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Relative Access to Corrective Speech: A New Test for Requiring Actual Malice

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INTRODUCTION

The public figure doctrine has become an anachronism. Current First Amendment protections for defamation[1] defendants are centered on a simplistic and antiquated conception of the communications environment—one that would appear quaint were it not so pernicious. This outmoded view of communications media cannot account for the dramatic democratization of the means of mass communication spurred by modern technology. The dissimilarity between the contemporary communications environment and the media landscape that informed the public figure doctrine renders current First Amendment protections insufficient and reveals them as inconsistent with the very rationale that demanded their creation.

The basic First Amendment framework for defamation suits announced in *Gertz v. Robert Welch, Inc.*[2] has changed little in the intervening decades.[3] The Court's consideration of defamation—a cause of action inseparably tied to the act of publication[4]—necessarily implicated its understanding of the means of mass communication. In 1974, "the media" was easily defined. Print publishers and broadcasters exhausted the universe of those capable of communicating to the masses.[5] As a result, the

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1. The term "defamation" refers to the torts of libel and slander. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 111, at 771 (5th ed. 1984). While libel is the publication of false and defamatory matter in writing, print, or other fixed representation, slander is the oral publication of such material. *Id.* Matter is deemed defamatory if it tends to harm the reputation of its subject. *Id.*

2. 418 U.S. 323 (1974). *Gertz* extended the actual malice fault requirement—the standard applied a decade earlier to public official plaintiffs in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—to suits brought by public figures. *See infra* notes 50-53 and accompanying text.

3. Subsequent Supreme Court decisions have addressed questions left unanswered by *Gertz*, but the basic structure of the public figure analysis remains substantially unaltered. *See infra* note 54.

4. *See* KEETON, *supra* note 1.

5. *See infra* note 109 and accompanying text.

Court crafted the public figure test with a relatively homogeneous class of defendants in mind. By looking only to the public or private status of the plaintiff in determining the appropriate degree of fault, the public figure doctrine assumes equality among media defendants.

Although the public figure test remained substantially unaltered in the three decades since its formulation, technological developments facilitated sweeping changes in the means of mass communication. New technologies, most notably the internet, democratized communication in ways inconceivable to the *Gertz* Court. Irrespective of the volume of information[6] and speed of delivery[7] offered by internet communication, this technology fundamentally altered our ability to communicate. Unlike the media of the 1970s, the internet allows users to contribute as publishers to its vast repository of content and as participants in the global conversation it makes possible. Where traditional media allowed for one-to-many distribution of information,[8] the internet facilitates many-to-many communication.[9] On the internet, for better or worse, each of us can have our say.[10]

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6. A 2003 study estimated that the internet included 532, 897 terabytes of data. PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003: EXECUTIVE SUMMARY 11 (Oct. 30, 2003), http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf. In contrast, the entire printed collection of the Library of Congress could be stored in just 10 terabytes. *Id.* at 3.

7. As of 2005, nearly thirty-eight million lines provided high speed internet access (defined as 200 kilobits per second or higher) to residential and business customers. Press Release, Federal Communications Commission, Federal Communications Commission Releases Data on High-Speed Services for Internet Access (July 7, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-259870A1.pdf.

8. One-to-many distribution is characterized by "masses of silent, shuffling consumers" who passively absorb information without interacting with each other or the source of that information. Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495, 496 (1997). Traditional broadcasting and publishing are paradigmatic examples of one-to-many communication, but some internet applications operate under the one-to-many model as well. For instance, web pages often exhibit the characteristics of one-to-many media. *Id.* These sites merely transfer the traditional newspaper or billboard advertisement to the digital environment, retaining the limitations of one-to-many communication.

9. *See* David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139, 162 (1996). Many-to-many communications media allow users to both contribute and receive information. Blogs, file sharing, and Wikis are among the current many-to-many applications. *See* Many-to-Many, http://en.wikipedia.org/w/index.php?title=Many-to-many&oldid=40318680 (last visited Sept. 5, 2005). In a broad sense, the world wide web, because of its low barriers to participation, functions as a many-to-many medium.

10. Internet distribution enables a potentially global readership, but the voice the internet offers is in part a theoretical one. In terms of visibility, operators of independent websites often share more in common with street corner pamphleteers than *The New York Times*. Blogs, for example, vary widely in their readership. The Volokh Conspiracy, a group blog authored by a number of law professors, attracts as many as 230,000 hits each week. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1130175621.shtml (Oct. 24, 2005, 1:40pm). Other blogs, such as For God and For Cheese, which received 395 hits in December of 2005, garner more modest audiences. *See* For God and For Cheese, http://forgodandcheese.blogspot.com/2006/01/my-faithful-readers.html (Jan. 16, 2006, 4:54pm).

Internet speech gives rise to a communications environment of unprecedented diversity. The average citizen—previously confined to the one-to-one methods of distributing information—enjoys a potential global audience on the internet. Web sites, blogs,[11] Usenet,[12] and other vehicles of internet speech extended communicative power previously vested solely in the hands of a small group of publishers and broadcasters to the public. Now these traditional media players must compete not only with each other, but also with citizens who once merely constituted their audience.[13] This complex taxonomy of potential defamation defendants simply surpassed the *Gertz* Court's capacity for imagination.

The pairing of a radically new communications environment with legal rules frozen in a previous era is bound to create conflict. Emerging legal threats against bloggers help illustrate the difficulty of shoehorning contemporary internet speakers into the current First Amendment framework. In one recent example,[14] Traffic Power, a company that claims to increase the search engine rank of its customers, filed a defamation suit against Aaron Wall, the operator of a blog focusing on search engine optimization technology.[15] Although the complaint failed to specify the particular posts containing the allegedly defamatory material, Traffic Power

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11. Blogs are websites consisting of periodic articles typically arranged in reverse chronological order. These articles, or posts, are typically authored by a single contributor or small group of contributors, but readers often add comments to these posts. While blogs are accessible through any web browser, blog posts are often available distributed in RSS, Atom, and XML formats which allow readers to view posts in specialized blog reading software called aggregators. Blog, http://en.wikipedia.org/w/index.php?title=Many-to-many&oldid=40318680 (last visited Sept. 5, 2005). "Blog" is an abbreviation of "weblog," a term coined on the Robot Wisdom WebLog. *See* Robot Wisdom WebLog, http://www.robotwisdom.com/log1997m12.html (Dec. 17-29, 1997).

12. Usenet is one of the oldest computer network communications systems still in wide use. Users read and post email-like messages, called articles, to a number of distributed newsgroups. Whereas email may be used for one-to-one communication, however, Usenet is a many-to-many medium. *See Usenet*, http://en.wikipedia.org/w/index.php?title=Usenet&oldid=41288869 (last visited Sept. 5, 2005).

13. *See* Lucas Graves, *Everyone's a Reporter*, WIRED, Sept. 2005, at 30, *available at* http://www.wired.com/wired/archive/13.09/start.html?pg=2.

14. This example is far from an isolated one. Irish blogger Gavin Sheridan received a demand letter from the attorneys of MEN ARE FROM MARS, WOMEN ARE FROM VENUS author Dr. John Gray after Sheridan suggested that Gray fabricated his educational credentials. *See* Gavin's Blog, http://www.gavinsblog.com/mt/archives/000533.html (Nov. 17, 2003); Letter from David M. Given, Phillips, Erlewine & Given LLP, to Gavin Sheridan (Mar. 9, 2004), *available at* http://www.gavinsblog.com/Graylegalthreat.pdf. In another example, a failed Brownsville, Texas City Commission candidate known as "Captain Bob" was the subject of a libel suit for accusing his opponent's wife of cocaine abuse on his campaign blog. Sergio Chapa, *Capt. Bob Sued for Blog Content*, THE BROWNSVILLE HERALD, Aug. 26, 2005, *available at* http://www.brownsvilleherald.com/ts_more.php?id=66731_0_10_0_C. Another recent suit pitted town councilman Patrick Cahill against anonymous authors of blog comments that referred to the councilman's alleged "character flaws" and "obvious mental deterioration." Cahill v. Doe, 879 A.2d 943, 946 (Del. Super. Ct. 2005).

15. *See* Seobook, http://www.seobook.com/archives/001130.shtml#more (Aug. 26, 2005) (including transcription of complaint filed by Traffic Power).

claimed that both Wall and anonymous readers who posted comments on his site were liable for defamation.[16]

Aside from the issue of liability for publishing comments authored by third parties,[17] current defamation doctrine draws no distinction between bloggers like Aaron Wall and traditional media outlets like *The New York Times* or *CNN*. The standard of fault is based on the plaintiff's status as a public figure, and without reference to the characteristics of the defendant publisher. As a result, the current First Amendment framework accounts for variety among plaintiffs but ignores diversity among possible defendants.

Although traditional publishers often spawn internet counterparts,[18] most internet publishers are easily distinguished from traditional media sources. Disparities in financial resources, perceived reliability, and popularity are among the most obvious differences between *CNN* and Aaron Wall—but those same distinctions can be drawn between traditional media as well.

Thus, in the defamation context, the most significant and legally relevant difference between traditional one-to-many and many-to-many internet media is the putative defamation victim's ability to respond. If *The Washington Post* prints false accusations about Jane Doe, short of publishing her own newspaper, at best she can ask for a correction or hope another news source will correct the *Post's* mistake. But if a Wikipedia[19] or blog post publishes those same accusations, often her easiest and most effective strategy is simply to correct the misinformation through her own response.[20] In the time it would take to contact a lawyer, she could compose a response that would counter the misinformation and prevent or repair any harm to her reputation.

The public figure doctrine fails to account for access to means of corrective speech so prevalent on the internet. But ironically, the ability to respond to defamatory speech served as a central consideration in the creation of the public figure test.[21] Because public figures enjoyed access to the media, they were better equipped to combat defamatory falsehoods. Therefore, higher standards of recovery were justified.

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16. *Id.*

17. As discussed *infra* Part V, 47 U.S.C. § 230 offers operators of "interactive computer services" (including blogs) immunity from liability for publishing content authored by third parties.

18. *See Top 20 Global News Web Sites for November*, EDITOR & PUBLISHER MAG., Dec. 16, 2005, LEXIS, Nexis Library, Editor & Publisher Magazine File.

19. *See infra* note 173 and accompanying text.

20. For one telling anecdotal comparison of the ease of correcting misinformation published in traditional one-to-many and many-to-many media, see Cory Doctorow, *Correcting the Record: Wikipedia vs. The Register*, BOING BOING, Jan. 11, 2006, http://www.boingboing.net/2006/01/11/correcting_the_recor.html (last visited Jan. 23, 2006).

21. *See infra* Part III.B.

In order to remain faithful to the rationale that informed the Court's balancing of reputational integrity and uninhibited debate, a new test for requiring actual malice is needed to account for the cacophony of internet speech. This new test should consider not only the variations among plaintiffs that account for their ability to respond to defamation. It must also reflect sensitivity to the increased diversity among defamation defendants and the concomitant variety of corrective speech opportunities.

This article proceeds as follows: Part I summarizes the evolution of the constitutional treatment of defamation. It also examines the framework developed in *New York Times Co. v. Sullivan* and the Court's efforts to modify that standard in subsequent cases to adequately balance the interests in reputational integrity and free speech. Part II isolates the principles that guided the Court in fashioning the constitutional balance struck in its defamation decisions and argues that access to self-help through corrective speech provides the primary justification for the current framework. Part III identifies the factual assumptions underlying the current public figure doctrine and argues that in the age of many-to-many communication these assumptions no longer strike an appropriate balance between reputational harm and First Amendment principles. Part IV suggests that the broad immunity to defamation claims established by § 230 of the Communications Decency Act was a prescient recognition of the need to adapt defamation law to reflect new developments in communication technology. Finally, Part V outlines a proposal that looks to the relative availability of corrective speech in determining whether a plaintiff must demonstrate actual malice and explore its application and potential difficulties.

