

# Freedom of Speech, Defamation, and Injunctions

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FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

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## ABSTRACT

*It has long been a fixture of Anglo-American law that defamation plaintiffs are not entitled to injunctive relief; their remedies are solely monetary. Indeed, it has been repeated as a truism: “equity will not enjoin a libel.” This precept rests on one of the strongest presumptions in First Amendment jurisprudence: that injunctions against libel and other kinds of speech are unconstitutional prior restraints. But it may not be true, at least not anymore.*

*Over the past decade, the Internet has brought increased attention to the adequacy of the remedies available in defamation cases. Prior to the widespread availability of digital publishing, most defamation lawsuits in the United States involved claims against the mass*

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*media. These defendants were amenable, at least in theory, to the threat of large damage awards and had professional and financial interests in maintaining their reputations for accurate reporting. Today, the defendants in defamation cases are more likely to be bloggers or users of social media, such as Facebook and Twitter. For this new crop of defendants, the threat of money damages does not appear to serve the same limiting function on their behavior.*

*Although the Supreme Court has never held that an injunction is a permissible remedy for defamation, the past decade has seen a veritable surge in injunctions directed at defamatory speech, especially speech on the Internet. Despite this surge, courts have not clearly articulated why injunctions are permissible under the First Amendment and consistent with long-standing principles of equity. As a result, many judges—and scholars—remain confused about the availability and proper scope of injunctive relief in defamation cases.*

*This Article challenges the widely held view that defamation law does not countenance injunctions. In doing so, it presents the first comprehensive analysis of more than two centuries of case law. Reviewing these cases, it draws out the rationales, both constitutional and equitable, for the no-injunction rule. The Article concludes that although courts should be cautious when granting injunctions, a limited form of injunctive relief would be constitutional and consistent with equitable principles if it were limited solely to false statements on matters of private concern that a court has found—after full adjudication—are defamatory. It then describes how such a remedy could be structured so that it would be both effective and compatible with the First Amendment.*

## FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

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## INTRODUCTION

It has long been a fixture of Anglo-American law that libel plaintiffs are not entitled to injunctive relief; their remedies are solely monetary.<sup>1</sup> Indeed, it has been repeated as a truism: “equity will not enjoin a libel.”<sup>2</sup> This precept rests on one of the strongest presumptions in First Amendment jurisprudence: that injunctions against libel and other kinds of speech are unconstitutional prior restraints.<sup>3</sup> But it may not be true, at least not anymore.

Over the past decade, the Internet has brought increased attention to the adequacy of the remedies available in defamation cases.<sup>4</sup> Prior to the widespread availability of digital publishing, most defamation lawsuits in the United States involved claims

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1. *See, e.g.*, *Konigsberg v. Time, Inc.*, 288 F. Supp. 989, 989 (S.D.N.Y. 1968) (“To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment ... and to historic principles of equity.”) (internal citations omitted); *Kuhn v. Warner Bros. Pictures*, 29 F. Supp. 800, 801 (S.D.N.Y. 1939) (“The decisions in our State and Federal courts have firmly established the legal principle that no injunction may issue to prevent or stop the publication of a libel.”); *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839) (stating that a court cannot issue an injunction “without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which ... cannot safely be entrusted to any tribunal consistently with the principles of a free government”); *Prudential Assurance Co. v. Knott*, (1875) 10 Ch.App. 142 at 145 (Eng.) (refusing to grant an injunction and stating, that “not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction”). Courts in the United Kingdom began departing from this rule in the late nineteenth century. *See* Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 *BUFF. L. REV.* 655, 708 (2008) (noting that “in 1878 England began cutting back on the traditional no-injunction rule and abandoned it by the end of the century”).

2. 2 *RODNEY A. SMOLLA, LAW OF DEFAMATION* § 9:85 (2d ed. 2012) (“There is a traditional maxim that ‘equity will not enjoin a libel.’”); *see also* 2 *ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 10:6.1 (4th ed. 2010) (“One principle long adhered to in defamation cases is that courts will not enjoin libels.... The absoluteness of the rule is crucial.”); *BRUCE W. SANFORD, LIBEL AND PRIVACY* § 13.3.3A (2d ed. Supp. 2006) (“Because of constitutional law’s antipathy toward prior restraints, courts are rarely willing to consider such injunctions.”).

3. *See infra* Part II.B.

4. Defamation includes both libel, which covers defamatory statements that are written or communicated in such a way that they persist similar to the printed word, and slander, which generally covers defamatory statements published orally or in a manner that is not likely to be preserved in a physical form or broadcast widely. *See* SACK, *supra* note 2, at xliii, §§ 2:4.1-2. The distinctions between the claims are not germane to the present analysis, so this Article uses the general label of defamation.

against the mass media. These defendants were amenable, at least in theory, to the threat of large damage awards and had professional and financial interests in maintaining their reputations for accurate reporting. Today, the defendants in defamation cases are more likely to be bloggers or users of social media, such as Facebook and Twitter. For this new crop of defendants, the threat of money damages does not appear to serve the same limiting function on their online behavior.

Not surprisingly, the so-called “no-injunction rule”—which essentially says that judges cannot prevent reputational harms that arise from defamatory falsehoods, and that they may order only money damages after the harms occur—has faced considerable criticism. As Professor Douglas Laycock observed, such a rule “sounds absurd to people who are neither lawyers nor economists.”<sup>5</sup> And even to many lawyers, the no-injunction rule often seems illogical.<sup>6</sup>

Although the Supreme Court has never held that an injunction is a permissible remedy in a defamation action, the past decade has seen a veritable surge in injunctions directed at defamatory speech, especially speech on the Internet.<sup>7</sup> Despite this surge, courts have not clearly articulated why injunctions are permissible under the First Amendment and consistent with long-standing principles of equity. As a result, many judges remain confused about the availability—and proper scope—of injunctive relief in defamation cases. In a number of cases, for example, judges have issued astonishingly broad injunctions, including injunctions that ordered defendants to never again mention the plaintiff’s name,<sup>8</sup> or to

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5. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* viii (1991). This view is not entirely surprising, given that many speech-protective doctrines strike the layperson as irrational; freedom of expression “does not come naturally to the ordinary citizen, but needs to be learned.” THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 12 (1970).

6. See, e.g., LAYCOCK, *supra* note 5, at 164-65; William O. Bertlesman, *Injunctions Against Speech and Writing: A Re-Evaluation*, 59 KY. L.J. 319, 323 (1971); George E. Frasier, *An Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504, 508-09 (1968); Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 BROOK. L. REV. 231, 262-63 (1982); Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115, 118-21 (1923); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 648 (1916).

7. See *infra* Part III.

8. See, e.g., *Baker v. Haiti-Observateur Group*, No. 12-CV-23300-UU (S.D. Fla. Feb. 6,

remove entire websites because a single page contained defamatory content.<sup>9</sup> Such injunctions raise obvious problems under the First Amendment's prior restraint doctrine, yet these judges seem oblivious to the constitutional ramifications of their orders, viewing injunctive relief as just another remedy available to tort plaintiffs.

As Professor Eugene Volokh recently remarked, uncertainty about the availability of injunctive relief in defamation cases is one of the most important issues in First Amendment law today.<sup>10</sup> It is an issue, however, that has not received significant attention by legal scholars.<sup>11</sup>

This Article aims to rectify this deficiency by analyzing more than two centuries of case law involving injunctions in defamation cases. In reviewing the cases, it identifies the rationales, both constitutional and equitable, for the no-injunction rule. It also argues that in some circumstances, the rule ought to be put aside so that a court can issue a narrowly tailored injunction to prevent further harm to

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2013) (order granting permanent injunction), *vacated*, Baker v. Joseph, No. 12-CV-23300-UU, 2013 WL 1458665 (S.D. Fla. Apr. 9, 2013); Eppley v. Iacovelli, No. 1:09-CV-386-SEB-JMS, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009) (entry granting preliminary injunction); Cochran v. Tory, No. BC239405, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002) (granting permanent injunction), *vacated*, 544 U.S. 734 (2005); Apex Tech. Grp., Inc. v. Doe, No. MID-L-7878-09 (N.J. Super. Ct. Law Div. Dec. 23, 2009) (order granting preliminary injunction).

9. See, e.g., *Bluemile, Inc. v. Yourcolo, LLC*, No. 2:11-CV-497, 2011 U.S. Dist. LEXIS 62178, at \*5 (S.D. Ohio June 10, 2011); *In re Davis*, 334 B.R. 874, 889 (Bankr. W.D. Ky. 2005), *rev'd in part*, 347 B.R. 607 (W.D. Ky. 2006); *Burfoot v. May4thCounts.com*, No. CL10-2735 (Va. Cir. Ct. Apr. 21, 2010), *withdrawn*, 80 Va. Cir. 306 (Apr. 22, 2010).

