GDA-S2T6].

221. Conway-Jones, *supra* note 33, at 23–25.

222. Italie, *supra* note 220.

223. Conway-Jones, *supra* note 33, at 23–25.

224. Nesrine Malik, Jonathan Freedland, Zoe Williams & Samuel Moyn, *Is Free Speech Under Threat from 'Cancel Culture'? Four Writers Respond*, GUARDIAN (July 8, 2020, 10:10 AM), https://www.theguardian.com/commentisfree/2020/jul/08/is-free-speech-under-threat-cancel-culture-writers-respond [https://perma.cc/K87E-UWTZ].

225. One criticism of free speech absolutism is that it is often used to defend harassment or hate speech, which frequently targets specific groups. Maeve Duggan, *Online Harassment 2017,* PEW RSCH. CTR. (July 11, 2017), https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/ [https://perma.cc/Q29V-2B8B]. A 2017 study from the Pew Research Center found that roughly one in four Black Americans, and one in ten Hispanic Americans had been harassed online because of their race or ethnicity, compared to only 3 percent of whites. *Id.* Women were also twice as likely as men to be targeted based on gender. *Id.* Citing this study, Nesrine Malik writes in a 2019 Guardian article that speech "has never been more free or less intermediated," but that "the targets of this growth in the means of expression have been primarily women, minorities and LGBTQ+ people." She describes the myth that free speech is under attack, which is "linked to efforts to normalize hate speech or shut down legitimate responses to it." Nesrine Malik, *The Myth of the Free Speech Crisis*, GUARDIAN (Sept. 3, 2019, 1:00 PM), https://www.theguardian.com/world/2019/sep/03/the-myth-of-the-free-speech-crisis [https://perma.cc/5CX8-A2NE].

dodges the task of having to reconcile competing interests, but ignores what can be a compelling, unmet need.

In a 2018 *New York Times* editorial, journalist Andrew Marantz cautions against this absolutism in the context of hate speech.[226] He cites recent tragedies where extremists cultivated their views on social media before committing horrific violence in real life.[227] Marantz argues that when speech presents a real safety threat to the people it targets, even the most vital protections cannot be treated as absolutes.[228] "Free speech is a bedrock value in this country[, b]ut it isn't the only one," he writes, "[l]ike all values, it must be held in tension with others."[229]

This Comment similarly rejects free speech absolutism, and with it the no-injunction rule. Like hate speech, defamation can have real-world consequences for the people it is directed against.[230] If an equitable remedy preventing continued defamation can actually protect someone who is otherwise without recourse, the option should not be foreclosed altogether. As a more flexible alternative, narrowly-tailored injunctions should be granted on a limited basis, and only when they are likely to have the intended effect.

While the no-injunction rule is regarded as the traditional view, there is precedent supporting this accommodation. State courts have a history of adopting versions of the modern rule.[231] And the Supreme Court has long recognized that not all speech is subject to constitutional protection.[232] Statements found by a court to be malicious, false, and lacking in social value

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226. Andrew Marantz, *Free Speech Is Killing Us*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/8E7A-2UMZ].

227. *Id.* In particular, Marantz recalls the 2019 mass shootings of mosques in Christchurch, New Zealand by a white supremacist who, "like so many of his ilk, had spent years on social media trying to advance the cause of white power. But these posts, he eventually decided, were not enough; now it was 'time to make a real life effort post.' He murdered 51 people." *Id.* The Christchurch shootings were part of a recent rise in white extremism and far-right terrorism across the Western world, fomented in part by online networks and social media. Weiyi Cai & Simone Landon, *Attacks by White Extremists are Growing. So Are Their Connections*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/interactive/2019/04/03/world/white-extremist-terrorism-christchurch.html [https://perma.cc/R2KZ-3XWT].

228. Marantz, *supra* note 226.

229. *Id.*

230. Rendleman, *supra* note 21, at 649–50.

231. *See supra* Section IV.B.

232. *See* Roth v. United States, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

(like obscenity and defamation) do not receive the same safeguards.[233] Moreover, the Court explicitly recognized in *Near* that the prior restraint doctrine was not absolute.