I
THE CONSTITUTIONAL LAW OF DEFAMATION

Prior to the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*, defamation was a constitutional backwater. The Court repeatedly denied any constitutional protection for defamatory speech.[22] In the pre-*Sullivan* era, "the punishment of [libel] ha[d] never been thought to raise any Constitutional problem."[23] Because libelous publications were "not . . . within the area of constitutionally protected speech,"[24] defamatory statements were subject to strict liability—"in the same class with the use of explosives or the keeping of dangerous animals."[25] With its decision in *Sullivan*, the Court parted with the long-standing tradition of strict liability

22. *See* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Near v. Minnesota, 283 U.S. 697, 715 (1931).

23. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

24. *Beauharnais*, 343 U.S. at 266.

25. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 773 (4th ed. 1971).

libel, fundamentally reshaping defamation liability and triggering a constitutional debate that would continue for a decade.

A. The Origin of Constitutional Privilege: Sullivan

In March 1960, the *New York Times* printed a full-page advertisement—intended to garner attention and support for the civil rights movement—describing a series of abuses perpetrated against student protesters and progressive civic leaders.[26] In response to the ad, L.B. Sullivan, an elected Commissioner of Montgomery, Alabama, filed a libel suit against the newspaper and four clergymen who endorsed the ad.[27] Alabama law recognized absolute truth as the only defense to libel per se.[28] The Supreme Court of Alabama upheld a $500,000 jury award in Sullivan's favor.[29]

In reversing the Alabama decision, the Supreme Court of the United States held that even defamatory speech warranted the protection of the First Amendment.[30] The Court, analogizing to the Sedition Act of 1798,[31] recognized robust and uninhibited debate of political concerns as "a fundamental principle of our constitutional system" necessary for self-governance.[32] The Court understood that because "erroneous statement is inevitable in free debate,"[33] truth alone is an inadequate defense to libel.[34] Strict liability defamation would prompt those who wish to question and criticize public officials to "steer far wider of the lawful zone" out of fear of civil liability.[35] The Court concluded that such a rule, because it failed to provide the breathing space necessary for free expression, was inconsistent with the First Amendment.[36]

But *Sullivan* did not grant unconditional immunity for speech critical of official conduct.[37] Instead the Court crafted a new standard of fault in

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26. New York Times Co. v. Sullivan, 376 U.S. 254, 256-58 (1964).

27. *Id.*

28. *Id.* at 267.

29. New York Times Co. v. Sullivan, 273 Ala. 656 (1962), *rev'd*, 376 U.S. 254 (1964).

30. *Sullivan*, 376 U.S. at 272-73.

31. The Sedition Act imposed criminal penalties against those who "write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame . . . ." and allowed only truth as a defense. Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798). From its inception, many condemned the Sedition Act as unconstitutional because it restricted debate and criticism of government officials in clear violation of the First Amendment. *Sullivan,* 376 U.S. at 274-76. While this derision failed to prompt Congress to repeal the Act or the Court to strike it down, "the attack upon its validity has carried the day in the court of history." *Id.* at 276. President Jefferson pardoned those convicted under the Act and remitted their fines, discounting the Act as "a nullity." *Id.*

32. *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

33. *Id.* at 271.

34. *Id.* at 278.

35. *Id.* at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

36. *Id.* at 271-73.

37. Justices Black and Goldberg, in two concurring opinions joined by Justice Douglas, demanded such a categorical privilege. Black argued that the Constitution granted "an absolute

defamation suits brought by public officials over criticism of their performance of official duties. In such cases, the Court required plaintiffs to demonstrate that the defendant's statement was made with knowledge that it was false or with reckless disregard for its falsity.[38] This actual malice[39] test—adapted from the standard developed in numerous state courts[40]—served as the first extension of constitutional protection to defamatory speech and marked the starting point for the standard developed in subsequent decisions.

B. Extending the Reach of Constitutional Privilege: Curtis *and* Rosenbloom

In the companion cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Court held that First Amendment protection extended to defamatory statements concerning public figures as well as public officials.[41] While the constitutional privilege for defamatory speech unquestionably grew broader, ambiguity remained regarding the precise definition of "public figures" as well as the level of the protection for publications defaming such figures. Justice Harlan's opinion premised recovery by those who thrust themselves into the vortex of a public controversy or possessed "access to the means of counterargument"[42] on a showing of "highly unreasonable conduct constituting an extreme departure from the standards" of responsible publishers.[43] In his concurring opinion, Chief Justice Warren required public figures, defined as those "intimately involved in the resolution of important public questions,"[44] to demonstrate actual malice rather than highly unreasonable conduct.[45] The Court's inability to settle on a single standard for requiring actual malice contributed to its reformulation of the doctrine just four years later.

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immunity for criticism of the way public officials do their public duty." *Id.* at 295. Further, he contended "an unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." *Id.* at 297.

38. *Id.* at 280.

39. The Court defined "actual malice" as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* This specialized use of the term differs from the common law usage, which defined "actual malice" as a state of mind—often ill will or spite—that gave rise to a loss of qualified privilege. *See* KEETON, *supra* note 1, § 115, at 833.

40. *See, e.g.*, Ponder v. Cobb, 126 S.E.2d 67, 80 (N.C. 1962); Lawrence v. Fox, 97 N.W.2d 719, 725 (Mich. 1959); Stice v. Beacon Newspaper Corp., 340 P.2d 396, 400-02 (Kan. 1959); Bailey v. Charleston Mail Ass'n, 27 S.E.2d 837, 844 (W. Va. 1943); Salinger v. Cowles, 191 N.W. 167, 174 (Iowa 1922); Snively v. Record Publ'g Co., 198 P. 1, 3-5 (Cal. 1921); McLean v. Merriman, 175 N.W. 878 (N.D. 1920).

41. 388 U.S. 130, 155 (1967).

42. *Id.*

43. *Id.*

44. *Id.* at 164.

45. *Id.* at 163-64.

In *Rosenbloom v. Metromedia, Inc.*, the Court addressed constitutional protections for speech that defamed private individuals.[46] The plurality opinion, authored by Justice Brennan, held that actual malice was required, even in cases brought by private individuals, if the statements involved matters of public concern.[47] *Rosenbloom*—in part because of the social and economic power resting in the hands of private individuals[48]—shifted focus from the public figure status of the plaintiff to the subject matter of the allegedly defamatory speech.[49] In so doing, the Court expanded protection afforded defamatory statements well beyond the bounds established just seven years earlier in *Sullivan*.

C. Refocusing on the Plaintiff's Public Status: Gertz

Just three years after *Rosenbloom*, the Court returned to the issue of First Amendment protections for defamatory speech in *Gertz v. Robert Welch, Inc*. The *Gertz* Court abandoned the *Rosenbloom* public interest test,[50] in large part adopting the rationale of Justice Harlan's *Rosenbloom* dissent.[51] According to the Court, public officials or figures suing for defamation must demonstrate actual malice, but states remain free to determine the liability standard in cases brought by private citizens so long as they require some degree of fault.[52] *Gertz* marked a return to determining the necessary degree of fault on the basis of the plaintiff's public status rather than the public's interest in the controversy. Further, *Gertz* resolved any lingering uncertainty stemming from the *Curtis* Court's reliance on the highly unreasonable conduct test and clarified the class of public figures.[53] With the exception of limited modifications of constitutional privilege in later cases,[54] the *Gertz* standard still defines contemporary First Amendment protection for defamatory speech.

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46. 403 U.S. 29, 31 (1971).

47. *Id.* at 52.

48. *Id.* at 41-42 (quoting *Curtis Publ'g*, 388 U.S. at 163-64 (Warren, C.J., concurring in result)).

49. *Id.* at 52.

50. 418 U.S. 323, 347 (1974).

51. 403 U.S. at 68-70 (Harlan, J. dissenting). *See* James J. Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch*: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777, 789 (1975).

52. *Gertz*, 418 U.S. at 347.

53. Those who "occupy positions of such persuasive power and influence" may be "deemed public figures for all purposes," while those who "thrust themselves to the forefront of particular public controversies" gain public status for that limited purpose. *Id.* at 345.

54. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (permitting recovery of presumed and punitive damages absent a showing of actual malice in private plaintiff suits when the defamatory statements do not involve matters of public concern); Phila. Newspapers v. Hepps, 475 U.S. 767, 777 (1986) (holding that the burden of showing falsity falls on the plaintiff in an action to prove defamation involving speech of public concern).

II
JUSTIFICATIONS FOR THE PUBLIC FIGURE STANDARD

The Court struggled to strike an appropriate balance between uninhibited debate and protecting the reputational interests of individuals,[55] but ultimately settled on the framework discussed above. While, broadly speaking, the democratic necessity of open discourse provided the primary thrust for developing such a balance,[56] two distinct rationales informed the particular solution chosen by the Court: the voluntary nature of public status and the access to media enjoyed by public persons. This Part traces the influence of these two rationales in the Court's defamation decisions and argues that media access serves as the primary motivation and justification for the current actual malice framework.

A. Public Life as Assumption of Risk

Those in positions of public notoriety—whether government officials, business leaders, or celebrities—typically achieve that status voluntarily.[57] The choice to assume positions of prominence opens public figures and officials to greater media scrutiny and thus weakens their claim to protection from reputational harm.

Although the *Sullivan* Court failed to directly address the voluntary nature of public status, this consideration complements the Court's analysis. Because the Court limited application of the actual malice standard to public officials criticized for their performance of official duties,[58] the assumption that those subject to the Court's standard were witting participants to public scrutiny hardly required noting.[59] Thus, the *Sullivan* Court's silence on the issue of willing participation in public life is unremarkable given the class of plaintiffs the decision contemplates.

The voluntary risk rationale began to take form in *Curtis*, although the precise implications of an individual's voluntary public status remained unclear. In establishing Walker as a public figure subject to the short-lived

55. *See, e.g.*, *Gertz*, 418 U.S. at 342.

56. *Id.* at 340; *Sullivan*, 376 U.S. at 270.

57. The Court recognized the possibility that some public figures may gain that status against their will; however, it presumed such involuntary public figures would be "exceedingly rare." *Gertz*, 418 U.S. at 345. In one example of this rare class of public figures, a Georgia court held that accused Olympic bomber Richard Jewell qualified as "an involuntary limited-purpose public figure." Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001); *see* Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell Is a Public Figure Is Wrong and Harms Journalism*, 22 LOY. L.A. ENT. L. REV. 293 (2002).

58. *Sullivan*, 376 U.S. at 279-80.

59. The vast majority of public officials voluntarily come into their positions of responsibility. Elected officials, judicial, diplomatic, and administrative appointees, and bureaucratic employees freely assume their responsibility. Military conscription presents some possibility of involuntary public officials, but even then, given the length of service necessary to elevate a conscript to a position of sufficient influence to achieve that status, some voluntary recommitment to military service would likely prove necessary.

"highly unreasonable conduct" standard,[60] the Court explained that Walker had thrust himself into the "'vortex' of an important public controversy."[61] Although the Court suggested that Walker's voluntary engagement in public affairs rendered him a public figure, it failed to clarify the significance of his deliberate involvement in balancing his reputational interest against First Amendment considerations.