10. Eugene Volokh, Oral Statement at the Association of American Law Schools' Section on Defamation and Privacy (Jan. 5, 2013).

11. Professor Volokh offered some insight into the issue in his influential work with Mark Lemley on injunctions in intellectual property cases, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 176-77 (1998) (arguing that the rule against preliminary injunctions in defamation actions should apply in copyright, trademark, right of publicity, and trade secret cases), as have a few other scholars, who have examined various aspects of the no-injunction rule. See Bertlesman, *supra* note 6, at 320 (explaining that equity has failed to result in just outcomes in defamation law); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 166-67 (2007) (expressing the belief that injunctions are unconstitutional prior restraints); Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087-88 (2001) (criticizing the Supreme Court for failing to define prior restraints); Siegel, *supra* note 1, at 663 (exploring the history of civil and criminal liability for defamation and the origins of the prior restraint doctrine); Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 2-3 (2000) (detailing the confusion in the Supreme Court's jurisprudence regarding injunctions).

a plaintiff who is suffering continuing injury from defamatory speech. In addition, it addresses the vexing question of whether an injunction directed at defamatory speech online has any chance of actually being an effective remedy.

In our increasingly networked world, defamatory speech may be beyond the power of a court to enjoin.<sup>12</sup> All speech now has digital echoes, whether neighborhood gossip shared on Facebook, archived news articles indexed and searchable through Google, or snippets of broadcast footage redistributed on YouTube. As Justice Thurgood Marshall remarked in the Pentagon Papers case, “A court of equity will not do a useless thing.”<sup>13</sup> Perhaps a court order enjoining the continuation of a press run might have been effective at preventing the spread of defamatory speech in a pre-Internet world, but speech now radiates—and persists—in ways that would have been unimaginable only a quarter century ago.<sup>14</sup>

Part I begins by examining the remedies available to plaintiffs in defamation cases, finding that there is frequently a gap between what plaintiffs want and what they can realistically achieve. For nearly all defamation plaintiffs, their only available remedy is monetary damages. But money is not what these plaintiffs want most. They want vindication, and they want the defendant to stop

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12. See David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 314 (2010) [hereinafter Ardia, *Reputation in a Networked World*] (noting that judicial remedies are largely ineffective at dealing with reputational harms).

13. N.Y. Times Co. v. United States, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) (rejecting the government’s efforts to enjoin *The New York Times* and *The Washington Post* from publishing a classified study of U.S. military involvement in Vietnam).

14. The recent dispute in the United Kingdom over a “super injunction” issued against British media companies ordering them not to identify or report on a famous soccer player who was allegedly having an extramarital affair with a reality television star illustrates the ineffectiveness of these injunctions. See Peter Preston, *Twitter and Wikileaks Have Made A Mockery of the Courts*, THE OBSERVER (May 22, 2011), <http://www.guardian.co.uk/media/2011/may/22/twitter-wikileaks-mockery-of-the-courts>. As *The New York Times* reported, “[T]ens of thousands of Internet users have flouted the injunction by revealing his name on Twitter, Facebook and online soccer forums, sites that blur the definition of the press and are virtually impossible to police.” Claire Cain Miller & Ravi Somaiya, *Free Speech on Twitter Faces Test*, N.Y. TIMES, May 23, 2011, at B1. Citing the ineffectiveness of the injunction, a British Member of Parliament mentioned the player’s name, Ryan Giggs, on the floor of Parliament, and British media outlets were then free to report it. See Eben Harrell, *The Great British Battle Between Privacy and the Press*, TIME (May 24, 2011), <http://www.time.com/time/world/article/0,8599,2073851,00.html>.



defaming them. Yet as recent cases show, those goals can be elusive, especially when the defamatory speech is disseminated on the Internet.

Part II explores the historical antecedents for the no-injunction rule and identifies the reasons courts initially adopted—and continue to invoke—the rule. A survey of more than 242 defamation decisions reveals that the no-injunction rule is based on both constitutional and equitable concerns about the power of government to silence speech. Modern courts most often cite the First Amendment’s prior restraint doctrine as a reason to deny injunctive relief, but the no-injunction rule was firmly ingrained in Anglo-American law long before the U.S. Constitution was ratified. Although the First Amendment has a lot to say on the question of injunctions in speech cases, the no-injunction rule is also based on, among other rationales, respect for the role of juries in free speech controversies, a general preference for legal rather than equitable remedies, and skepticism about the effectiveness of speech injunctions.

Nevertheless, as Part III shows, judges have increasingly granted injunctions in defamation cases, often without considering their constitutionality or consistency with long-standing principles of equity. A review of the case law reveals that at least fifty-six decisions have granted or affirmed an injunction directed at defamatory speech, with an especially sharp increase in such cases after 2000.<sup>15</sup> Although the number of injunctions is still small relative to the total number of cases in which injunctive relief is requested, a more permissive attitude toward injunctions is clearly emerging. Described by some courts as the “modern approach,”<sup>16</sup> they take the view that judges may order injunctive relief if there

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15. Of the fifty-six decisions granting or affirming injunctive relief, thirty-one were issued after January 1, 2000. *See infra* note 189. This follows the trend other scholars have noted with regard to the granting of injunctions generally, which appears to have increased throughout the twentieth century. *See* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 347 (1981) (“[C]ontemporary judges grant more injunctions than their predecessors.”); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 996 (1965) (“The expanding role of the injunction is partly due to the attractiveness of so flexible a remedy in a modern society with expanding regulation of complex economic and social affairs.”).

16. *See, e.g.*, *Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1160 (D.N.M. 2012); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 306 (Ky. 2010).

has been a finding of defamation and the injunction is limited to speech adjudged to be defamatory. Part III scrutinizes the decisions granting or affirming injunctive relief and develops a taxonomy for evaluating whether the injunctions are narrowly tailored, finding that in more than three-quarters of the decisions, courts issued an injunction that restrained speech that had not been found to be defamatory.

Part IV concludes by considering whether the no-injunction rule still makes sense today. It proposes that, although courts should continue to remain cautious when granting injunctions, a limited form of injunctive relief would be constitutional and consistent with equitable principles if it were limited solely to false statements on matters of private concern that a court has found—after full adjudication—are defamatory. It then describes how such a remedy might be structured so that it would be both effective and compatible with the First Amendment.

### I. REPUTATIONAL HARMS AND EQUITABLE REMEDIES

When an individual or organization believes its reputation has been harmed, a common response is to file a defamation lawsuit. Defamation, which encompasses both libel and slander,<sup>17</sup> is a dignitary tort directed at remedying harm to a plaintiff's reputation caused by false statements of fact.<sup>18</sup> As a product of state law, the elements of a defamation claim vary, but generally a plaintiff must prove that the defendant published a false and defamatory statement concerning the plaintiff to a third party; that the defendant acted negligently or with actual malice when publishing the statement; and that the statement is actionable, either because it caused special harm, *per quod*, or irrespective of special harm, *per se*.<sup>19</sup>

Although this may seem like a straightforward cause of action, defamation lawsuits are complex and difficult for plaintiffs to win.<sup>20</sup>

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17. See generally *supra* note 4 (defining defamation).

18. See Ardia, *Reputation in a Networked World*, *supra* note 12, at 277-78.

19. See RESTATEMENT (SECOND) OF TORTS § 558 (1977); see also discussion *infra* Part IV.A.1.

20. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488-90 (1991); Ardia, *Reputation in a Networked World*, *supra* note 12, at 304-05; Lyriisa Barnett

Moreover, defamation law does not impose liability for every statement that harms reputation. The law places a number of obstacles in the path of an aggrieved plaintiff.<sup>21</sup> And even if the plaintiff succeeds in the end, her victory is often pyrrhic. As discussed throughout this Article, defamation plaintiffs are typically entitled only to money damages. But money is not what many plaintiffs want most.<sup>22</sup>

### A. *The Changing Face of Defamation Litigation*

Although defamation is one of the oldest torts in the common law,<sup>23</sup> it has not been static. In the 1960s, the Supreme Court constitutionalized the tort of defamation by proclaiming that even false speech was deserving of some First Amendment protection.<sup>24</sup> This led to extensive substantive and procedural changes, imposed by the Court to ensure that speakers have the “breathing space” they need to engage in robust public discourse.<sup>25</sup> For example, the Court requires defamation plaintiffs to prove, in addition to falsity,<sup>26</sup> that the defendant was at fault when he published a defamatory statement.<sup>27</sup> More recently, defamation law took on a decidedly

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Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 4 (1996); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 520 (2001).

21. See Ardia, *Reputation in a Networked World*, *supra* note 12, at 314-15.

22. See *infra* notes 54-55 and accompanying text.

23. See NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 3 (1986) (“The common law crime of libel can claim a long and broad ... ancestry.”).

24. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964).

25. *Id.* at 271-72 (“[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive.’”) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

26. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986).

27. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (requiring that private figures in matters of public concern must prove at least negligence on the part of the defendant); *Sullivan*, 376 U.S. at 279-80 (requiring that public officials suing for libel prove that the defendant acted with actual malice). It remains an open question whether the First Amendment requires that private figures *in matters of private concern* must prove falsity and at least negligence on the part of the defendant. See Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM. L. & POL’Y 1, 34-39 (2009) (discussing the confusion on this issue and arguing that private figures should be required to prove at least negligence in all cases).

medium-specific aspect when Congress passed § 230 of the Communications Decency Act, which granted operators and users of websites and other interactive computer services broad protection from defamation claims based on the speech of third parties.<sup>28</sup>

Not only has defamation law undergone doctrinal evolution, the nature of defamation litigation has also changed. In the 1980s, 70 percent of all libel actions in the United States involved claims against the mass media.<sup>29</sup> Today, bloggers, users of social media, and “citizen journalists” are more often the targets of defamation claims.<sup>30</sup> In fact, so few defamation cases have been filed against the mass media in the past five years that several of the nation’s leading media lawyers have suggested that libel law is dead.<sup>31</sup> For example, George Freeman, vice president and assistant general counsel at *The New York Times*, says that for the first time in his twenty-nine years at the *Times* there are no active domestic libel suits.<sup>32</sup>

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28. Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137-38 (codified as amended at 47 U.S.C. § 230). In deceptively simple language, section 230 of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2006); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379 (2010) [hereinafter Ardia, *Intermediary Immunity*]. The impact of section 230 is discussed *infra* Part I.B.

29. See DONALD M. GILLMOR, *POWER, PUBLICITY AND THE ABUSE OF LIBEL LAW* 133 (1992). It is exceedingly difficult to find and catalog every defamation case filed; as a result, assessments of the total number of such suits can only be approximations. Many lawsuits do not result in published decisions, nor do they appear in the news.

30. See, e.g., Dan Frosch, *Venting Online, Consumers Can Land in Court*, N.Y. TIMES, June 1, 2010, at A1; Debra Cassens Weiss, *As Sites Like Yelp Increase in Popularity, More Consumers Get Sued for Defamation*, ABA JOURNAL (Dec. 6, 2012, 6:30 AM), [http://www.abajournal.com/news/article/as\\_sites\\_like\\_yelp\\_increase\\_in\\_popularity\\_more\\_consumers\\_get\\_sued\\_for\\_defam/](http://www.abajournal.com/news/article/as_sites_like_yelp_increase_in_popularity_more_consumers_get_sued_for_defam/).

31. See John Koblin, *The End of Libel?*, THE NEW YORK OBSERVER (June 9, 2010, 1:23 AM), <http://observer.com/2010/06/the-end-of-libel/> (quoting prominent First Amendment attorney Floyd Abrams, Time Inc. general counsel Robin Bierstedt, and *New York Times* assistant general counsel George Freeman). But see Eric P. Robinson, *The End of Libel? Or Just Libel Trials?*, BLOG L. ONLINE (June 11, 2010), <http://bloglawonline.blogspot.com/2010/06/end-of-libel-or-just-libel-trials.html> (stating that focusing on lawsuits pending against media companies is not an accurate indication of the total number of libel cases).

32. Koblin, *supra* note 31.

Although there are no comprehensive studies of defamation litigation in the United States,<sup>33</sup> anecdotal evidence indicates that defamation claims are actually increasing.<sup>34</sup> This is because plaintiffs are filing their lawsuits against a different type of publisher. Media lawyers who represent or study online publishers have seen a substantial increase in libel lawsuits filed against bloggers and users of social media. A database of libel lawsuits against bloggers maintained by the Media Law Resource Center, for example, revealed a 216 percent increase in cases filed between 2006 and 2009.<sup>35</sup> And in a 2008 study at Harvard's Berkman Center for Internet & Society, researchers cataloged more than 280 civil lawsuits that had been filed in the previous ten years against bloggers and other online publishers, ranging from copyright infringement claims against celebrity-gossip bloggers to defamation claims against operators of hyper-local journalism sites.<sup>36</sup>

It is not just the defendants who are different in today's defamation cases. There also has been a shift in the types of plaintiffs who are filing defamation claims. In past decades, the typical defamation plaintiff was a public official or public figure.<sup>37</sup> This makes intuitive

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33. Several researchers have done limited empirical studies, primarily in the 1970s and 1980s. See RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 4-5 (1987) [hereinafter BEZANSON ET AL., *LIBEL LAW AND THE PRESS*]; Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 226-27 (1985) [hereinafter Bezanson, *Libel Law and the Realities of Libel Litigation*]; Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 798, 829-31 (1981) [hereinafter Franklin, *Suing Media for Libel*]; Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 459, 497-501 [hereinafter Franklin, *Winners and Losers and Why*].

34. See, e.g., Frosch, *supra* note 30, at A1; David Ardia, *Bloggers and Other Online Publishers Face Increasing Legal Threats*, POYNTER (Sept. 22, 2008, 11:19 AM), <http://www.poynter.org/latest-news/top-stories/91639/bloggers-and-other-online-publishers-face-increasing-legal-threats/> [hereinafter Ardia, *Legal Threats*]; *Defamation Lawsuits Abound*, LAWYERS.COM (2011), <http://communications-media.lawyers.com/libel-slander-defamation/Defamation-Lawsuits-Abound.html> (last visited Sept. 21, 2013).

35. See James C. Goodale, *Communication and Media Law: Can You Say Anything You Want on the Net?*, 242 N.Y. L.J. 3, 3 (2009) (reporting on the MLRC data). A similar increase in lawsuits also appears to be occurring outside the United States. See *Online Defamation Cases in England and Wales 'Double,'* BBC NEWS UK (Aug. 26, 2011, 1:03 PM), <http://www.bbc.co.uk/news/uk-14684620> ("The number of court cases brought by people who say they have been defamed online has more than doubled in a year.").

36. See Ardia, *Legal Threats*, *supra* note 34.

37. See Franklin, *Suing Media for Libel*, *supra* note 33, at 798-99, 807 (finding that of 291 reported libel cases filed against the media between 1977 and 1980, more than two-thirds of

sense; media companies tend to report on individuals and organizations that are prominent in society. When this reporting impugns their reputation, such parties typically have the financial resources and access to legal counsel necessary to bring a defamation claim against a well-financed media company.

Today, given the ease with which information is published and shared online, many defamation plaintiffs are not so well known. They are what defamation law calls private figures.<sup>38</sup> They are plaintiffs like Kirk Burbage, who filed a defamation lawsuit against his brother Chad for creating a website with the family name and falsely stating that Kirk had abused their mother and fraudulently secured an undeserved inheritance,<sup>39</sup> and Edward Saadi, a Lebanese-American lawyer who sued the creator of a blog called “Biggest Losers” [sic] for falsely stating, among other things, that he was “mentally unstable” and a “criminal.”<sup>40</sup>

Although these private figure plaintiffs are more likely to win their defamation cases because, unlike public officials and public figures, they do not shoulder the heavy burden of proving that the defendant acted with actual malice,<sup>41</sup> they still face the hard reality

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the identifiable plaintiffs were public officials, business managers, government employees, professionals, or commercial corporations).

38. See Walden & Silver, *supra* note 27, at 3 (observing that private figure defamation cases “account for a significant proportion of the defamation suits filed each year”). Private figures are those who are not public figures, and public figures are determined by reference to “the notoriety of their achievements or the vigor and success with which they seek the public’s attention.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). A person “may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” or may only be “a public figure for a limited range of issues.” *Id.* at 351.

39. See *Burbage v. Burbage*, No. 03-09-00704-CV, 2011 WL 6756979, at \*1-2 (Tex. App. Dec. 21, 2011). A jury awarded Mr. Burbage nearly \$10,000,000 in compensatory and exemplary damages, and the trial court permanently enjoined his brother from publishing statements like those at issue in the suit. *Id.*

40. *Saadi v. Maroun*, No. 8:07-CV-1976-T-24-MAP, 2008 WL 4194824, at \*2 (M.D. Fla. Sept. 9, 2008). The jury returned a verdict in favor of Mr. Saadi on all counts of his defamation claim and awarded him \$30,000 in compensatory damages and \$60,000 in punitive damages. See *Saadi v. Maroun*, No. 8:07-CV-01976-T-24-MAP, 2009 WL 3617788, at \*1 (M.D. Fla. Nov. 2, 2009). The judge then granted Mr. Saadi’s motion for a permanent injunction, ordering the defendant to remove certain Internet postings about the plaintiff that the jury found were defamatory. *Id.* at \*3.