Given this foundation, and the public interests at stake, courts should adopt the reasoning behind the modern rule. However, they should not grant injunctions simply because the speech has been found to be defamatory. Instead, the rule should be treated as a threshold requirement. Rather than permitting any injunctions that are sufficiently tailored to offensive or defamatory statements, courts should perform a fact-specific inquiry into the necessity and effectiveness of each proposed order, in light of the evolving realities of modern speech.

B. Permitting Injunctions that Effectively Prevent Harm

Among those who support defamation injunctions, there is still dispute over how to craft them effectively.[234] Defamation is highly contextual.[235] Certain statements might be malicious when spoken in one setting and harmless in another. And a simple change in circumstances could turn a defamatory falsehood into a straightforward statement of fact. Narrow tailoring may resolve the immediate constitutional issue.[236] But if it is *too* narrow, then the defendant could freely continue their attack with a simple rephrasing, defeating the whole purpose of equitable relief.[237] As Steve Tensmeyer summarizes in the 2017 article *Constitutionalizing Equity*, "injunctions against defamation must be somewhat narrowly tailored, but it is unclear how narrow this tailoring must be."[238]

In the 2013 article *Freedom of Speech, Defamation, and Injunctions*, David Ardia writes that courts should permit defamation injunctions under a limited set of circumstances, taking into account both constitutional constraints and maxims of equity.[239] He argues that injunctions should be permitted only when

233. Rendleman, *supra* note 21, at 628–29.

234. Ardia, *supra* note 108, at 28.

235. Sindi v. El-Moslimany, 896 F.3d 1, 33 (1st Cir. 2018); McCarthy v. Fuller, 810 F.3d 456, 465 (7th Cir. 2015) (Sykes, J., concurring).

236. *See* Balboa Island Village Inn, Inc., v. Lemen, 156 P.3d 339, 347 (Cal. 2007).

237. Kinney v. Barnes, 443 S.W.3d 87, 97 (Tex. 2014). "The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction." *Id.* The Texas Supreme Court goes on to note that on the other hand, an overbroad injunction would run the risk of chilling protected speech. *Id.*

238. Tensmeyer, *supra* note 23, at 45.

239. Ardia, *supra* note 108, at 58.

they enjoin previously stated or published defamatory speech,[240] and only if they involve private matters.[241] Furthermore, he says, plaintiffs should be required to demonstrate that the injunction would have the desired effect.[242]

Like Ardia's article, this Comment supports defamation injunctions that are strictly limited to defamatory statements[243] and permitted only when the plaintiff shows that such an order would be effective. The effectiveness requirement aligns with the principle that equitable remedies must have a practical outcome, or as Justice Marshall wrote in his concurrence to *New York Times Co. v. United States,* [244] the "traditional axiom of equity that a court of equity will not do a useless thing."[245]

Limiting injunctions to private issues also aligns with Supreme Court precedent, which, Ardia notes, affords higher protection to public matters.[246] For example, in *Snyder v. Phelps*, the Court held that the Westboro Baptist Church's practice of disrupting military funerals with homophobic and inflammatory protests was protected on First Amendment grounds, because of the substantial interest in free expression on issues of public concern.[247] By contrast, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a company received a punitive damages award against a credit reporting agency that falsely stated the company had filed for bankruptcy, despite being unable to show that the agency had acted with actual malice.[248] The Supreme Court established the actual malice standard in *Sullivan* to protect free expression.[249] But in *Dun & Bradstreet*, the Court found that the company did not have to meet the standard, because of the reduced First Amendment interest in purely private speech.[250] The contrast between the Court's handling of *Snyder* and *Dun & Bradstreet* shows how the level of public interest in an issue can determine the scope of First Amendment protections.

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240. *Id.* at 66.

241. *Id.* at 59.

242. *Id.* at 78.

243. *See supra* Section V.A.

244. 403 U.S. 713, 744 (1971).

245. *Id.* The Pentagon Papers were classified government documents leaked by former military analyst Daniel Ellsburg, which revealed a secret history of the United States' strategy in the Vietnam War. *See generally* Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers,* N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/us/pentagon-papers-post.html [https://perma.cc/V39P-69T7]. The Nixon administration tried to block publication of the papers, leading to the 1971 Supreme Court case. *Id.*

246. Ardia, *supra* note 108, at 28.

247. 562 U.S. 443, 454 (2011).

248. 472 U.S. 749, 751–52, 754 (1985).

249. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

250. *Dun & Bradstreet, Inc.*, 472 U.S. at 759.