In his *Rosenbloom* dissent[62]—the opinion that eventually formed the basis of the Court's *Gertz* decision[63]—Justice Harlan voiced the first clear statement of the relevance of voluntary public status, "public personalities . . . may be held to have run the risk of publicly circulated falsehoods . . . ."[64] In Justice Harlan's estimation, voluntary involvement in matters of public concern amounted to an assumption of risk warranting reduced libel protection for the plaintiff. As a result, "the need to provide monetary compensation for defamation appears a good deal more attenuated."[65]

Three years later, writing for the *Gertz* majority, Justice Powell echoed Justice Harlan's reasoning, citing the "compelling normative consideration" that public officials and public figures "run[] the risk of closer public scrutiny" by "assum[ing] roles of special prominence in the affairs of society" as justification for requiring public figures to show actual malice.[66] Even in the "exceedingly rare" circumstance in which a public figure emerged against her will, the Court explained that the media are entitled to presume her voluntary participation in public affairs.[67]

This "assumption of risk" reasoning contributed significantly to the current actual malice framework. The Court understood that to enter public life is to forego some protection from media scrutiny, including defamation. But, as discussed *infra*, the "assumption of risk" rationale serves as neither the sole nor the primary justification for insisting on actual malice in cases brought by public figures.

B. Public Status as Access to Media

The second, and, as this Comment will demonstrate, dominant rationale for the public figure doctrine is that public officials and public figures, by virtue of their power and renown, command significant media attention. This attention enables them to redress the harms inflicted by defamatory publications through corrective speech. As a result, the balance shifts

60. *See Curtis Publ'g*, 388 U.S. at 155.
61. *Id.*
62. 403 U.S. at 62-78 (Harlan, J., dissenting).
63. *See* Brosnahan, *supra* note 51.
64. *Rosenbloom*, 403 U.S. at 70.
65. *Id.* at 71.
66. 418 U.S. at 344-45.
67. *Id.* at 345.

toward less stringent enforcement of defamation law in favor of robust public debate.

Although it does not lend direct support to the media access rationale, the landmark *Sullivan* decision foreshadowed later developments. While the *Sullivan* majority did not rely on public officials' access to means of response in requiring actual malice, the Court demonstrated sensitivity to a plaintiff's ability to speak in determining appropriate liability standards. The Court reasoned that because public officials enjoyed unlimited immunity from defamation claims,[68] the right of the public to criticize such officials must be similarly unrestrained.[69] The Court implicitly embraced the notion that when a plaintiff's speech opportunities are great, barriers to judicial relief must be more substantial.

Although the *Sullivan* majority failed to directly address the access to media rationale, Justice Goldberg's concurrence relied in part on the importance of corrective speech.[70] An absolute privilege to criticize public officials, Justice Goldberg argued, would not eliminate all remedies for the defamed because "[u]nder our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . . ."[71]

In subsequent cases, the Court's reliance on this justification became explicit. In *Curtis*, the Court reasoned that since Plaintiff Butts enjoyed access to the means of counterargument,[72] he could likely redress any harm caused by the allegedly defamatory speech, thereby lessening his need for protection. And while the *Rosenbloom* plurality discounted access to media as a factor overly subject to the whims of the press,[73] Justice Harlan's dissent continued to stress the importance of "access to channels of communication sufficient to rebut falsehoods" in determining the appropriate standard in defamation suits.[74]

In *Gertz*, the majority adopted Harlan's media access rationale, abandoning the public interest test formulated in *Rosenbloom*.[75] In doing so, the *Gertz* Court clarified the media access justification for the actual malice requirement:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater

68. *See* Barr v. Matteo, 360 U.S. 564, 575 (1959).
69. *Sullivan*, 376 U.S. at 282.
70. *Id.* at 304-05 (Goldberg, J., concurring).
71. *Id.* (quoting Wood v. Georgia, 370 U.S. 375, 389 (1962)).
72. 388 U.S. at 154.
73. 403 U.S. at 46.
74. *Id.* at 70.
75. *See supra* note 50 and accompanying text.

> access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[76]

The media access rationale offers a more compelling justification for requiring actual malice.

C. Media Access as the Dominant Rationale

Both the voluntary risk and media access rationales figured prominently and with equal frequency in the Court's development of the contemporary constitutional defamation framework. In fact, the *Gertz* Court referred to the assumption of risk rationale as the more important of the two.[77] Nonetheless, this Comment argues that the availability of self-help through corrective speech provides stronger justification for demanding a showing of actual malice. First, the media access rationale, unlike the assumption of risk justification, weighs on both sides of the balance between protecting reputation and promoting speech. Second, the media access rationale finds support in the First Amendment's preference for self-help.

1. Media Access as a Thumb on Both Scales of the Constitutional Balance

The balance between protecting reputational integrity and securing uninhibited discussion shifts in favor of increased burdens on defamation plaintiffs in two ways. As the defamation victim's claim to protection decreases, heightened standards for recovery become more appropriate. This allows more space for expression. The scales tip further in favor of higher hurdles to recovery when more exacting standards promote independent First Amendment values. Since the media access rationale influences the balance by both methods, it offers stronger support for requiring actual malice.

In weighing the protection of reputation with the preservation of free debate, the Court understood that because the majority of public figures gained that status by choice, the interest in protecting the reputations of these figures is less compelling. The voluntary risk rationale shifts the balance between reputational harm and unfettered debate unquestionably in the direction of heightened standards of liability. It does so not by directly enhancing First Amendment values, but by weakening the public figure plaintiff's claim to protection.

The media access rationale, because it weighs on both scales of the constitutional balance, provides a justification of more fundamental importance. Just as assumption of risk lessens the interest in guarding against harmful false statements, the availability of corrective speech renders defamation judgments less necessary to ensure reputational integrity. But

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76. 418 U.S. at 344.

77. *Id.*

access to counterspeech does more than simply reduce the vulnerability of public figures to libel and slander: it furthers the values espoused by the First Amendment. Corrective speech contributes to robust public debate.[78] As Judge Learned Hand explained, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues . . . ."[79] By not only allowing, but strongly encouraging, those criticized by alleged defamers to respond, the imposition of actual malice spurs this "multitude of tongues." Therefore, media access militates against the public figure's interest in protection from defamation while simultaneously advancing independent First Amendment principles.

2. Media Access as Self-Help

The media access rationale finds support in the preference for self-help expressed in American legal tradition. Where private action can eliminate or reduce harms, the law often encourages the wronged party to engage in self-help before calling for state intervention. In contract claims, for example, plaintiffs are barred from recovering damages that they were capable of mitigating.[80] Trademark owners who fail to police their marks risk losing protection.[81] Trade secret law extends protection only to those who take reasonable measures to guard valuable information.[82]

But nowhere is the preference for self-help more explicit than in the First Amendment context.[83] In evaluating content-based restrictions on speech, courts look to the availability of self-help in determining both the existence of a compelling state interest and in establishing whether that interest was satisfied by the least restrictive means.[84] The Supreme Court's decision in *Cohen v. California* provides the most vivid example of an instance where self-help can undermine a claimed compelling interest.[85] Cohen was convicted of engaging in offensive conduct[86] for wearing a

78. *See* Douglas Lichtman, *How the Law Responds to Self-Help*, Berkeley Center for Law and Technology, Paper 1 (2005), http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1004&context=bclt (discussing the preference for self-help in intellectual property and First Amendment law).

79. United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

80. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

81. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 3:10, 18:42 (4th ed. 1996).

82. *See* Uniform Trade Secrets Act § 1(4) (1985), 14 U.L.A. 433; ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.04 (2005).

83. See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 744 (2003).

84. *Id*. at 745-46.

85. *Cohen*, 403 U.S. 15 (1971); *see also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 542 (1980) (invalidating the Public Service Commission's regulation prohibiting the inclusion of printed materials discussing controversial issues in monthly utility bills because customers could "transfer the bill insert from envelope to wastebasket").

86. *Cohen*, 403 U.S. at 15 (quoting CAL. PENAL CODE § 415, which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct").

jacket, meant to protest the Vietnam War, adorned with the phrase "Fuck the Draft."[87] The Court reversed, reasoning that those offended by Cohen's expression "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[88] The availability of self-help thus diminished the state's interest in restricting Cohen's speech.

More recently, the Court employed self-help to demonstrate the availability of less restrictive means of addressing the government's compelling interest in restricting speech.[89] In *Reno v. ACLU*, the Court upheld a First Amendment challenge to the Communications Decency Act (CDA),[90] which criminalized the transmission of indecent material to minors.[91] The Court deemed the law overbroad because it chilled protected speech online.[92] In reaching this conclusion, the Court stressed the importance of alternative means of achieving the compelling state interest in protecting minors from harmful online speech.[93] The Court pointed to the district court's findings that "*user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available."[94] Here, even the prospective availability of filtering software promised an adequate self-help remedy that weighed against governmental interference with the free flow of internet communications. The Court in *Ashcroft II*, upholding a preliminary injunction preventing the enforcement of the Child Online Protection Act,[95] reiterated its conviction that filtering can provide an adequate self-help mechanism.[96]

The central role of the media access rationale in determining the appropriate level of protection for defamatory speech is fitting, given the importance of self-help alternatives in evaluating restrictions on speech. But while the cases discussed above demonstrate that the ability to avoid offensive speech through self-help can be sufficient to prevent state interference, self-help plays a different role in the defamation context. Because defamation harms its victim not by the victim's own exposure to the speech, but by the exposure of that speech to third parties,[97] avoidance proves an insufficient self-help mechanism. Instead, defamation requires corrective speech capable of counteracting the harm caused by the defamer. Only by

87. 403 U.S. 15, 16 (1971).
88. *Id.* at 21.
89. Bell, *supra* note 83, at 762-69.
90. For further discussion of the CDA, see *infra* Part V.
91. *See* 47 U.S.C. § 223 (1996).
92. Reno v. ACLU, 521 U.S. 844, 882 (1997).
93. *Id.* at 879.
94. *Id.* at 877 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).
95. 47 U.S.C. § 231 (1998).
96. Ashcroft v. ACLU, 542 U.S. 656, 702 (2004).
97. KEETON, *supra* note 1, at § 113.

correcting any damaging misconceptions resulting from defamatory statements can this sort of reparative speech provide an adequate means of self-help.

The argument for this variety of self-help—critical to the *Gertz* decision and our current First Amendment defamation framework—finds its roots in an opinion that pre-dates *Cohen*. In his concurrence in *Whitney v. California*, Justice Brandeis gave voice to the underlying principle of the corrective self-help approach: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[98] This call for counterspeech represents more than a judicial preference. As Professor Tribe explained, "whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally mandated remedy."[99]

The current actual malice rule presumes that countering defamation with corrective speech will reduce the harm caused by published falsehoods; at least one study supports that assumption.[100] Public figures, because of their greater access to the means of mass communication, are better equipped to utilize corrective speech to redress these harms. The practical and constitutional significance of this sort of counterspeech bolsters the claim that the media access rationale serves as the central justification for the public figure doctrine.

Although the voluntary risk rationale addresses important normative concerns that lessen the claim to protection of public figures, the media access rationale—rooted in the First Amendment's preference for counterspeech—offers the more compelling justification for requiring actual malice because it both lessens the need for protection and furthers the First Amendment values central to the Court's effort to reform defamation law.

III
THE PUBLIC FIGURE DOCTRINE AS A PRODUCT OF ONE-TO-MANY MEDIA

While the media access and voluntary risk rationales provide the primary justifications for the current public figure doctrine, the Court's understanding of the media unmistakably influenced the precise formulation of the constitutional treatment of defamatory speech. By focusing on the Court's conception of the media during the decade between *Sullivan* and *Gertz*, a picture of a doctrine inextricably tied to outdated assumptions emerges. This section first examines those assumptions and their influence on the public figure standard. Next, it demonstrates the ways in which

98. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

99. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 603 (1978).

100. *See* Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933 (1995).

recent technological developments undermined those assumptions and the test they informed.

A. The Court's Media Assumptions

The Court's assumptions about the media unquestionably influenced its formulation of First Amendment protections for defamatory speech embodied in the public figure doctrine. The Court envisioned defamation defendants—publishers and broadcasters—who fit squarely within the archetype of traditional media. Further, the Court relied on an understanding of the communications environment that presumed the continued dominance of one-to-many media in determining the content of public debate.