41. A finding of actual malice requires proof that the defendant published the defamatory statement with “knowledge that it was false or with reckless disregard of whether it was false or not.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). There are no comprehensive studies of the success rates of different types of plaintiffs in defamation cases.



that their legal remedies are limited. Mr. Burbage and Mr. Saadi both succeeded in convincing a jury to impose liability. Both won thousands of dollars in damages, yet they still sought injunctions ordering the defendants to remove the defamatory statements from the Internet and to refrain from making similar statements in the future. Trial judges in both cases granted this relief, but the Texas Court of Appeals overturned the injunction in Mr. Burbage's case, concluding that "defamatory speech is not sufficiently injurious to warrant prior restraint."<sup>42</sup>

### *B. Irreparable Injuries and Inadequate Remedies*

Tort law aspires to provide plaintiffs with a complete remedy for every injury.<sup>43</sup> The remedies available to a specific plaintiff, however, will vary depending on the nature of her claims.<sup>44</sup> According to one of the leading treatises on remedies, "The two most common remedies are judgments that plaintiffs are entitled to collect sums of money from defendants and orders to defendants to refrain from their wrongful conduct or to undo its consequences."<sup>45</sup> Most tort plaintiffs request money in the form of compensatory and punitive damages, which are considered to be "legal remedies."<sup>46</sup> When a plaintiff asks the court to order the defendant to refrain from specified conduct or to perform an affirmative act, she seeks an "equitable remedy."<sup>47</sup>

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Nevertheless, in an analysis of defamation and related claims filed against "media defendants" between 1980 and 1996, Professor David Logan found that claims brought by plaintiffs who were public figures or public officials were dismissed at a very high rate of 85 percent. *See* Logan, *supra* note 20, at 509-10. In that same study, private figure plaintiffs did nearly 20 percent better in avoiding dismissal. *See id.* at 510.

42. *Burbage*, 2011 WL 6756979, at \*10. The Texas Court of Appeals did, however, leave the jury award intact. *Id.*

43. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 1.9, at 43 (2d ed. 1993) (noting that courts seek to "make whole all relevant legal harm").

44. "A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (3d ed. 2002).

45. *See id.*

46. BLACK'S LAW DICTIONARY 979, 1407-08 (9th ed. 2009) ("A remedy historically available in a court of law, as distinguished from a remedy historically available only in equity.").

47. Equitable remedies include specific performance, partition, quiet title, trusts, guardianship, and injunctions. *See* Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1643-44 (1992).

Naturally, a remedy that prevents harm altogether is the most complete remedy for a plaintiff. For that reason, plaintiffs often request an injunction, “equity’s premier remedy,”<sup>48</sup> in addition to money damages. Unlike compensatory damage awards, however, which plaintiffs are entitled to upon presenting adequate proof of liability, plaintiffs have no right to an injunction: “the grant of an injunction is always discretionary with the court, and in each case the injunction order, if granted, will be tailored to arrive at an equitable result under the circumstances.”<sup>49</sup> Moreover, under general principles of equity a judge must first “determine the adequacy of a remedy in law before resorting to equitable relief.”<sup>50</sup> If a court believes that money damages provide an adequate remedy, it will not consider granting an injunction.<sup>51</sup>

Given the law’s preference for legal remedies, there is often a gap between what plaintiffs want and what is available to them. The no-injunction rule widens this gap in defamation cases by making the general preference for money damages a veritable edict.<sup>52</sup> As a result, money damages are typically the only remedy available to defamation plaintiffs.<sup>53</sup> Yet research has shown that money is not what defamation plaintiffs want most. A study conducted in the 1980s by Professor Randall Bezanson found that only 20 percent of plaintiffs sued to obtain money as compensation for their reputational harms.<sup>54</sup> Instead, Professor Bezanson’s research

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48. *Id.* (“The injunction is modern equity’s premier remedy; it began in obscurity, dividing business between two courts and protecting property, grew into bumptious adolescence as a tool for enterprise to wield against its employees, and achieved the present stage of its growth facilitating judges’ efforts to assure constitutional rights.”). The term “injunction” encompasses any “court order commanding or preventing an action.” BLACK’S LAW DICTIONARY 855 (9th ed. 2009). This includes temporary restraining orders, preliminary injunctions, permanent injunctions, and similar court orders directed at expressive conduct. *See id.*

49. Monica E. McFadden, *Provisional and Extraordinary Remedies*, 2 LITIGATING TORT CASES § 13:3 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2012) (citing *Bhd. of Locomotive Eng’rs v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960)).

50. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

51. *See id.*

52. *See infra* Part II.

53. A plaintiff can, of course, negotiate a retraction or correction as part of a settlement of the case. The few studies, however, that have looked at settlement rates in defamation litigation found that defamation cases rarely end in settlement. *See Bezanson, Libel Law and the Realities of Litigation*, *supra* note 33, at 228 (reporting that approximately 15 percent of libel cases settle).

54. *Id.*



revealed that what libel plaintiffs desire most is a correction or retraction.<sup>55</sup>

The irony for those who suffer reputational harm is that money is an especially inadequate remedy for defamation. This is because reputational injuries are not readily translatable into monetary relief; money can neither restore a diminished reputation nor make a plaintiff's emotional distress go away.<sup>56</sup> Furthermore, because of the procedural protections available to libel defendants,<sup>57</sup> a plaintiff must incur substantial legal costs to see a defamation lawsuit through to completion, but "[v]ery few libel plaintiffs suffer enough provable pecuniary loss to justify litigating" their case.<sup>58</sup>

The inadequacy of monetary damages is made all the more apparent when defamatory speech is published online. In our increasingly networked world, online speech invariably passes through the hands of countless intermediaries who distribute, host, and index the billions of webpages, e-mails, and social media posts that make up our digital lives.<sup>59</sup> These intermediaries, however, are largely immune from defamation liability because of § 230 of the Communications Decency Act,<sup>60</sup> which grants operators of websites and other interactive computer services broad protection from defamation claims based on the speech of third parties,<sup>61</sup> including protection from injunctive relief.<sup>62</sup>

This leaves defamation plaintiffs in the unenviable position of being able to sue only the initial speaker or publisher of the

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55. BEZANSON ET AL., *LIBEL LAW AND THE PRESS*, *supra* note 33, at 24 (finding that 71 percent of the plaintiffs said they would have been satisfied with a correction or retraction).

56. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 944 cmt. b (1977) (commenting that money cannot compensate for loss of "personal reputation"); LAYCOCK, *supra* note 5, at 165 ("Both because the thing lost is irreplaceable and because the loss is hard to measure, damages are a seriously inadequate remedy for defamation.").

57. *See infra* Part II.B.2.

58. Anderson, *supra* note 20, at 542.

59. *See* Ardia, *Intermediary Immunity*, *supra* note 28, at 383-84.

60. 47 U.S.C. § 230 (2006).

61. *See* Ardia, *Intermediary Immunity*, *supra* note 28, at 409-12.

62. *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 983 (10th Cir. 2000); Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 781 (Cal. Ct. App. 2001). *But see* Giordano v. Romeo, No. 09-68539-CA-25, 2010 BL 318373, at \*1-2 (Fla. Cir. Ct. Dec. 28, 2010) (granting temporary restraining order directed at website operator), *withdrawn*, No. 09-68539-CA-25, (Fla. Cir. Ct. Feb. 18, 2011) (dismissing claim against website operator under section 230).

defamatory speech, even when an online content provider such as Facebook or Google is continuing to make the information available to others.<sup>63</sup> Unless these online intermediaries voluntarily remove the defamatory speech, a court cannot force them to do so.<sup>64</sup> As a result, injurious falsehoods can live indefinitely on the Internet, waiting to be pulled up and recycled by a search engine.<sup>65</sup> Even for those plaintiffs who ultimately achieve some legal vindication, the genie cannot be fully put back into the bottle.

Perhaps in the days when media companies made up the majority of defendants in defamation cases, a plaintiff's need for injunctive relief was less acute. Pre-Internet communications technology provided a relatively ephemeral stream of information from the media. Newspapers had a shelf life of fewer than twenty-four hours.

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63. See 47 U.S.C. § 230. There are a number of policy reasons section 230 protects online intermediaries. See, e.g., Ardia, *Intermediary Immunity*, *supra* note 28, at 389-92 (discussing how section 230 reduces the likelihood that online intermediaries will excessively censor speech of their users); Eric Goldman, *The Regulation of Reputational Information*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293 (Berin Szoka & Adam Marcus eds., 2010) (“[C]onsumer review websites can motivate consumers to share their opinions and then publish those opinions widely—as determined by marketplace mechanisms (i.e., the tertiary invisible hand), not concerns about legal liability.”); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 395-96 (2008) (“[I]ndirect liability reduces incentives to develop self-help technology, such as location or identity tracking software and user-end filters, the development of which was one of § 230’s primary policy goals.”). But see Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1002-05 (2008) (concluding that section 230’s blanket immunity for intermediaries fails to take into account circumstances in which the relative interests and incentives of speakers and intermediaries justifies imposing responsibility on the intermediary); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 330-31, 340 (2011) (arguing that intermediaries should not receive immunity when they are acting with the incentives of an original speaker or when the form of liability at issue is uniquely applicable to intermediaries rather than original speakers).