Historically, the public/private distinction has helped protect individuals without stifling the national commitment to open discussion and debate. But a rule limiting defamation injunctions to strictly private matters may be hard to apply in the digital age, when the very definition of privacy is always in flux. Today's technology enables the constant tracking, compiling, and sharing of personal data. And the way people interact on the Internet has further obscured the line between public and private concerns. It is now the norm for people to share their personal lives on social media,[251] often on platforms that are open to the public without restriction.[252] Web hosting sites make it easy for even the tech-averse to maintain blogs,[253] which are often as intimate and confessional as diaries.[254] On Google's video-sharing platform YouTube, numerous channels are dedicated to ordinary people filming their home lives, with segments featuring their spouses, children, pets, meals, and purchases.[255] Some have made a living out of presenting their personal experiences and routines,[256] and a few have leveraged their private lives to become public figures.[257] But even those who are not well-known may have a whole community of strangers following them online.

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251. *See* Carrie Battan, *The Rise of the "Getting Real" Post on Instagram*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/culture/culture-desk/the-rise-of-the-getting-real-post-on-instagram [https://perma.cc/NPV5-4XWL].

252. Bendor & Tamir, *supra* note 121, at 1165.

253. *Publish Your Passions, Your Way,* BLOGGER, https://www.blogger.com/about/?bpli=1&pli=1 [https://perma.cc/687P-2RN7]; *Create a Website You're Proud of,* WIX, https://www.wix.com/ [https://perma.cc/4ZG2-EKSM].

254. *See* Emily Nussbaum, *My So-Called Blog*, N.Y. TIMES MAG. (Jan. 11, 2004), https://www.nytimes.com/2004/01/11/magazine/my-so-called-blog.html [https://perma.cc/U9XM-JMCM].

255. *See* Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html [https://perma.cc/8QE5-3946]; Taylor Lorenz, *Emma Chamberlain Is the Most Important YouTuber Today*, ATLANTIC (July 3, 2019), https://www.theatlantic.com/technology/archive/2019/07/emma-chamberlain-and-rise-relatable-influencer/593230/ [https://perma.cc/EY2S-ZPYT].

256. *See* Sarah Halzack, *Social Media 'Influencers': A Marketing Experiment Grows into a Mini Economy*, WASH. POST (Nov. 2, 2016), https://www.washingtonpost.com/business/economy/social-media-influencers-a-marketing-experiment-thats-metastasized-into-a-mini-economy/2016/11/02/bf14e23a-9c5d-11e6-9980-50913d68eacb_story.html [https://perma.cc/TK7N-3JPM].

257. *See* Amanda Hess, *When Instagram Killed the Tabloid Star*, N.Y. TIMES (Nov. 24, 2019), https://www.nytimes.com/2019/11/24/arts/celebrity-instagram.html [https://perma.cc/L5JT-8LVD]. Hess describes how, with the emergence of the photo-sharing app Instagram, "the whole proposition of celebrity flipped. Regular people became a little bit famous for doing celebrity-like things . . . Our cats and dogs became stars, and our domesticated raccoons, and our hedgehogs. This occurred on such a vast scale that it required a new word to describe these figures, one ensconced in a new form of commerce: 'influencer.'" *Id.*

These changes notwithstanding, some cases may continue to fall squarely in the "public" or "private" category. But many others will likely exist in an ever-expanding grey area. In this situation, which has no clear analog in traditional media, courts cannot consistently distinguish purely private matters from issues of public concern.

Instead of attempting to demarcate public and private, plaintiffs should be required to show that continued defamation by the defendant poses a substantial threat to their safety or livelihood. Preventing irreparable harm is a primary function of prospective relief, and already part of courts' analysis on whether to grant an injunction.[258] But given the highly contextual nature of defamation, and the ever-changing, interconnected state of communication today, it is not enough to show an imminent threat. Plaintiffs must show that the defendant remains the sole or primary source of that threat. They must also show that if the defendant were permitted to repeat the offending statements, they face substantial harm that could otherwise be prevented. If the original allegations have been picked up and disseminated by other outlets, or been so widely shared that their origin was no longer clear, then silencing the defendant might have little practical effect. In such cases, the injunction should not be permitted. The following hypothetical illustrates this point.