The *Gertz* Court likely understood the defamation framework it announced as one limited to traditional media defendants.[101] Although subsequent case law suggests a broader application of the public figure doctrine,[102] the *Gertz* Court focused unquestionably on media defendants, discussing the impact of the actual malice standard on "communications media,"[103] "press and broadcast media,"[104] "publishers,"[105] and "broadcasters."[106] Even in *Gertz*, the Court cast its holding in terms particularly applicable to media defendants—"the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[107] In crafting the public figure doctrine, the Court conceptualized a particular sort of defamation defendant, and as a result, the principle announced in *Gertz* is one deeply rooted in the nature of the press.[108]

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101. *See* Brosnahan, *supra* note 51, at 792-93.

102. Some courts refused to apply the *Gertz* standard to non-media defendants in suits brought by private plaintiffs. *See, e.g.*, Greenmoss Builders v. Dun & Bradstreet, 461 A.2d 414 (Vt. 1983), *aff'd on other grounds*, 472 U.S. 749 (1985); Rowe v. Metz, 579 P.2d 83 (Colo. 1978), Wheeler v. Green, 593 P.2d 777 (Or. 1979). But typically courts applied the actual malice standard to media and non-media defendants alike when the plaintiff was a public figure. *See, e.g.*, Avins v. White, 627 F.2d 637, 649 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1980), Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975), Williams v. Pasma, 656 P.2d 212 (Mont. 1982), *cert. denied*, 461 U.S. 945 (1983). The Court, however, refused to explicitly abandon the distinction. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990).

103. 418 U.S. at 341, 345.

104. *Id.* at 333, 343, 348.

105. *Id.* at 337 n.7, 338, 341, 343, 350, 365-66, 369. In the defamation context the label "publisher" is a term of art, referring to anyone who communicates a defamatory statement to a third party. PROSSER, *supra* note 25, at 766-67. Courts, however, often use the term to refer to those, such as newspaper owners, engaged in the business of publication. Read in light of the entirety of the decision, the *Gertz* Court likely employed the term "publisher" in the laymen's sense.

106. *Gertz*, 418 U.S. at 341, 343, 350, 366, 369.

107. *Id.* at 347.

108. Brosnahan, *supra* note 51; Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 861-62 (2000).

Not only did *Gertz* assume "the media" would be the recipient of the protection offered by the public figure doctrine, but the Court also had a clear conception of the characteristics shared by those media defendants. In the mid-1970s when *Gertz* was decided, media defendants shared a reliance on one-to-many means of communication. One-to-many communication, as its name implies, describes a method of sharing information by which one party disseminates material to an audience. Newspapers, television, and radio epitomize one-to-many communications. In each of these media, a centralized source is responsible for the creation and distribution of information to a large and typically passive audience of consumers. Aside from one-to-one communication like individual letters, phone calls, and conversations, the one-to-many communication employed by the media defendants envisioned in *Gertz* offered the only option for disseminating information in the 1970s.

As a result of their use of one-to-many communication, the media shared a number of common traits. First, they were relatively few in number.[109] Both economic and physical constraints limited the number of publishers and broadcasters. The prohibitive expense of the technology necessary to engage in one-to-many communication prevented the vast majority of Americans from taking advantage of its communicative power. The physical constraints of spectrum scarcity and the resulting governmental regulation of spectrum allocation further limited the broadcast media.[110] The effects of these constraints were most conspicuous in the television industry, which in the 1970s was dominated by just three networks that distributed the vast majority of programming.[111] While radio broadcasters and print publishers faced lower barriers to entry, these media outlets were in similar short supply.[112]

Second, traditional media defendants exerted considerable influence over the content of public debate. As a result of their extensive reach and limited number, media outlets—both collectively and individually—were able to regulate public exposure to information and shape public opinion. The broadcasters and publishers of the 1970s were particularly

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109. In 1970 just 862 local television stations, dominated by three networks, operated in the United States. DAVID DEMERS, MEDIA CONCENTRATION IN THE UNITED STATES 12-13 (2001), *available at* http://www.cem.ulaval.ca/CONCetatsUnis.pdf. At that same time, the number of radio stations was a mere 6,700. Adam D. Thierer, *Overcoming Mythology in the Debate over Media Ownership,* Sept. 28, 2004, http://www.cato.org/testimony/ct-at092804.html#1. While the total number of radio stations increased dramatically, ownership of the nation's radio stations became more highly concentrated. *See* Adam J. van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire*, 88 MINN. L. REV. 627 (2004).

110. *See, e.g.*, *In re* Amendment of Section 73.3555, [formerly 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17 (1984) (limiting ownership of radio and television stations).

111. *See supra* note 109.

112. *Id.*

well-situated in their ability to communicate to the American public. By the 1970s—five hundred years after the Gutenberg press launched a new era in the dissemination of information[113]—the possibilities of one-to-many communication had almost been fully realized. The American media industries extended the reach of one-to-many communications to unprecedented levels.[114] And since the ability to reach these audiences was concentrated in the hands of a relatively small number of corporations, the Court rightly assumed that the whims of media interest influenced the content of public discourse.[115]

Thus, the public figure doctrine was devised in the era of centralized, concentrated, and powerful one-to-many media. This reality exerted an undeniable influence on creation of the public figure doctrine. The access to media rationale offers public figures less protection from defamation because they are better able to attract attention of the fickle media that determine the content of public attention and discussion. Further, because the Court constructed a framework that assumed one-to-many media defendants, the public figure test looks only to the status of the plaintiff in determining the appropriate degree of fault. Since the Court assumed that the defendant was among the one-to-many media—a class with well-defined and relatively uniform characteristics—the Court saw no need to determine the communicative power of the defendant. While these assumptions about communications media may have appropriately informed the standard for requiring actual malice in the 1970s, subsequent developments in communications technology call the viability of these assumptions into question.

B. Assumptions Undermined

In many ways, the assumptions that influenced the Court's decisions still hold true today. Concentrated ownership and resource scarcity continue to limit the viewpoints expressed in many popular media.[116] Public figures, in part because of our celebrity-obsessed culture, still have greater access to mainstream media outlets. Our modes of information exchange, however, have changed in fundamentally important respects. While the majority of Americans still rely on traditional one-to-many media like

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113. *See* Printing Press, http://en.wikipedia.org/w/index.php?title=Printing_press&oldid=40934715 (last visited Feb. 28, 2006).

114. ABC's television broadcast of Alex Haley's *Roots* in 1977 drew the largest broadcast audience in history—130 million viewers. Gayle Noyes, *American Broadcast Company*, http://www.museum.tv/archives/etv/A/htmlA/americanbroa/americanbroa.htm (last visited Nov. 3, 2005).

115. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971) (discussing "the unpredictable event of the media's continuing interest in the story").

116. While regulation of media ownership peaked in the mid-1970s, the means of communicating to a large audience remained concentrated in the hands of a relatively small number of industry players and far out of reach of the average citizen. *See* Aaron Perzanowski, Prometheus Radio Project v. FCC*: The Persistence of Scarcity*, 20 BERKELEY TECH. L.J. 743 (2005).

television and newspapers,[117] technological change fostered an era of unprecedented access to the means of mass communication. Many-to-many communication is steadily displacing the one-to-many communication central to the public figure doctrine.[118]

No technology embodies this trend better than the internet. As its popularity exploded in the mid-1990s, this global communications network provided its users with a wealth of easily accessible information. The internet presents a unique opportunity for open discourse to flourish, allowing anyone capable of accessing information to publish their own globally available content. The *Reno* Court explained:

> First, [the internet] presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[119]

Unlike traditional print publication, burdened by economic barriers to mass publication, or broadcast media, bound by both economic obstacles and spectrum scarcity, the internet provides a medium in which everyone with access can speak. Online publishers include "government agencies, educational institutions, commercial entities, advocacy groups, and individuals."[120] This democratization of publishing profoundly affects the way we share information. On the internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[121]

The many-to-many communication enabled by the internet undermines the assumptions central to the public figure doctrine.[122] When

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117. *See* JOHN HORRIGAN ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, THE INTERNET AND DEMOCRATIC DEBATE 4 (2004), http://www.pewinternet.org/pdfs/PIP_Political_Info_Report.pdf (describing television as the dominant source of political news and information).

118. *See* LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, THE STATE OF BLOGGING 1-2 (2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (describing a 58% increase in blog readership and an increase in the number of Americans who have created blogs to 7% of internet users or eight million individuals); PEW INTERNET & AMERICAN LIFE PROJECT, THE MAINSTREAMING OF ONLINE LIFE 58 (2005), http://www.pewinternet.org/pdfs/Internet_Status_2005.pdf (demonstrating a 37% increase in the number of adults using the internet on an average day between 2000 and 2004).

119. Reno v. ACLU, 521 U.S. 844, 863 n.30 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 877 (E.D. Pa. 1996)).

120. 521 U.S. at 853.

121. *Id.* at 870.

122. In many ways, the environment spawned by internet communication harkens back to the era of pamphleteering. Increasingly, citizens rely on each other for news, information, and opinions. Rather than receiving information from monolithic traditional media outlets, many internet users rely on independent individual reporters of the day's news.

This ongoing and personal relationship between news-giver and audience could be seen as a return to an earlier paradigm rather than the adoption of a new one. This observation may suggest that rather

one-to-many communication offered the only means to reach the public, identifying those with the ability to widely disseminate information presented a relatively simple task; but as individuals began to contribute to the marketplace of ideas through the internet, the line between citizen and media blurs. On Usenet, message boards, and listservs,[123] individuals have long engaged in publicly accessible conversations, simultaneously serving as both speaker and audience. With the advent of blogs, the distinction between audience and news source becomes an increasingly elusive one.[124] In the words of professional reporter turned citizen journalist Dan Gillmor, "technology has given us a communications toolkit that allows anyone to become a journalist at little cost and, in theory, with global reach."[125]

Apple Computer's recent efforts to subpoena the records of Mac-related blogs to identify Apple insiders who allegedly disclosed information in violation of non-disclosure agreements put the contemporary struggle to define "the media" on the front pages of both newspapers[126] and RSS aggregators.[127] The sites in question allowed readers to contribute tips on upcoming Apple products or other Mac-related news.[128] When one such site announced an unreleased product, Apple filed suit against the unknown informants and sought identifying information from the site's email provider.[129] The bloggers operating the site opposed Apple's subpoena,

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than expanding protections for defamation defendants, the law should return to the more limited protections that existed in this earlier era. This suggestion is misguided because it ignores the historical and jurisprudential context within which protections for defamation defendants were crafted. The role of the First Amendment has expanded radically since the colonial period. The protections extended to defamation defendants in *Sullivan* and *Gertz* reflected the Court's understanding of the intervening changes in First Amendment jurisprudence generally, in addition to its recognition of the technological shift between pamphleteering and modern publishing.

123. The word "Listserv" is often used as a generic term for any electronic mailing list application. Listserv, http://en.wikipedia.org/w/index.php?title=Listserv&oldid=40451215 (last visited Nov. 1, 2005). "Electronic mailing lists are a special usage of email that allows for widespread distribution of information to many Internet users.. Sometimes these take the form of what is termed a 'discussion list': a subscriber uses the mailing list to send messages to all the other subscribers, who may answer in similar fashion." Electronic Mailing List, http://en.wikipedia.org/w/index.php?title=Electronic_mailing_list&oldid=40542628 (last visited Feb. 28, 2006).

124. Likewise, the internet complicates the public figure determination. The degree to which discussion of an issue in a public internet forum establishes status as a public figure remains an open question.

125. DAN GILLMOR, WE THE MEDIA xii (2004).

126. *See, e.g.*, Dan Fost, *Legal Status of Bloggers Debated, Journalists' Shield Claimed in Response to Apple's Lawsuit*, S.F. CHRON., Mar. 8, 2005, at A1.