64. See, e.g., *Bobolas v. Does*, No. CV-10-2056-PHX-DGC, 2010 WL 3923880, at \*2 (D. Ariz. Oct. 1, 2010) (refusing to enjoin GoDaddy.com because it was not an agent of the defendant); *Blockowicz v. Williams*, 675 F. Supp. 2d 912, 915-16 (N.D. Ill. 2009) (refusing to enjoin third-party website operator under FED. R. CIV. P. 65), *aff’d*, 630 F.3d 583 (7th Cir. 2010).

65. The largest of these online repositories is the Internet Archive, a non-profit digital library that contains over 240 billion web pages archived from 1996 onward. See INTERNET ARMING: WAYBACK MACHINE, <http://www.archive.org/web/web.php> (last visited Sept. 21, 2013). As part of its indexing process, Google Search maintains cached versions of web pages for an indeterminate period. See RAYMOND T. NIMMER, INFORMATION LAW § 4:77 (2006 & Supp. 2012).

Broadcasts simply disappeared into the ether. Although some media sources were physically archived in libraries—or later in proprietary electronic databases—defamatory statements did not persist or remain in the public’s view for very long. Today, the lifespan of a defamatory statement is essentially infinite.

Not surprisingly, defamation plaintiffs are frustrated with the remedies available to them. And as Part III of this Article reveals, so are many judges.

## II. THE NO-INJUNCTION RULE IN DEFAMATION CASES

The no-injunction rule has been a fixture of Anglo-American law for more than three centuries. Well before the First Amendment was ratified, it was taken as a given by judges and lawyers that injunctions, including permanent injunctions following trial, were not permissible remedies in defamation actions.<sup>66</sup> The rule’s lineage can be traced to the backlash that arose from England’s infamous Star Chamber, which “served as an unhealthy hybrid of legislature and court,” issuing laws and trying those accused of libel or slander while acting “both as *Judges and Jurors*.”<sup>67</sup>

Given the indelible mark that English censorship left on the American colonists, it should come as no surprise that the no-injunction rule appears quite forcefully in American cases not long after the nation was founded.<sup>68</sup> The first such published decision

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66. See THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 3 (London, W. Clarke & Sons 1813) (“[C]ommunications concerning reputation cannot be [] prohibited.”); Note, *The Restraint of Libel by Injunction*, 15 HARV. L. REV. 734, 734 (1902) (“For one hundred and fifty years there has existed a tradition having the force of absolute law that equity has no jurisdiction to enjoin a libel.”).

67. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 299 (2001). In the thirteenth and fourteenth centuries, defamation claims fell exclusively within the purview of ecclesiastical courts. See R. C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 100-03. At some point thereafter, the Star Chamber took over the trial of libel claims and declared that libel was a criminal offense. See Brief for Historians Alfred L. Brophy et al. as Amici Curiae Supporting Petitioners, *Tory v. Cochran*, 544 U.S. 734 (2005) (No. 03-1488), 2004 WL 2582553, at \*11 [hereinafter Brief Amici Curiae of Historians].

68. See, e.g., *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839); STARKIE, *supra* note 66, at 3.

was the 1839 New York case of *Brandreth v. Lance*.<sup>69</sup> In *Brandreth*, Chancellor Reuben Walworth wrote that a court cannot issue an injunction without “attempting to exercise a power of preventive justice which ... cannot safely be entrusted to any tribunal consistently with the principles of a free government.”<sup>70</sup> If a court were to enjoin libelous speech, he warned, it would mark a dangerous return to the days of English censorship:

The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction.<sup>71</sup>

The following subsections explore the historical antecedents for the no-injunction rule and elucidate the reasons courts initially adopted—and continue to invoke—the rule. An examination of more than 242 decisions addressing injunctive relief in defamation cases reveals that the no-injunction rule is based on both equitable and constitutional concerns about the power of judges to silence speech.<sup>72</sup> In more than three-quarters of these decisions, courts refused to grant injunctive relief, citing one of four reasons for doing so: (1) the court did not have the power to issue an injunction directed at defamatory speech; (2) money was an adequate—and preferred—remedy for the injured plaintiff; (3) an injunction would not be effective in providing relief to the plaintiff; or (4) an injunction directed at defamatory speech would be an unconstitutional

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69. 8 Paige Ch. at 24.

70. *Id.* at 26.

71. *Id.* (internal citations omitted).

72. The author conducted a search on Westlaw and Lexis for decisions in which a court addressed a party's request for an injunction directed at defamatory speech. The following search terms were used: (defamation libel slander) /p (injunction enjoin gag). This list was then supplemented with additional decisions found by examining citing references and news searches. After eliminating irrelevant decisions, the author reviewed a total of 242 decisions through March 15, 2013. It is very likely that a number of decisions, especially in state trial courts, were not identified by these searches. Like other studies attempting to empirically examine case law, the exclusion of some unpublished decisions may bias the results to the extent that there is a systematic difference between available and unavailable decisions. See Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1884-87 (2005).

prior restraint.<sup>73</sup> Of course, courts sometimes relied on more than one of these reasons, or offered no justification, when denying injunctive relief.

#### A. *Equitable Limitations on Injunctive Relief*

When American courts initially invoked the no-injunction rule, the reason most often cited was the conviction that a court of law did not have the power to issue an injunction. Due to the historical division between courts of law and courts of equity, common law judges originally lacked the authority to grant any equitable relief.<sup>74</sup> When the Crown abolished the Star Chamber in 1641, English common law courts began to hear defamation claims.<sup>75</sup> Because these courts had no power to grant injunctions, and courts of equity lacked the authority to adjudicate claims for defamation, the only remedy available for defamation was money damages at law.<sup>76</sup>

In the United States, this same division of power between courts of law and courts of equity existed until 1938, when enactment of the Federal Rules of Civil Procedure formally merged law and equity jurisdiction in the federal courts.<sup>77</sup> Merger in most states followed shortly thereafter.<sup>78</sup> The no-injunction rule, however, continued to be invoked by both state and federal courts. As several of the nation's leading legal historians noted in an *amicus curiae*

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73. *See id.*

74. "Equity practice arose during the thirteenth century ... when English courts were rigidly attached to the writ system," which left many injured parties no recourse but to "petition the King's chancellor for special relief." Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 55 (2012).

75. *See* Brief Amici Curiae of Historians, *supra* note 67, at \*12.

76. *See* *Francis v. Flinn*, 118 U.S. 385, 389 (1886) ("If a court of equity could interfere and use its remedy of injunction in [libel] cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."); Brief Amici Curiae of Historians, *supra* note 67, at \*12.

77. *See* FED. R. CIV. P. 2 (1938) (amended 2007) ("There shall be one form of action to be known as 'civil action.'").

78. *See* John J. Kircher & Christine M. Wiseman, 2 PUNITIVE DAMAGES: LAW AND PRACTICE § 20:2 (2d ed. 2012) ("The reform that merged the two systems in individual states was inaugurated by New York in 1948 and nearly all of the other jurisdictions have subsequently followed suit."). *But see* Rendleman, *supra* note 47, at 1643 ("Merger of law and equity is incomplete; in most of our state systems, some parts of the field are considered permanently 'equitable jurisdiction.'").

brief they filed in the Supreme Court's most recent defamation injunction case, *Tory v. Cochran*, "the unavailability of injunctive relief for defamation came to be considered an integral part of a free press" in the United States.<sup>79</sup>

Indeed, American judges were quick to dismiss requests for injunctions directed at defamatory speech, and the earliest decisions almost uniformly did so on the basis that the court had no jurisdiction to grant equitable relief of any kind.<sup>80</sup> Judges continued to deny requests for injunctions targeting defamatory speech, however, long after law and equity courts had merged in most jurisdictions in the United States, stating that they had no authority to grant such

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79. Brief Amici Curiae of Historians, *supra* note 67, at \*13. For a discussion of *Tory v. Cochran*, 544 U.S. 734 (2005), see *infra* Part II.B.