A little-known blogger makes a series of false claims that the owners of a popular local restaurant are involved in drug dealing, prostitution, and child pornography.[259] One of the blog's readers sees the claims and shares them with her several thousand Twitter followers. Among those followers is a journalist from a local news station who reports on the rumor. The allegations are so lurid that they are picked up by national media companies and proliferate online to the point where a Google search of the restaurant's name will bring up multiple articles repeating the blogger's claims. Locals shun the restaurant on principle, or for fear of being criticized themselves. After being forced to close their business, the restaurant owners identify the blogger as the source of the rumor and sue her. A jury finds the claims to be false and malicious, and awards damages which the blogger is unable to pay. The restaurant owners then seek an injunction barring the blogger from continuing to publish the specific claims that the jury found to be defamatory.

This injunction would arguably be lawful under the First Amendment, because it was limited to unprotected speech. And the restaurant owners could show that they had been tangibly harmed by the blogger's claims and would

258. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

259. The blogger's accusations in this hypothetical example are borrowed from those made by the defendant in *Balboa Island Village Inn, Inc. v. Lemen*. 156 P.3d 339, 343 (Cal. 2007). In that case, the Supreme Court of California concluded that the remarks were defamatory. *Id.*

likely suffer more harm if the rumors continued to spread. But issuing an injunction against the blogger would be unlikely to prevent future harm, as her own words had limited reach, and the claims had now found a much wider audience through other sources.

The court may also consider the restaurant owners' ability to engage in self-help. The scandal might have thrust them into the spotlight, giving them access to media channels to counter the blogger's narrative.[260] This may be a more useful course of action than simply preventing the blogger from continuing her attacks. Under these circumstances, an injunction may not be appropriate.

Conversely, if the blogger were a prominent food critic with singular influence over the local dining scene, who remained the main source of the smears, the restaurant owners might succeed in obtaining an injunction by showing that continued libel from the defendant herself was the main threat to their future livelihood. All of these surrounding facts—including the prominence of the defendant, the number of other sources spreading the information, and the medium used to defame the plaintiffs—should help determine whether injunctive relief is warranted.

Given the nature of online defamation, and the Internet's facility for rapidly spreading news across myriad sources, it is likely that few plaintiffs would be able to meet this requirement. This is a reasonable outcome, as prior restraints should be permitted only in exceptional circumstances. It also aligns with the Supreme Court's handling of defamation in the *Sullivan* line of cases, which set a high threshold for recovery on defamation claims, without eliminating the possibility altogether.[261]

A more flexible approach to defamation injunctions does not signal a diminishing appreciation for free speech. Rather, it is a practical response to the dilemma brought on by modern communication, and by online libel in particular. In that spirit, these limitations are meant to preserve the presumption against prior restraints, while permitting exceptions only rarely, as a matter of practical necessity. Prospective relief may be the best option for many online defamation plaintiffs, but as courts have long recognized, such relief cannot be merely symbolic. Courts must therefore consider not only whether a defamation injunction is narrowly tailored to defamatory statements, but also whether it is likely to prevent meaningful harm in the context of modern speech.

260. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (stating that a defamation victim's first remedy is self-help—using any channels available to them to contradict or correct misstatements—and that public figures tend to enjoy greater access to such channels, making them better equipped to address reputational harm themselves).

261. 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION §35:78 (2019).

VI. CONCLUSION

The fraught question of how to balance reputation and free speech has lingered for hundreds of years but taken on a new character in the Internet age. Given the tension of competing interests at stake, defamation injunctions cannot be mechanically granted or refused. Defamation plaintiffs should not be entirely foreclosed from obtaining equitable relief. But they should not be entitled to an ineffective injunction restraining the defendant's future speech simply because such speech is technically exempt from First Amendment protections.

Therefore, defamation injunctions should be permitted only on the rare occasion that barring the defendant from repeating defamatory statements is likely to prevent their claims from spreading through other sources. When assessing an injunction's effectiveness in preventing harm, courts should consider not only the circumstances of the individual parties, but also the reality of how information spreads today. By allowing such a remedy only when it is necessary and effective under these circumstances, courts may address concern for the safety of defamation victims, while upholding the values embodied in the prior restraint doctrine. This narrow interpretation of the modern rule would require courts to consider each proposed injunction in the context of modern speech. As a result, the approach could be continuously adapted as technology, media, and communication evolve.

ELIZABETH ELVING*

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