127. *See Apple Subpoenas, Sues Over Leaks*, SLASHDOT, Dec. 22, 2004, http://apple.slashdot.org/article.pl?sid=04/12/22/195239&tid=141&tid=179&tid=3%20; Alex Wexelbat, *Are Bloggers Journalists?*, COPYFIGHT, Feb. 4, 2005, http://www.corante.com/copyfight/archives/2005/02/04/are_bloggers_journalists.php; Peter Rojas, *Apple Sues Think Secret for Reading Pages from Their Diary*, ENGADGET, Jan. 5, 2005, http://engadget.com/entry/1234000383026207/.

128. Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178 at 2 (Cal. Super. Ct. Mar. 11, 2005), *available at* http://www.eff.org/Censorship/Apple_v_Does/20050311_apple_decision.pdf.

129. *Id.*

arguing that as journalists they could not be compelled to reveal the identity of their confidential sources.[130] While the Superior Court denied the bloggers motion for a protective order, it acknowledged that "[d]efining what is a 'journalist' has become more complicated as the variety of media has expanded."[131]

Since courts apply the public figure doctrine to non-media defendants,[132] the difficulty in defining the media does not preclude the doctrine's application to cases involving internet speech. But to the extent that many-to-many media create variety among those speakers with access to means of mass communication—variety the *Gertz* Court neither considered nor predicted—the uniform treatment of defamation defendants should be questioned. The public figure doctrine assumes relative equality among defamation defendants, failing to distinguish between those whose communication with the public is actual rather than potential, constant rather than occasional, and pervasive rather than specialized. The complex taxonomy of potential defamation defendants has surpassed the *Gertz* Court's imagination. The standard that Court crafted, while resting on justifications of continued importance, cannot accommodate the variety of speakers in today's marketplace.

Not only has the era of many-to-many communications challenged the Court's assumptions about who serves the function of the press, it also calls into question the Court's view of the primary significance of mainstream media in defining public debate. From Senator Trent Lott's decades late endorsement of segregationist presidential candidate Strom Thurmond[133] to CBS's reliance on forged memos that claimed to show President Bush shirked his National Guard duties during Vietnam,[134] bloggers have demonstrated an ability to shape the national debate. No longer do the whims of the mainstream media as understood by the *Gertz* Court limit the public's exposure to information. While access to media remains a fundamental consideration in determining the appropriate level of protection for defamatory speech, the simplistic public figure test is unlikely to fully capture the rich set of factual scenarios under which defamation suits now arise.

As the first mode of many-to-many communication, the internet did more than simply blur the distinctions between audience and media or

130. *Id.* at 8.

131. *Id.*

132. *See supra* note 102.

133. Talking Points Memo, http://www.talkingpointsmemo.com/archives/000479.php (Dec. 10, 2002, 11:18pm EDT); Noah Shachtmar, *Blogs Make the Headlines*, WIRED, Dec. 23, 2002, http://www.wired.com/news/culture/0,1284,56978,00.html.

134. Scott Johnson, *The Sixty-First Minute*, POWER LINE, Sept. 9, 2004, http://powerlineblog.com/archives/007760.php; John Borland, *Bloggers Drive Hoax Probe into Bush Memos*, CNET, Sept. 10, 2004, http://news.com.com/Bloggers†rive+hoax¶robe+into£ush+memos/2100-1028_3-5362393.html.

citizen and journalist. It reshaped the way information is shared, challenging the assumptions about the means of mass communication central to the Court's defamation decisions. Because the media no longer provides the sole means of mass communication, and because we can no longer reliably or sensibly define who constitutes the media, the current defamation framework requires reexamination.

IV
SECTION 230: A REFLECTION OF CHANGING CONDITIONS

In 1996, as the internet emerged as a powerful and popular communication tool,[135] Congress enacted a law that shielded providers of "interactive computer services" and their users from liability for publishing defamatory speech created by third parties.[136] Properly interpreted, § 230 demonstrates a rejection of common law doctrine[137] in favor of a rule tailored to current circumstances. As the only instance in which Congress explicitly recognized the need to alter defamation law to accommodate internet speech, § 230 serves as the first, but ultimately inadequate, step toward a treatment of defamation that reflects the exigencies of internet communication.

A. The Origins of Section 230

In the mid-1990s the legislature and the public grew concerned about children's access to objectionable material online.[138] Two distinct approaches to remedying this concern emerged. The first, embodied in a bill that became the Communications Decency Act (CDA), sought to impose steep criminal penalties on those who used the internet to display or transmit indecent material to minors.[139] However, many legislators worried that the federal policing of the internet called for by the CDA would fail to curb

135. A year earlier, in 1995, online dial-up services such as America Online and CompuServe began providing internet access, eventually bringing the internet into millions of American homes. *Nerds 2.0.1 Timeline, 1990-1998*, http://www.pbs.org/opb/nerds2.0.1/timeline/90s.html (last visited Nov. 1, 2005).

136. 47 U.S.C. § 230(c)(1) (1996).

137. At common law "every one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication." KEETON, *supra* note 1, § 133, at 799.

138. Much of this concern can be traced to a July, 1995 TIME MAGAZINE cover story on the dangers of internet pornography. *See* Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38. This story, which made its way to the Senate floor, relied heavily on a flawed study conducted by a Carnegie Mellon undergraduate student that claimed over 80% of the images on the internet were pornographic in nature. Andrew L. Shapiro, *Liebling's Revenge: The Power of Interactivity*, http://www.mediachannel.org/originals/shapiro-liebling.shtml (last visited Apr. 11, 2006).

139. S. 314, 104th Cong. (1996), 47 U.S.C. § 223(a)(1)(B), (d)(1)(A-B) (1997), *invalidated by* Reno v. ACLU, 521 U.S. 844 (1997).

children's access to objectionable content.[140] Moreover, they feared the legislation would interfere with protected speech between adults, endangering the online forum for free discourse then developing.[141] In response to what these legislators saw as the overzealous and unconstitutional tack of the CDA,[142] the House passed the Internet Freedom and Family Empowerment Act,[143] eventually codified in 47 U.S.C. § 230.[144]

With § 230, legislators hoped to reconcile the two seemingly conflicting interests: protecting children from indecent material and preserving the Internet's speech-enhancing characteristics. To spur the market-driven development of filtering tools and self-regulatory policies, § 230 removed a legal stumbling block to voluntary efforts to monitor and regulate content. A developing body of libel case law created uncertain liability for services that monitored and removed content created by others.[145] By attempting to remove or limit potentially defamatory or indecent material available

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140. *See* Elizabeth Corcoran, *Legislation to Curb Smut On-Line Is Introduced*, WASH. POST, July 1, 1995, at F2.

141. As then Speaker of the House Newt Gingrich commented:

> I think that the Amendment . . . by Senator Exon in the Senate will have no real meaning and have no real impact and in fact I don't think will survive. It is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other. I don't agree with it and I don't think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?

Progress Report (National Empowerment Television broadcast), *Gingrich Says CDA is "a clear violation of free speech rights,"* http://www.cdt.org/speech/cda/950620ging_oppose.html (last visited Nov. 1, 2005).

142. Representative Goodlatte urged his colleagues in the House to adopt the Internet Freedom and Family Empowerment Act because unlike the CDA, it "[did not] violate free speech or the right of adults to communicate with each other." 141 CONG. REC. H8460, 8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

143. The Internet Freedom and Family Empowerment Act was also known as the Cox-Wyden Amendment. *Id.*

144. Although the CDA and § 230 offered competing visions, Congress enacted them both. Despite the unconstitutionality of the indecency provisions in the CDA, *see* Reno v. ACLU, 521 U.S. 844, 885 (1997), § 230 remains intact.

145. Two cases motivated Congress' action—*Stratton Oakmont v. Prodigy* and *Cubby v. CompuServe*. In *Stratton Oakmont*, Prodigy, which "held itself out to the public and its members as controlling the content of its computer bulletin boards" and "implemented this control through its automatic software screening program," was held liable for publishing messages posted by others to its computer bulletin boards. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, *10 (N.Y. Super. Ct. 1995). According to the court, the establishment of a monitoring policy designed to limit offensive content exposed Prodigy to libel actions for all 60,000 messages posted to its service each day, regardless of whether Prodigy had actual or constructive knowledge of the libelous posts. *Id.* at *13.

In *Cubby*, the court equated CompuServe's online forums, including electronic bulletin boards, to an "electronic, for-profit library," concluding that while CompuServe might decline to carry a given forum, it had little editorial control over the forum's content once it was accepted. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991). On this basis, the court concluded that CompuServe could only be liable for publication where it had actual or constructive knowledge. *Id.* at 141. The *Cubby* court, however, found no evidence of actual or constructive knowledge triggering such liability. *Id.*

through their services, online service providers exercised the sort of editorial control likely to increase their liability. To eliminate this disincentive, § 230 provided blanket immunity from causes of action stemming from the publication of third-party created content,[146] dramatically altering the law of defamation as a means of stimulating self-regulation for a broad range of objectionable content.

B. The Application of Section 230

Although § 230 avoided the speech-inhibiting pitfalls of the CDA, judicial interpretation of the statute threatened to render it a nullity. Despite unanimous precedent interpreting § 230 immunity broadly, two recent California Court of Appeal decisions have attempted to narrow the application of the statute in a manner inconsistent with the policy goals of the statute.

In *Zeran v. America Online, Inc.*, the first in a long line of cases interpreting § 230 broadly, the Fourth Circuit held that the proper scope of § 230 abrogated all civil liability for the online publication of content authored by third parties.[147] Zeran filed suit after AOL failed to remove messages from its bulletin board—authored by a third party posing as Zeran—that advertised t-shirts mocking the Oklahoma City bombing.[148] AOL argued that § 230 provided immunity for its publication;[149] Zeran contended that § 230 permitted recovery under a theory of "distributor liability."[150] At common law, publishers were subject to strict liability,[151] but distributors, because of their limited editorial control, faced liability only if they possessed knowledge of the defamatory nature of the statement.[152] Since Zeran notified AOL of the posts, he argued it possessed the requisite knowledge.[153]

The court held that § 230 immunized service providers and their users from all liability for the online publication of third party content.[154] The court explained that "publisher"—a term of art in the defamation context[155]—included both primary publishers and distributors, or secondary

146. Section 230 provides in part 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." 47 U.S.C. § 230(c)(1)(2000). The statute's broad immunity did not extend to criminal behavior or to infringements of intellectual property. § 230(d)(1)&(2).

147. 129 F.3d 327 (4th Cir. 1997).

148. *Id.* at 329.

149. *Id.* at 330.

150. *Id.* at 331.

151. *See* PROSSER, *supra* note 25, at 773 ("The effect of this strict liability [for defamatory publications] is to place the printed, written, or spoken, word in the same class with the use of explosives or the keeping of dangerous animals.").

152. RESTATEMENT (SECOND) OF TORTS § 581.

153. *Zeran*, 129 F.3d at 331.

154. *Id.* at 332.

155. KEETON, *supra* note 1, at § 113.

publishers.[156] More importantly, the court reasoned that imposing liability on the basis of actual or constructive knowledge would thwart the self-regulation Congress intended the statute to spur.[157]

Prior to the California Court of Appeal's decision in *Barrett v. Rosenthal*, every court to evaluate § 230 followed *Zeran*.[158] The *Barrett* court parted with the well-established consensus and excluded "distributor liability" from the scope of § 230 immunity.[159]

In *Barrett*, a message authored by a third party and posted by defendant Rosenthal to a Usenet group allegedly defamed Barrett.[160] When Barrett demanded that Rosenthal remove the post, she refused, and Barrett filed suit.[161] Rosenthal then moved for dismissal pursuant to California's Anti-SLAPP[162] statute, relying on immunity under § 230.[163] The Superior Court struck the libel claim, and Barrett appealed.[164]

Abandoning the well-settled interpretation of § 230, the Court of Appeal held that defamation liability premised on actual or constructive knowledge survived the statutory immunity clause.[165] The court, relying heavily on legislative silence[166] and a misconstrual of the statute's

156. "Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers." *Zeran*, 129 F.3d at 332 (quoting KEETON, *supra* note 1, at 803).