80. See *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 557 (C.C.M.D. Ala. 1909); *Balliet v. Cassidy*, 104 F. 704, 706 (C.C.D. Or. 1900); *Kidd v. Horry*, 28 F. 773, 776 (C.C.E.D. Pa. 1886); *Balt. Car-Wheel Co. v. Bemis*, 29 F. 95, 95 (C.C.D. Mass. 1886); *Palmer v. Travers*, 20 F. 501, 502 (C.C.S.D.N.Y. 1884); *Willis v. O'Connell*, 231 F. 1004, 1009 (S.D. Ala. 1916); *Dailey v. Super. Ct. of S.F.*, 44 P. 458, 460 (Cal. 1896); *Reyes v. Middleton*, 17 So. 937, 939 (Fla. 1895); *McFarlan v. Manget*, 174 S.E. 712, 712 (Ga. 1934); *Bell & Co. v. Singer Mfg. Co.*, 65 Ga. 453, 459 (1880); *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70, 74 (1873); *Christian Hosp. v. People ex rel. Murphy*, 79 N.E. 72, 74 (Ill. 1906); *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558, 565 (1898); *Everett Piano Co. v. Bent*, 60 Ill. App. 372, 378 (1895); *Raymond v. Russell*, 9 N.E. 544, 544 (Mass. 1887); *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 70 (1873); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 805 (Mo. 1892); *Marlin Firearms Co. v. Shields*, 64 N.E. 163, 165 (N.Y. 1902); *Brandreth v. Lance*, 8 Paige Ch. 24, 24 (N.Y. Ch. 1839); *Singer v. Romerrick Realty Corp.*, 5 N.Y.S.2d 607, 607 (App. Div. 1938); *Koussevitzky v. Allen, Towne, & Heath, Inc.*, 68 N.Y.S.2d 779, 785 (Sup. Ct. 1947), *aff'd*, 69 N.Y.S.2d 432 (App. Div. 1947); *League for Peace with Justice in Palestine v. Newspaper P.M.*, 65 N.Y.S.2d 480, 481 (Sup. Ct. 1946); *Judson v. Zurhorst*, 20 Ohio Cir. Dec. 9, 11 (1907), *aff'd*, 85 N.E. 1127 (Ohio 1908); *Balt. Life Ins. Co. v. Gleisner*, 51 A. 1024, 1024 (Pa. 1902); *Houston v. Interstate Circuit, Inc.*, 132 S.W.2d 903, 906-07 (Tex. Civ. App. 1939); *Strang v. Biggers*, 252 S.W. 826, 827 (Tex. Civ. App. 1923); *Mitchell v. Grand Lodge Free & Accepted Masons of Tex.*, 121 S.W. 178, 179 (Tex. Civ. App. 1909). *But see* *Hawks v. Yancey*, 265 S.W. 233, 237 (Tex. Civ. App. 1924) (asserting that the rule that equity would not protect purely personal rights was known chiefly by its breach and could be regarded as a fiction).

relief.<sup>81</sup> Many judges also remarked that it would be a usurpation of the jury's role if they were to do so.

### *1. Maintaining a Check on Judicial Power*

Respect for the role of juries in free speech controversies played a seminal part in the adoption of the no-injunction rule by American courts. The aphorism that "equity will not enjoin a libel" was essentially an assertion that a judge, acting alone, could not censor speech, and that juries were a necessary bulwark against government encroachment into fundamental liberties.<sup>82</sup> One of the key distinctions between courts of law and courts of equity was that juries were empaneled in the former but not in the latter.<sup>83</sup> For example, in *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, the court refused to enjoin a libel and stated:

Defendant has a right to have the truth or falsity of the issue determined by a jury trial as at common law. That it cannot get in a court of equity. A person cannot be enjoined from doing any act unless it is fairly apparent the act is wrongful, or the person sought to be enjoined has no right to do that act. How can a court of equity be satisfied where the right lays in the matter of the alleged false statements? It cannot try the question for itself, or determine the right in advance of the law court.<sup>84</sup>

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81. *See* Am. Univ. of Antigua Coll. of Med. v. Woodward, No. 10-10978, 2010 WL 5185075, at \*3 (E.D. Mich. Dec. 16, 2010); *Kessler v. Gen. Servs. Admin.*, 236 F. Supp. 693, 698 (S.D.N.Y. 1964), *aff'd*, 341 F.2d 275 (2d Cir. 1964); *Hoxsey Cancer Clinic v. Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957); *Birnbaum v. Wilcox-Gay Corp.*, 17 F.R.D. 133, 139 (N.D. Ill. 1953); *Weiss v. Weiss*, 5 So. 3d 758, 760 (Fla. Dist. Ct. App. 2009); *Rodriguez v. Ram Sys., Inc.*, 466 So. 2d 412, 412 (Fla. Dist. Ct. App. 1985); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Emps. of Am.*, 79 N.E.2d 46, 48 (Ill. 1964); *Krebiozen Research Found. v. Beacon Press, Inc.*, 134 N.E.2d 1, 6 (Mass. 1956); *Prucha v. Weiss*, 197 A.2d 253 (Md. 1964); *Rosenberg Diamond Dev. Corp. v. Appel*, 735 N.Y.S.2d 528, 528 (App. Div. 2002); *Donnelly v. United Fruit Co.*, 166 N.Y.S.2d 392, 392 (App. Div. 1957); *Schmoldt v. Oakley*, 390 P.2d 882, 883 (Okla. 1964); *Kyritsis v. Vieron*, 382 S.W.2d 553, 557 (Tenn. Ct. App. 1964); *Kwass v. Kersey*, 81 S.E.2d 237, 243 (W. Va. 1954).

82. *See supra* note 2 and accompanying text.

83. *See* Rendleman, *supra* note 47, at 1644-45.

84. 171 F. at 556; *accord Hutchinson Smoke Burner Co.*, 19 S.W. at 806; *Balt. Life Ins. Co.*, 51 A. at 1024.



In fact, the expanding role of juries in civil and criminal cases tracked the increasing protections Americans saw as essential to freedom of speech and of the press. One of the many criticisms of the Star Chamber was its lack of a jury. When common law courts began hearing libel claims, the inclusion of a jury offered an important limitation on the government's power to censor speech. Under English common law, however, the jury was initially limited to deciding the question of whether the defendant *published* the statements the plaintiff sued upon.<sup>85</sup> Jurors had no role in determining whether the speech was defamatory or what relief the plaintiff should receive.<sup>86</sup>

Such a limited role for the jury did not sit well with colonial Americans. The trial of John Peter Zenger demonstrates this quite clearly. Zenger, the publisher of the *New York Weekly Journal*, had been a leading proponent of a free press when he was put on trial for seditious libel on August 4, 1735.<sup>87</sup> After the judge ruled that truth was not a defense and that it was the judge's exclusive province to determine if a printed statement "make a Lybel," he instructed the jury that its only job was to decide if Zenger had printed the material in question.<sup>88</sup> Zenger's attorney, Andrew Hamilton, conceded that his client had published the material, but implored the jury to make its own determination of guilt, "as Men who have baffled the Attempt of Tyranny."<sup>89</sup> When the jury returned a verdict of not guilty, "there were three Huzzas in the Hall which was crowded with people."<sup>90</sup>

The *Zenger* jury's unwillingness to cede power to the judge became a powerful rallying cry both for the adoption of the Sixth Amendment's guarantee of trial by jury<sup>91</sup> and for the expansion of the jury's role in libel cases,<sup>92</sup> which now encompasses determina-

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85. See Meyerson, *supra* note 67, at 306.

86. *Id.*

87. *Id.* at 318-19.

88. *Id.* (quoting FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 47, 60 (Leonard W. Levy ed., 1966) [hereinafter FREEDOM OF THE PRESS]).

89. *Id.* (quoting FREEDOM OF THE PRESS, *supra* note 88, at 59).

90. *Id.* (quoting FREEDOM OF THE PRESS, *supra* note 88, at 61).

91. See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

92. See ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH AND PRESS 40 (1955) (asserting that the colonists had learned from the sedition trials that this essential power of the people to talk about political issues can be easily destroyed by their rulers unless the question of



tions of falsity, fault, and injury. “It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges.”<sup>93</sup> As the historian Michael Meyerson observed: “Liberty in America was seen as protection *from*, not by, colonial judges.”<sup>94</sup>

Indeed, juries play several essential roles in defamation cases. As a threshold matter, the jury must determine whether the defamatory meaning the plaintiff ascribes to the speech at issue is the way others would understand that speech.<sup>95</sup> Although this might seem like a straightforward inquiry, whether a statement has caused reputational harm cannot be determined solely by reference to the words themselves. “Because harm to reputation is a socially constructed injury, a court must measure its effects by the ‘attitudes, beliefs, and prejudices of the relevant community.’”<sup>96</sup> The jury’s function in defamation cases, therefore, is “to act as a tribune of the people; to be a popular institution with veto power over government sanctions for speech.”<sup>97</sup>

## 2. *A Preference for Legal over Equitable Remedies*

The law’s antipathy toward injunctions in defamation cases is also rooted in the longstanding view that legal remedies are preferable over equitable remedies.<sup>98</sup> This principle is so ingrained in our legal system that the Supreme Court has stated, “[I]t is axiomatic

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punishing talk is decided by plain citizens on a jury).

93. Meyerson, *supra* note 67, at 319; *see also* Siegel, *supra* note 1, at 698 (“[I]n the eighteenth century, there was a growing, and by the century’s end, dominant aversion to entrusting speech and press controversies entirely to judges operating without the constraint of a jury.”).