157. *Id.* at 333.

158. *See, e.g.,* Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003); Green v. America Online, 318 F.3d 465, 469, 471 (3d Cir. 2003); Ben Ezra, Weinstein, & Co. v. America Online Inc., 206 F.3d 980, 983, 986 (10th Cir. 2000); Smith v. Intercosmos Media Group, Inc., U.S. Dist. LEXIS 24251, *2, 9, 10-11 (E.D. La. 2002); Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); Morrison v. America Online, Inc., 153 F. Supp. 2d 930, 934 (N.D. Ind. 2001); Blumenthal v. Drudge, 992 F. Supp. 44, 51-52 (D.D.C. 1998); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 831, 833 n.10, 835 (Cal. Ct. App. 2002); Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684, 692, 695 n.3, & 696-97 (Cal. Ct. App. 2001); Doe One v. Oliver, 755 A.2d 1000, 1003-04 (Conn. Super. Ct. 2000); Doe v. America Online, Inc., 783 So. 2d 1010, 1012-17 (Fla. 2001); Barrett v. Fonorow, 799 N.E.2d 916, 922-26 (Ill. App. Ct. 2003); Schneider v. Amazon.com, Inc., 31 P.3d 37, 38-41 (Wash. Ct. App. 2001).

159. Barrett v. Rosenthal, 114 Cal. App. 4th 1379, 1410 (2004).

160. *Id.* at 1384.

161. *Id.*

162. California, among other states, enacted a statute to expeditiously strike complaints in "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," also known as strategic lawsuits against public participation (SLAPP). *See* CAL. CODE CIV. PROC. § 425.16.

163. *Barrett*, 114 Cal. App. 4th at 1395.

164. *Id.*

165. *Id.* at 1410.

166. The court inexplicably assumed that the absence of an explicit congressional rejection of the distributor liability standard applied but not satisfied in the *Cubby* case evidenced a congressional intent to retain the secondary publisher (distributor) standard of liability after § 230. *Id.* at 1395.

purpose,[167] contended that immunity from distributor liability could not further the goals of § 230.[168] According to the court, under *Zeran*, "ISPs will not bother to screen their content at all because they will never be subject to liability."[169] Ignoring the purpose of § 230, the court reasoned that imposing liability for "neglecting to monitor information or failing to remove objectionable content that is brought to their knowledge," would provide a strong incentive to regulate content.[170] *Barrett* is currently on appeal before the California Supreme Court.[171]

C. An Incomplete Solution

The arguments for a narrow interpretation of § 230 ignore both the practical fallout of notice-based liability and the Congressional intent to establish additional barriers to liability for the publication of third party content online. The narrowing of immunity called for by *Barrett* creates virtually unchecked incentives for private removal of protected speech.[172]

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167. The court asserted that liability was a necessary incentive for monitoring and removing objectionable content by service providers, despite a clear congressional desire to eliminate such liability as a means to achieve that same end. *See id.* at 1403.

168. *Id.*

169. *Barrett*, 114 Cal. App. 4th at 1403 *(*quoting Sewali K. Patel*,* Note*, Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 684 (2002).

170. *Id*.

171. Barrett v. Rosenthal, 87 P.3d 797 (Cal. 2004).

172. Under a narrowed reading of § 230, the economics of content removal are dispositive. While removing content is free—both in terms of costs and potential exposure—preserving free speech online requires costly investigation, legal analysis, and uncertain liability. This incentive for content removal risks abuse by those who wish to silence critical or unpopular speech, regardless of its truth. By submitting bad-faith notification to a provider, an individual can all but ensure the removal of speech regardless of its truth, reducing the *Barrett* court's liability rule to a heckler's veto.

Given the incentives created by a narrow reading of § 230, reasonable actors will immediately remove allegedly defamatory speech without regard to the merits of the notification. While the considerable costs of investigation, in terms of both actual expenditures and increased liability, weigh heavily in favor of removal, no significant costs are associated with the removal of allegedly defamatory material. Removal requires neither factual inquiry nor legal expertise; nor does removal give rise to potential liability. Section 230 shields providers from liability for their removal of content "whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2). This protection, coupled with the threat of litigation and the high costs of investigation, all but guarantees that providers will remove speech upon notice.

In the United Kingdom, the standard of liability for online defamation is nearly identical to the narrow reading of § 230 announced in *Barrett*. In order to avoid liability, a provider of third party content must show that they "did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement." Defamation Act, 1996, c. 31, § 1(c) (Eng.). In response, the trade association for internet service providers in the UK advises its members to expeditiously remove allegedly defamatory material in order to avoid liability. According to the Internet Service Providers' Association (ISPA) UK's Compliance Guidance Scheme for Online Defamation "[t]here is almost never a good business reason" not to remove allegedly defamatory speech after receiving notice. ISPA UK, *Compliance Guidance Scheme for Online Defamation*, http://www.ispa.org.uk/html/legal_forum/compliance%20guidance%20scheme/040506%20Defamation.html. (last visited April 21, 2006).

Moreover, it reduces § 230 to a merely symbolic congressional gesture by failing to appreciably alter the existing state of the law.[173]

A narrowing of § 230 immunity—despite its inconsistency with statutory text, legislative history, and sound policy—has been recently bolstered by errors published in Wikipedia,[174] a freely editable internet encyclopedia. After journalist and First Amendment advocate John Seigenthaler discovered inaccuracies implicating him in the assassination of Robert Kennedy in a Wikipedia entry,[175] some suggested that Wikipedia should be held liable for the content authored by its users.[176]

After Seigenthaler complained,[177] Wikipedia promptly corrected the gaff, demonstrating precisely why liability for third party content is both unnecessary and antithetical to the further development of many-to-many media. If Wikipedia faced liability for the accidental or malicious misstatements authored by its thousands of users, the vast and unpredictable threat of defamation judgments would undermine the viability of its mission to create a forum in which information is free for all to both consume and produce. Moreover, the ease of correcting false information on sites like Wikipedia[178] signals the need for further adjustments of defamation law in the age of many-to-many communication.

Far from extending too much protection to internet speech, § 230, even broadly construed, offers at best an incomplete solution to the strains on traditional defamation law created by many-to-many communication.

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173. Congress—presumably well aware of the state of defamation law—enacted § 230 as a means of recasting liability for internet publication of third party content. As Representative Cox explained when he introduced the legislation, "what we want are results. We want to make sure we do something that actually works." 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). But if § 230 permits liability premised on actual or constructive knowledge, Congress accomplished almost nothing. The statute would offer little if any additional protection in cases where actual malice is required. Plaintiffs unable to show that the defendant "knew or had reason to know" of the defamatory nature of their publication would likely prove unable to establish actual malice. The subjectivity of the actual malice requirement offers the only ground for distinguishing it from constructive knowledge. Actual malice requires that the "defendant realized that [his] statement was false or that he subjectively entertained serious doubt as to the truth of his statement." Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984). Constructive knowledge imposes an objective rather than subjective test. Given the likely reluctance of a jury to credit a claim that a defendant—who objectively should have known of a statement's falsity—did not subjectively doubt the truth of his publication, this distinction is unlikely to offer much in the way of additional protection. Nor would this cramped interpretation of § 230 appreciably raise the hurdle for private defamation plaintiffs who need only prove negligence. A defendant who is negligent with regard to his publication is necessarily one with "reason to know" of its falsity. Under the *Barrett* court's interpretation of § 230, Congress' effort to reshape defamation on the internet was nearly meaningless.

174. *See* http://en.wikipedia.org/.

175. John Seigenthaler Sr., http://en.wikipedia.org/w/index.php?title=John_Seigenthaler_Sr.&oldid=35321784 (last visited Jan.16, 2006).

176. *See* Posting of Aaron Perzanowski to bIPlog, http://boalt.org/biplog/archives/638 (Dec. 12, 2005, 4:37am) (discussing the viewpoint of Doug Lichtman, as well as others, who make this argument).

177. Seigenthaler, *supra* note 175.

178. *See* Doctorow, *supra* note 20.

While the statute severely cabins liability for publishing libelous comments authored by third parties—offering significant legal protection for bloggers like Aaron Wall[179]—it does not address the larger difficulty of a communications environment that has outgrown the assumptions of the public figure doctrine. That problem implicates not only third party content, but material authored by the defendant as well.

Many-to-many media providers that publish third party content typically provide the greatest opportunity for corrective speech by potential defamation victims. So while § 230 was not crafted to accommodate the counterspeech-facilitating nature of these media, the ease of response associated with them supports the policy outcome of a broad immunity under § 230. Nonetheless, the question of the appropriate standard of liability for the author of a message posted via such a medium remains unanswered. Therefore, if the availability of means of response is to remain a dominant consideration in determining the appropriate barriers to recovery, further changes are necessary to bring defamation jurisprudence in line with technological reality.

V
IMPOSING ACTUAL MALICE ON THE BASIS OF ACCESS TO CORRECTIVE SPEECH

The broad principle motivating § 230—that developments in communication technologies demand refinements in defamation law—extends beyond its application to third party content. The existence of many-to-many modes of communication requires a re-examination not only of liability for content authored by others, but for primary defamation liability as well.

Intuitively, internet communication challenges our notions about the necessity of strong legal protections against defamatory speech. In a case like *Barrett* where the allegedly defamatory speech is posted to a publicly accessible forum, the putative victim's most immediate and effective response is often not to file a lawsuit, but instead to refute the defamer's misstatements. In many instances, the internet offers an ideal vehicle for this sort of counterspeech. Often the victim can respond almost immediately with equal visibility in the same forum, simultaneously addressing both the author and the audience of the defamatory statements, thus preventing or correcting any reputational injury. This sort of counterspeech provides "a day in court that you can have over and over again, and it normally comes cheap,"[180] obviating the need for lawsuits. Furthermore, counterspeech and

179. Seobook, *supra* note 15.

180. MIKE GODWIN, CYBER RIGHTS 89 (2003).

legal rules that encourage it create an environment hospitable to the open debate favored by the First Amendment and promised by the internet.[181]

The potential ease of response offered by internet speech, coupled with the arcane assumptions about the media central to the Court's defamation decisions, leave the current actual malice framework out of step with the realities of modern communication. While a new approach to the constitutional treatment of defamation is necessary, any proposed standard must recognize that although conditions have changed, the ultimate interests at stake remain unaltered. The difficulty in crafting acceptable standards for defamation remains in the balancing of individuals' interests in maintaining reputational integrity against society's interest in free speech. The standard described below attempts to apply the central rationale of the current defamation framework in a manner that can accommodate technological developments, both past and future.

This Part first outlines the basic considerations that comprise the proposed relative access test. Next, it describes the application of the proposed test to a number of hypothetical defamation disputes. Finally, it anticipates some potential criticisms of the relative access test.

A. The Relative Access Test

Rather than imposing the actual malice requirement—demanding that plaintiffs demonstrate that the defendant published with knowledge of falsity or reckless disregard for the truth of a statement—on the basis of status as a public figure, courts should look to the plaintiff's relative access to corrective counterspeech to determine whether the actual malice standard is appropriate.[182] Courts should require actual malice when plaintiffs enjoy access to some means of communication that, when compared to the defendant's publication, are likely to provide an adequate means of response. Unless a substantial imbalance in the parties' abilities to communicate to the relevant audience would prevent self-help, actual malice should be required.

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181. Of course, the ease and effectiveness of self-help varies greatly on the internet. Some internet media lend themselves to corrective speech more so than others. While Usenet, message boards, and blog comments may allow an immediate response visible to the relevant audience, other vehicles of internet speech do not lend themselves to such direct means of correction. Websites like www.nytimes.com—the online counterpart of *The New York Times*—do not typically allow for direct response to their publications. Counterspeech would have to take place in another forum, and given the widespread popularity of the site, only a defamation victim with access to a similarly high traffic internet publication would reasonably be able to counter the false publication. The variation among internet media is accounted for by the test outlined *infra*.

182. Although this proposed standard replaces the public figure test for actual malice, it is not intended to alter the law of defamation in any other respect. It does not limit common law defenses such as truth and opinion, nor is it intended to alter immunity for the publication of third party content established by § 230 or the application of actual malice to lawsuits brought by public officials.

The relative access test I propose is deeply rooted in the Court's defamation jurisprudence. As this Comment contends, the primary justification for requiring heightened standards for recovery in suits brought by public figures is the access to the means of corrective speech those with public status enjoy. But with many-to-many communications, even the average citizen can often respond with equal voice in the marketplace of ideas, obviating the need for special protections from the potential harms of defamation. The negligence standard for defamation recovery, while once necessary to protect citizens from harm, now threatens to function as an unnecessary burden on the free exchange of information. By weighing the impact of defamatory speech against the plaintiff's ability to respond, the relative access standard would limit recovery subject to negligence to those cases where—because of significant inequities between speakers—there are likely to be failures in the marketplace of ideas. Further, such a test not only would look to the plaintiff's status, but also to the power of the defendant. This would eliminate the presumed equality among defamation defendants implicit in the current public figure doctrine, and would allow courts leeway to be more sensitive to context when determining defamation liability standards.

In determining relative access to corrective speech, courts should consider four factors: (1) respective means of communication, (2) relative notoriety, (3) access to the relevant audience, and (4) efforts to engage in or permit counterspeech. These factors, none of which should be dispositive in isolation, would require careful balancing by courts.

First, the court should compare the medium of distribution employed by the defendant to those available to the plaintiff. Disparities in modes of communication present perhaps the most formidable barrier to corrective speech. Alleged defamers with access to traditional means of one-to-many communication such as newspapers or television—because of the pervasiveness and perceived reliability of those media—currently enjoy more influence than defamation plaintiffs whose sole response mechanism is a newsgroup or personal website.[183] This imbalance in favor of the defendant weighs against applying the actual malice standard. Conversely, when the plaintiff's means of counterspeech are more powerful than those of the defendant or when the parties exhibit relative parity in available media, counterspeech presents a more realistic option to counteract reputational harm. Both parties to a dispute over defamatory statements made on a publicly accessible Usenet group, for example, can utilize equivalent forms of communication, thus tipping the scales in favor of the application of actual malice.

183. The current dominance of certain modes of distribution should not enshrine a hierarchy of communications media. Consideration of the means of communication employed by the parties must remain sensitive to the constantly evolving relationship between media.

Since this inquiry is designed to estimate the availability of corrective speech, which invariably occurs after the allegedly defamatory speech, courts should not determine the means of response open to the plaintiff in reference to his capabilities before the defendant's statement or even simultaneously with its publication. Instead, courts should compare the medium employed by the alleged defamer to the plaintiff's post-publication counterspeech options. This distinction will typically prove relevant only when a potentially defamatory publication launches its purported victim from relative obscurity to considerable public attention. Under such circumstances, the court's consideration of pre- rather than post-publication means of response could prove dispositive.[184]

Second, courts should consider the notoriety of both the plaintiff and the defendant. The determination of each party's status under this factor would prove similar to the public figure determination under the current defamation framework. But rather than looking only to the plaintiff's status, this comparative evaluation considers both parties, accounting for the variety of potential defamation defendants. Under this factor, actual malice is appropriate not only when the plaintiff enjoys greater renown or otherwise qualifies as a public figure—for instance when a celebrity brings suit against the operator of a small website—but also when the two parties are of relatively equally public status—think of the typical internet message board flame war.[185] If the defendant's public status greatly overshadows the plaintiff's—consider as an example the falsely accused Olympic bomber Richard Jewell's case against a major newspaper[186]—then this factor would weigh in favor of permitting the negligence standard.[187] Unless the defendant enjoys considerable notoriety advantage, this factor should favor requiring actual malice; otherwise those who qualify as public figures under the current doctrine may escape the actual malice requirement when they bring suit against major media providers.

Relative notoriety is important not only because it helps courts remain cognizant of the widely varying status of parties to defamation suits, but also because it incorporates the other rationale that justifies our current

184. Although the current actual malice framework denies defendants the ability to create their own defense by claiming that their allegedly defamatory publication establishes the plaintiff's public status, *see, e.g.*, Hutchison v. Proxmire, 443 U.S. 111, 135 (1979), the relative access test—both by the point in reference to which response options are measured and by the explicit consideration of the defendant's efforts to encourage counterspeech—allows the defendant's actions to influence the applicability of actual malice.

185. A flame war is a series of "messages that are deliberately hostile and insulting" in an internet discussion group, usenet, or on mailing lists. *See* Flaming, http://en.wikipedia.org/w/index.php?title=Flaming&oldid=41316441 (last visited April 21, 2006).

186. *See generally,* Jewell v. Atlanta Journal-Constitution, 2002 Ga. LEXIS 104 (Ga. 2002).

187. Since the relative access test is meant solely to displace the public figure test, those who qualify as public officials under *Sullivan* would be unable to rely on the greater media presence of their alleged defamers regardless of the limited notoriety of many public officials.

defamation scheme—the voluntary assumption of risk. The current defamation framework reduces protection for those who attain public status on the basis of voluntary exposure to public criticism; similarly, consideration of the parties' relative notoriety increases the plaintiff's burden when she enjoys greater renown.

In addition to the public status of the parties and the forms of media available to them, courts must further consider the parties' access to the relevant audience. To serve its purpose, corrective speech need not reach each and every individual exposed to a defamatory publication. In many cases, the reputational harm suffered by the alleged victim is concentrated among a small subset of the total audience. In large part, access to this relevant audience determines the plaintiff's ability to correct any damage to her reputation. Despite an inability to reach the broad audience of a particular defamatory publication, the plaintiff may have the ability to communicate with the relevant segment of that audience. If the impact of the defendant's statements are likely to harm the plaintiff's reputation only within a limited segment of the audience, and the plaintiff has adequate means of reaching that audience segment, this factor should weigh in favor of actual malice. If, however, the impact of the defamatory statement is not limited to a discrete subset of the population or if the plaintiff has no special access to the relevant subset, this factor militates against requiring actual malice.

Finally, courts must evaluate the significance of any steps taken by the plaintiff to engage in—or the defendant to encourage—corrective speech. A plaintiff's good faith effort to correct the damage caused by the defendant's publication by engaging in self-help should discourage the application of actual malice, while the plaintiff's refusal to tell her side of the story despite an invitation from the defendant should shift the balance toward actual malice. In those cases, however, in which courts permit the lower negligence standard in part because of the plaintiff's self-help efforts, the court should limit recovery to those damages the plaintiff was unable to mitigate.

Additionally, the relative access standard should encourage fairness among both individuals and traditional media providers. Because the test weighs access to means of corrective speech in favor of the defendant, it creates a strong incentive to invite the targets of news reports, blog entries, and Usenet posts to respond. Not only would this practice weigh in favor of actual malice should a suit arise, it gives the defamed an immediate and satisfying method to address her concern. Most importantly, it bestows on the public the benefit of informed discussion.

B. Application of the Relative Access Standard

Basing the application of actual malice on relative access to the means of communication would enable courts to strike the appropriate balance between protecting reputation and free speech in the modern communications environment. By creating a standard that is at once more context-sensitive and less context-dependent, the relative access test balances these competing rights better than the current public figure standard. By moving away from an antiquated test based on the technology of a bygone era toward a standard cast in more general terms, the relative access test avoids the obsolescence problem faced by our current constitutional defamation framework. Given the likelihood of inter-media defamation suits involving parties with varying access to a range of media options, this approach will prove a better long-term solution than either the current public figure doctrine or a carve-out for internet speech.[188] In crafting a solution to the problem created by the *Gertz* Court's dated understanding of media, we must be careful to avoid the same fate. Internet carve-outs themselves are tied to particular technologies and conceptions of communications with limited shelf lives. The more principled solution offered by the relative access test guards against this sort of obsolescence.

The relative access test would alter the current application of the law in precisely those instances most in need of reform. Today, given the complex and varied exchange of information, many private parties wield considerable access to the channels of mass communication. A relative access test would require plaintiffs with sufficient access to the means of response—those who may nonetheless qualify as private figures under the current framework—to demonstrate actual malice regardless of the nature of the issue or the type of damages sought. The relative access standard emphasizes the importance of a level playing field in the battle of public opinion, thus providing the sort of environment most conducive to uninhibited debate.

The current actual malice framework is incapable of distinguishing between defamation defendants. Despite the Court's emphasis on the importance of access to corrective speech in determining the appropriate fault standard, all suits brought by private citizens are subject to the negligence standard whether the defendant is a major media company like *The New York Times* or the poster of a comment on an obscure blog. Because it compares the modes of communication open to the plaintiff and the medium used by the defendant, the relative access test can make such distinctions.

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188. Some commentators propose requiring actual malice when the defamatory messages are published in an open internet forum such as bulletin board systems. *See* Jeremy Stone Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235 (1995).

Consider a hypothetical defamation suit brought by a private figure against a major cable news network, such as Fox News, for falsely accusing the plaintiff and his family of ties to terrorist organizations.[189] Under the current public figure doctrine, this suit—as a constitutional matter—would not require actual malice,[190] and for good reason. A private figure like the plaintiff has little, if any, opportunity to effectively dispute the accusations made by a media outlet with the power of Fox News. In order to protect the private figure's reputation and ensure responsible behavior by the media, the public figure doctrine recognizes the need for a less demanding standard of fault. Under these facts, the relative access test would reach the same conclusion. Because of the vast disparity between the parties' respective abilities to communicate, effective counterspeech by the private plaintiff is highly unlikely. Therefore, actual malice is inappropriate.[191]

Imagine, however, that instead of Fox News, the defamed brought suit against the author of a message board post that contained similar accusations.[192] Again, because of his private status, the public figure doctrine would require the plaintiff merely to prove negligent publication. Although the public figure test imposes the same degree of fault in both instances, in this second scenario the rationale for imposing such a low fault requirement breaks down. The plaintiff—who presumably read the post at

189. Former Fox News contributor and Justice Department prosecutor John Loftus recently read the home address of a California family on the air, claiming that terrorists resided at that address, exposing the family to numerous violent threats. *See* H.G. Reza, *When Blame Knocks on the Wrong Door; Since Fox News Wrongly Identified a La Habra Home as that of a Terrorist, its Five-Member Family has Faced an Angry Backlash*, L.A. TIMES, Aug. 25, 2005, at B3.

190. In fact, under one reading of the Court's *Dun & Bradstreet v. Greenmoss Builders* decision, states may impose strict liability under such circumstances. *See infra* notes 54, 102 and accompanying text.

191. If, instead, Fox News offered the family an opportunity to rebut the charges and they accepted, the relative access test would likely demand a showing of actual malice since the plaintiffs enjoyed access to the same audience through the same medium as a result of Fox's effort to ensure "fair and balanced" reporting. In fact, encouraging this sort of conversation between publishers (whether traditional publishers or internet posters) and potential defamation victims will in many cases prevent the defamatory publication in the first place. Had Fox producers engaged in even the most preliminary discussion with the family in question, they would have likely discovered the reporting error before any damage occurred. Moreover, if Fox insisted on running the story after the family proffered evidence of its falsity, actual malice would not prove difficult to establish.