94. Meyerson, *supra* note 67, at 320; *see also* Kidd v. Horry, 28 F. 773, 776 (C.C.E.D. Pa. 1886) (noting that the no-injunction rule was premised on the right to trial by jury); *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 745 (1882) (refusing to issue an injunction and warning “[u]nder ... a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed”).

95. *See, e.g.*, MacLeod v. Tribune Pub. Co., 343 P.2d 36, 41 (Cal. 1959).

96. Ardia, *Reputation in a Networked World*, *supra* note 12, at 296 (quoting Lidsky, *supra* note 20, at 25). Examples of how reputational injury is societally constructed can be seen in defamation claims that are based on assertions that the plaintiff was a communist, a negro, or a homosexual; such terms were at one point considered to be defamatory, but that largely is not the case today. *See id.* at 295-300.

97. Siegel, *supra* note 1, at 729.

98. *See* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1 (1978).

that a court should determine the adequacy of a remedy in law before resorting to equitable relief.”<sup>99</sup> Although this view is attributable, at least in part, to the historical division between courts of law and courts of equity, the preference for legal remedies persists today.<sup>100</sup>

By the mid-twentieth century, fewer courts were interposing a lack of equity jurisdiction as a reason for denying injunctive relief. Instead, they began to rely on the more general equitable principle that a plaintiff is not entitled to injunctive relief if she has an adequate remedy at law.<sup>101</sup> In Texas, for example, courts assume that money damages are an adequate remedy for defamation unless the speech sought to be enjoined includes a threat of harm to another.<sup>102</sup> Some judges also describe this reason for denying injunctive relief in terms of a plaintiff’s failure to demonstrate “irreparable injury,”<sup>103</sup> which is simply another way of saying that

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99. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

100. *See id.*; *see also* FISS, *supra* note 98, at 1.

101. *See* *Oorah, Inc. v. Schick*, No. 09-CV-00353(FB)(JO), 2012 WL 3233674, at \*4 (E.D.N.Y. Aug. 6, 2012); *Allen v. Ghoulsh Gallery*, No. 06CV371NLS, 2007 WL 1555739, at \*2 (S.D. Cal. May 23, 2007); *Freedom Calls Found. v. Bukstel*, No. 05CV59460(SJ)(VVP), 2006 WL 845509, at \*22 (E.D.N.Y. Mar. 3, 2006); *Ameritech v. Voices for Choices, Inc.*, No. 03C3014, 2003 WL 21078026, at \*2 (N.D. Ill. May 12, 2003); *Bihari v. Gross*, 119 F. Supp. 2d 309, 324 (S.D.N.Y. 2000); *Tilton v. Capital Cities/ABC Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993); *Ga. Soc. of Plastic Surgeons, Inc. v. Anderson*, 363 S.E.2d 140, 144 (Ga. 1987); *Basarich v. Rodeghero*, 321 N.E.2d 739, 743 (Ill. App. Ct. 1974); *Everett Piano Co. v. Bent*, 60 Ill. App. 372, 378 (1895); *Daugherty v. Allen*, 729 N.E.2d 228, 235 (Ind. Ct. App. 2000); *Greenberg v. Burglass*, 229 So. 2d 83, 83 (La. 1969); *Vartech Sys., Inc. v. Hayden*, 951 So. 2d 247, 262 (La. Ct. App. 2006); *Wolf v. Harris*, 184 S.W. 1139, 1141 (Mo. 1916); *Mescalero Apache Tribe v. Allen*, 469 P.2d 710, 711 (N.M. 1970); *Ashinsky v. Levenson*, 100 A. 491, 493 (Pa. 1917); *Frick v. Stevens*, 43 Pa. D. & C.2d 6, 28 (C.P. Ct. Cumberland Cnty. 1967); *Cullum v. White*, No. 04-09-00695-CV, 2011 WL 6202800, at \*13 (Tex. App. Dec. 14, 2011); *Perez v. Dietz Dev., LLC*, No. 122157, 2012 WL 6761997, at \*1 (Va. Dec. 28, 2012); *Kwass v. Kersey*, 81 S.E.2d 237 (W. Va. 1954).

102. *See, e.g.*, *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 109 (Tex. App. 2003).

103. *See* *Kramer v. Thompson*, 947 F.2d 666, 679-80 (3d Cir. 1991); *McGath v. Hamilton Local Sch. Dist.*, 848 F. Supp. 2d 831, 839 (S.D. Ohio 2012); *Allen v. Quest Online, LLC*, No. CV-11-138-PHX-GMS, 2011 WL 4403674, at \*13 (D. Ariz. Sept. 22, 2011); *Bobolas v. Does*, No. CV-10-2056-PHX-UGC, 2010 WL 3923880, at \*3 & n.2 (D. Ariz. Oct. 1, 2010); *Bynog v. SL Green Realty Corp.*, No. 05CIV.0305WHP, 2005 WL 3497821, at \*3 (S.D.N.Y. Dec. 22, 2005); *Hammer v. Trendl*, No. CV02-2462(ADS), 2003 WL 21466686, at \*3 (E.D.N.Y. Oct. 10, 2002); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 867 (Ct. App. 2008); *Cohen v. Advanced Med. Grp. of Ga., Inc.*, 496 S.E.2d 710, 711 (Ga. 1998); *Pittman v. Cohn Cmty., Inc.*, 239 S.E.2d 526, 528 (Ga. 1977); *Richter Bros. v. Journeymen Tailors’ Union*, 11 Ohio Dec. Reprint 45, 46 (Franklin C.P. 1890).

a plaintiff has an adequate remedy at law.<sup>104</sup> Both approaches ultimately function as a means of channeling plaintiffs toward monetary relief and away from equitable remedies, such as injunctions.

Rather surprisingly, when courts have held that a plaintiff has an adequate remedy at law, the content of the defamatory speech appears irrelevant to their conclusion; they engage in little analysis of how the plaintiff could be made whole through existing legal remedies. In fact, courts have stated that a plaintiff has an adequate remedy even when there are serious questions about the defendant's ability to pay damages<sup>105</sup> or the defamatory conduct is continuing to cause harm.<sup>106</sup> A review of the cases reveals that courts have denied injunctions in a wide variety of circumstances, including cases in which the defendant police department was continuing to display the plaintiff's photograph in its "rogues' gallery" after criminal charges were dropped;<sup>107</sup> the defendant was publishing a circular that falsely stated that the plaintiff attorney was a "[s]hyster egomaniac ... [who had made] deliberately false statements" in legal proceedings;<sup>108</sup> and the plaintiff's mother-in-law was slandering her to the plaintiff's husband so as to alienate his affections.<sup>109</sup>

Perhaps not surprisingly, many commentators find the suggestion that legal remedies are adequate to repair reputational harms troubling, seeing monetary remedies as clearly insufficient and viewing a court's reliance on them as masking an antipathy for

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104. See *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) ("[I]nadequacy of available remedies goes only to the existence of irreparable injury."); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952) ("[T]hese two contentions are here closely related, if not identical.").

105. See, e.g., *Willis v. O'Connell*, 231 F. 1004, 1014 (S.D. Ala. 1916) ("[I]f this be a sound principle we must conclude that a rich man is allowed to freely utter libels, subject only to action for damages and criminal prosecution in a court, where he can have his rights passed upon by a jury; whereas the poor man is deprived of a trial by jury because he is poor, and subject, I may say, to the summary injunctive process of chancery. Such cannot be the law."); *Willing v. Mazzocone*, 393 A.2d 1155, 1158 (Pa. 1978) ("[T]he insolvency of a defendant does not create a situation where there is no adequate remedy at law. In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor.").

106. See *infra* notes 107-09 and accompanying text.

107. *Owen v. Partridge*, 82 N.Y.S. 248, 249 (Sup. Ct. 1903).

108. *Garipey v. Springer*, 48 N.E.2d 572, 573 (Ill. App. Ct. 1943).