192. Traditionally, suits brought by private plaintiffs against non-media defendants are uncommon. Nonetheless, changes in both law and technology increase the chances of these suits in the future. The access to the means of mass communication enjoyed by individual internet users increases the likelihood that nonmedia publishers will disseminate information thought to defame potential plaintiffs. The two-way nature of most internet communication increases the likelihood of potentially defamatory exchanges between private parties. Further, because of the potentially large audience for these exchanges, the likelihood of damages significant enough to warrant litigation increases. Finally, because § 230 shields ISPs and other deep-pocketed republishers from liability, non-media entities will often present the only viable option for recovery.

issue[193]—could easily respond to his alleged defamer, correcting the misstatements and likely mitigating much of their harm through a few minutes of typing rather than protracted litigation. Under the relative access test, since both private parties had access to identical means of communicating to the same audience, the plaintiff would be required to demonstrate actual malice. Applied in this fashion, the relative access test would ensure that those acting without actual malice are free to discuss issues of concern regardless of the private nature of the parties involved. It would also encourage those targeted by potentially defamatory speech to engage in discussion rather than hiring a lawyer.

Even when a private plaintiff is the subject of defamatory statements published by a mainstream media source, the relative access test may depart from the public figure doctrine's imposition of the negligence standard. Imagine that *The New York Times* runs a story describing the possible rediscovery of the ivory-billed woodpecker, a species long thought extinct.[194] Further imagine that the *Times* is skeptical of the local Arkansas ornithologist who claims to have located the bird, questions his methodology, and claims that his credentials are fabricated. After publication, the plaintiff—who operates a blog popular within the bird-watching community focusing on ornithological issues—files suit. Under the relative access test, actual malice may prove appropriate despite the apparent disparity of access between the parties. Since the plaintiff's reputation is likely to be injured primarily within the relatively small community of ornithology enthusiasts[195]—an audience not particularly targeted by the *Times*—the plaintiff's blog may offer a significant self-help remedy despite the comparative numerical insignificance of its audience. Certainly, to insist that viable corrective speech requires the ornithologist to communicate with each *New York Times* reader places an impossible burden on self-help. Instead, by limiting the relevant audience to those readers whose opinions contribute directly to the plaintiff's reputation, the relative access test strikes a reasonable balance between the interest in protecting reputational integrity and the practical limitations of corrective speech.

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193. However, he may have read the post long after its initial posting. In this sense, the relative access test does impose some duty to police one's own reputation since the effectiveness of corrective speech will be reduced over time in most cases. Given the effect of delayed response, efforts to purposely conceal a publication from those it may defame should therefore weigh against requiring actual malice under the fourth factor of the relative access test.

194. *See, e.g.*, James Gorman, *Ivory Bill or Not? The Proof Flits Tantalizingly Out of Sight*, N.Y. TIMES, Aug. 30, 2005, at F1; Avi Salzman, *A Scientist, So Sure One Day, Changes His Call the Next*, N.Y. TIMES, Aug. 14, 2005, at 14CN.

195. The relevant audience in this case, of course, also includes the ornithologist's friends, family, and local community. Assuming they read the *Times* article, the plaintiff likely has sufficient access to these audience members to engage in self-help measures. In fact, his access to many of these individuals will be greater than that enjoyed by the *Times.*

Although cases such as this one demonstrate perhaps the most radical departure from the current public figure doctrine, the relative access test proves faithful to the justifications that underlie current protections for defamatory speech, even if it changes the outcome in some subset of cases.

C. Potential Difficulties of Relative Access

The relative access test faces four major criticisms—the first doctrinal and the remaining three practical: (1) it ignores the Court's limitation of actual malice to publications relating to public concerns and controversies, (2) corrective speech is ineffective, (3) the standard is not amenable to summary judgment, and (4) uncertainty resulting from a new standard will chill speech.

The Court has considered the public nature of the issue giving rise to allegedly defamatory speech in two distinct ways. In determining the plaintiff's status as a limited purpose public figure, the Court inquires whether the plaintiff thrust himself into the vortex of a "public controversy."[196] In *Time, Inc. v. Firestone*, for example, the Court ruled that a divorce proceeding between a prominent businessman and his former wife did not constitute a "public controversy." Therefore, the plaintiff ex-wife was not required to demonstrate actual malice in her suit against a magazine publisher for its defamatory coverage of the divorce[197]—despite persistent media coverage and numerous press conferences held by the plaintiff concerning the proceedings.[198]

Additionally, the Court limited the scope of constitutional protection if the issue is not of "public concern."[199] In *Dun & Bradstreet*, the Court held that in suits concerning matters that are not of public concern, punitive and presumed damages require no showing of actual malice.[200]

To the extent the relative access test ignores the public controversy and concern questions, it is inconsistent with the Court's holdings. However, the indifference of the relative access test to issues of public controversy or concern is a virtue rather than a deficiency. These questions are a source of persistent confusion and place courts in the untenable position of deciding which speech is of sufficient societal importance to gain the protection of the actual malice test and which is not.

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196. This language has its origin in Justice Harlan's *Curtis* opinion. *See supra* note 41 and accompanying text.

197. 424 U.S. 448, 453-54 (1976).

198. *Id.* at 485 (Marshall, J., dissenting).

199. Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 125 (1987).

200. Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 763 (1985). *Dun & Bradstreet* arguably left open the possibility of strict liability in suits brought by private plaintiffs over matters of purely private concern. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 3:5 (2d ed. 1999); *cf.* Langvardt, *supra* note 199 (calling this reading "arguable").

Both "public controversy" and "public concern" lack precise definitions.[201] In fact, courts often confuse the two.[202] The Court has never defined a "public controversy" in the context of defamation—explaining only that "a libel defendant must show more than mere newsworthiness."[203] Nor does the Court's explanation that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record"[204] offer courts or litigants any valuable guidance.[205]

Moreover, basing the requirement of actual malice either in whole or in part on a determination of whether the subject matter of a publication is a public controversy would "forc[e] state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—and to determine . . . 'what information is relevant to self-government.'"[206] The *Gertz* Court "doubt[ed] the wisdom of committing this task to the conscience of judges."[207] The task of separating the socially valuable wheat from the prating chaff is one better left to the public than the judiciary. Focusing on the public nature of the issue simply "resurrects the precise difficulties that . . . *Gertz* was designed to avoid."[208] By jettisoning these inquiries, the relative access test allows courts to avoid deciding the murky and dangerous question of the relative value of speech, and instead determine fault standards in a manner that ensures a level playing field for competing ideas.[209]

The effectiveness of corrective speech in mitigating the harmful effect of defamatory speech presents another difficulty. Counterspeech cannot guarantee that victims of defamation will avoid or repair all harm to their reputations. Nor need it. Self-help measures invariably sacrifice efficiency in exchange for protecting other highly valued interests.[210] In the defamation context, while neither monetary compensation nor self-help efforts can fully repair reputational harms, a favorable judgment may provide a more

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201. *See* C.W., Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983) (discussing the ambiguity of "public controversy"); Langvardt, *supra* note 199, at 125-32.

202. *See* C.W, *supra* note 201, at 945.

203. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979).

204. *Dun & Bradstreet*, 472 U.S. at 761 (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

205. *See* Langvardt, *supra* note 199, at 125-32.

206. *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)).

207. *Id.* at 346.

208. *Firestone*, 424 U.S. 448, 487 (1976) (Marshall, J., dissenting).

209. Of course, the public concern inquiry could remain an independent consideration that limits the application of the actual malice requirement. Such an approach would create a two-part test for requiring actual malice. First the court would determine if the issue was of public concern. If so, actual malice would be required unless the plaintiff demonstrated substantial inequality in access to the means of response.

210. *See* Lichtman, *supra* note 78, at 10.

complete recovery for defamation victims than could a self-help remedy. The relative access test tolerates some level of harm to defamation victims—the level of harm that cannot be avoided by corrective speech—in order to encourage free debate. First Amendment jurisprudence presupposes that the truth is most likely to emerge from unfettered discussion. As Learned Hand explained, "to many this is, and always will be, folly; but we have staked upon it our all."[211] If this assumption is well founded, corrective speech offers an effective remedy to those subjected to injurious falsehoods, and as discussed above, studies demonstrate that corrective speech does exhibit some mitigating effect.[212]

Third, although the inquiries required by the relative access test are complicated, they are unlikely to preclude summary judgment. Courts are often expected to dispose of questions of similar complexity at the summary judgment level. Copyright's fair use doctrine,[213] for example, while far from a model of doctrinal clarity, presents a mixed question of law and fact that, nonetheless, can be resolved on summary judgment.[214] Among the seemingly factually intensive factors courts must weigh are the effects of the defendant's use on the market for the product or the value of the plaintiff's work,[215] and the amount and substantiality of the portion of the copyrighted work used by the defendant.[216]

The current actual malice standard is itself one less than ideally calibrated for summary adjudication.[217] But despite the seemingly fact-intensive inquiries required to determine the satisfaction of actual malice, courts frequently manage to decide these suits on summary judgment. States like California have even adopted Anti-SLAPP statutes, which have made an art out of disposing of defamation suits at an early procedural stage.[218] Given courts' demonstrated ability to resolve similarly fact-intensive inquiries at early procedural stages, the introduction of the relative access test proposed here is unlikely to eliminate the availability of summary judgment.

Furthermore, the public figure distinction itself is hardly a simple standard to apply. As one court explained, "[d]efining public figures is

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211. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

212. *See* Calvert & Richards, *supra* note 57.

213. 17 U.S.C. § 107 (2005).

214. Harper & Row, Pub., Inc. v. Nation Enters., Inc., 471 U.S. 539, 560 (1985).

215. § 107(4).

216. § 107(3).

217. Hutchison v. Proxmire, 443 U.S. 111, 120 n.9 (1979) ("The proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition.") (internal citations omitted).

218. CAL. CIV. PROC. CODE § 425.16-17 (West 2006); CAL. CIV. CODE § 47 (West 1998).

much like trying to nail a jellyfish to the wall."[219] Nonetheless, courts routinely decide public figure status on summary judgment. Courts would certainly face some initial difficulty in applying the relative access test, but the questions it presents are no less amenable to summary judgment than questions routinely faced by courts.

Finally, it may be argued that by introducing a new multifactor test for applying actual malice, the relative access approach will introduce uncertainty likely to chill speech. Though the adoption of a new test may initially provoke caution among speakers until the precise contours of the doctrine emerge, any uncertainty arising from the relative access test would likely dissipate quickly. Since the overall shift achieved by this new standard would favor speakers—requiring a showing of actual malice in more instances that the current public figure doctrine—significant chilling of speech is unlikely. In fact, because the relative access test would generally place new burdens on plaintiffs, any resulting uncertainty may chill libel litigation rather than speech.

The transition to a relative access test for defamation would prove challenging. Nonetheless, this test offers significant benefits well worth the growing pains it may induce. As time passes and our communications environment continues to drift further from the one that formed the basis of our current defamation framework, the move to such a test will grow both more necessary and more difficult.

CONCLUSION

The public figure doctrine—the current constitutional framework for determining the applicability of the actual malice standard for defamation—is the product of an increasingly outmoded understanding of the communications environment. Democratization of the means of communication spurred by the internet has called into question the assumptions that informed the Court's formulation of the public figure test. As a result, current First Amendment protections lack the granularity necessary to discriminate between wide varieties of potential defamation defendants.

Conditioning the actual malice requirement on the parties' relative access to corrective speech provides increased sensitivity to variations in circumstance that are likely to arise in today's communications environment. Moreover, the relative access standard does so while remaining faithful to the rationale that initially gave rise to the public figure doctrine: rather than seek to recover monetary damages to repair their reputations, those who are able to meaningfully respond to potentially harmful misstatements are obligated by the First Amendment to seek self-help.

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219. Rosanova v. Playboy Enters., Inc, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd* 580 F.2d 859 (5th Cir. 1978).