109. *Devine v. Devine*, 90 A.2d 126, 127 (N.J. Super. Ct. Ch. Div. 1952).

injunctions. Douglas Laycock, who has written a cogent critique of the irreparable injury rule,<sup>110</sup> concludes that “because the legal remedy is almost never adequate,” the rule obscures the real reasons judges make remedial choices.<sup>111</sup> Because “damages cannot replace a reputation once lost or erase emotional distress once suffered,” Professor Laycock asserts that money damages are a grossly inadequate remedy and therefore the irreparable injury requirement should be easy for a plaintiff to meet.<sup>112</sup> Yet, as he points out, courts do not typically grant such relief. Instead, the no-injunction rule limits libel plaintiffs “to less effective remedies because we fear over enforcement of rules against tortious or criminal speech.”<sup>113</sup> Although Professor Laycock believes that plaintiffs should be able to choose their preferred remedy, he concedes that courts do—and should—refuse to order an injunction when other interests outweigh the plaintiff’s interest.<sup>114</sup> According to Professor Laycock, “Such interests include burdens on the defendant, the court, or the public, and countervailing policies of substantive law.”<sup>115</sup>

The preference for legal remedies also reflects an affinity for juries. Given that juries typically do not play a role in awarding equitable relief, claimants could request an equitable remedy in order to deprive their opponents of a jury trial.<sup>116</sup> Long-standing principles of equity serve to limit this form of strategic behavior.<sup>117</sup> “Judges administer the irreparable injury rule, with its preference for legal remedies, to sort legal from equitable in ways that protect a litigant’s right to have legal actions heard by a jury.”<sup>118</sup>

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110. LAYCOCK, *supra* note 44, at 237-43. After analyzing several hundred judicial decisions purporting to apply the irreparable injury rule, Professor Laycock concluded: “The irreparable injury rule almost never bars specific relief, because substitutionary remedies are almost never adequate. At the stage of permanent relief, any litigant with a plausible need for specific relief can satisfy the irreparable injury rule.” *Id.* at 23.

111. *Id.* at 161.

112. *Id.* at 165 (footnote omitted).

113. *Id.*

114. *Id.* at 266.

115. *Id.*

116. *Id.* at 213-14. In a number of cases, plaintiffs did just that.

117. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959).

118. Rendleman, *supra* note 47, at 1645; *see also id.* at 1645 n.12 (“Through our national history, the prevailing sorting mechanisms for legal and equitable remedies have expressed

Lest we think that equitable principles no longer hold sway now that courts of law and equity have merged, two recent decisions by the Supreme Court, albeit not in the defamation context, affirm that “well-established principles of equity” remain a guide for courts evaluating injunctive remedies.<sup>119</sup> Among those equitable principles is the instruction that courts should determine the adequacy of a remedy at law before entertaining equitable relief and the admonition that, even when equitable relief is appropriate, a court should not order a party to do “a useless thing.”<sup>120</sup>

### 3. Concerns About the Efficacy of Speech Injunctions

It may very well be that an injunction directed at defamatory speech is a useless thing. Judges face formidable challenges when drafting injunctions that will achieve a plaintiff’s purposes without being overbroad or underinclusive. And even a well-crafted injunction will face significant enforcement problems, both in terms of a court’s jurisdictional limitations and the practical problems of ensuring compliance.<sup>121</sup> Speech is notoriously difficult to restrain, especially when the topic relates to a matter of public interest.<sup>122</sup> As Professor Doug Rendleman observes, “An injunction stops conduct only as well as a stop sign halts a car; the defendant must apply the brakes and obey.”<sup>123</sup>

Indeed, among the reasons judges provide for refusing to grant injunctive relief in defamation cases are the difficulties they face in tailoring an injunction to the plaintiff’s specific needs and the heavy administrative and enforcement burdens that accompany equitable

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the preference for civil juries.”).

119. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (instructing that traditional principles of equity must be taken into account when evaluating permanent injunctions in patent cases); *see also* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (reversing preliminary injunction against Navy’s use of sonar and cautioning that “[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course”).

120. *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring); *see also* *Mitchell v. Chambers Constr. Co.*, 214 F.2d 515, 517 (10th Cir. 1954) (“Equity will not do a useless or vain thing, and in the absence of some likelihood or probability that the violations will recur, the court is fully justified in refraining from entering an empty decree.”).

121. *See* Rendleman, *supra* note 47, at 1650.

122. *See infra* Part IV.A.4-5.

123. Rendleman, *supra* note 15, at 357.

relief.<sup>124</sup> Unlike monetary damages, which typically do not require that a court do anything beyond issuing a final judgment, injunctive remedies require careful tailoring and often necessitate additional steps for enforcement.<sup>125</sup>

In *Devine v. Devine*, for example, the plaintiff sued her mother-in-law for making false statements to her husband that she claimed were intended to wreck her marriage.<sup>126</sup> The New Jersey Chancery Court denied her request for an injunction, noting that an injunction “would not be enforceable because of the inherent difficulties involved in the enforcement.”<sup>127</sup> The court highlighted just how challenging it would be to effectively enjoin the speech in question:

[I]t appears that the plaintiff would have the court censor the written or verbal communications by the defendant to her son and restrain and enjoin the defendant from making adverse comment or criticisms of the plaintiff to her son, and from telling any false stories or disseminating any false information to the son of, about and concerning the plaintiff. Just how the court could enforce such an order, were an injunction granted, is not clear and the enforcement of such an injunction would appear to present insurmountable difficulties.<sup>128</sup>

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124. See *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“Loose injunctive orders are neither easily obeyed nor strictly enforceable.”); *Oakley, Inc. v. McWilliams*, 819 F. Supp. 2d 1087, 1090 (C.D. Cal. 2012) (“The injunction here, like injunctions against defamation in general, would also be ineffective, overbroad, or both.”); *Jordan v. Metro. Life Ins. Co.*, 280 F. Supp. 2d 104, 112 (S.D.N.Y. 2003) (“It is impossible for the Court to tailor an injunction that would prevent defamatory remarks while preserving [the employer’s] interest in notifying [the plaintiff employee’s] clients of his termination.”); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 356 (Cal. 2007) (Kennard, J., concurring and dissenting) (“Subtle differences in wording can make it exceptionally difficult to determine whether a particular utterance falls within an injunction’s prohibition.”); *Devine v. Devine*, 90 A.2d 126, 129 (N.J. Super. Ct. Ch. Div. 1952) (“[The proposed injunction] would not be enforceable because of the inherent difficulties involved in the enforcement.”).

125. See Rendleman, *supra* note 15, at 354 (“Administrative concerns loom larger in equity than in law. It is difficult to adjudicate, formulate, administer, and enforce injunctions.”); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1084 (1979) (reviewing OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978)) (“Sometimes injunctions are ... difficult to enforce, or difficult for appellate courts to supervise.”).

126. 90 A.2d at 127.

127. *Id.* at 129.

128. *Id.*

Even when a court can reach the speech in question, judges face significant challenges drafting injunctions that will prevent further reputational harm without being overbroad or underinclusive. Given the socially constructed interest that defamation law seeks to protect,<sup>129</sup> an injunction must do more than just restrain the specific words a defendant has used; it must target the defamatory meaning ascribed to the defendant's speech. For example, the accusation that the plaintiff perjured himself can be communicated in a number of different ways, including that he "lied under oath," "was untruthful," "deceived the court," "dissembled on the witness stand," "misled the jury," or "prevaricated." In most cases, an injunction directed only at the specific words a court has found are defamatory would be "useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order."<sup>130</sup>

To prevent the defendant from causing further harm, an injunction must reach beyond the precise words used and restrain the defendant from communicating the *idea* that the plaintiff lied under oath. But the English language is full of nuance. Words can have multiple meanings, depending on their context. For example, would an injunction that forbids the defendant from communicating the idea that the plaintiff perjured himself prohibit the defendant from saying that the plaintiff was "disingenuous"? What if the defendant merely carries placards that say the plaintiff is a "Bad Bad Boy," "Don't Laugh, [He] Screwed You Guys Too!," or "Your Piss is Not Rain"? These were among the placards the defendant used when picketing attorney Johnnie Cochran, Jr., who sued for defamation.<sup>131</sup>

Obviously these statements cannot be understood apart from their context. Defamatory meaning is highly dependent on the

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129. See Ardia, *Reputation in a Networked World*, *supra* note 12, at 267-69.

130. Chemerinsky, *supra* note 11, at 171; *see also* Ne. Press Ass'n v. Stuart, 427 U.S. 539, 566-67 (1976) (reversing injunction and noting the "difficulty of drafting an order that will effectively" prevent the harm from occurring); Oakley, Inc. v. McWilliams, 819 F. Supp. 2d 1087, 1091 (C.D. Cal. 2012) ("Plaintiffs seek to enjoin McWilliams from stating that Plaintiffs 'sent thugs, Blackwater operatives, or military special forces to intimidate him.' But this injunction would be worthless if McWilliams could instead simply claim that Plaintiffs had hired the mafia or a street gang to threaten him. Such a narrowly tailored injunction would therefore fail to achieve its purpose of stopping the defendant's defamatory statements.")

131. See Cochran v. Tory, No. BC239405, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002) (order granting permanent injunction), *aff'd*, No. B159437, 2003 WL 22451378, at \*1 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005).



circumstances extant at the time of expression; a statement will not be actionable if it is understood to be mere hyperbole or if the context belies the defamatory import the plaintiff ascribes to it.<sup>132</sup> This leaves judges with few viable options when enjoining defamatory speech. As Erwin Chemerinsky points out, “Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective.”<sup>133</sup>

### *B. Constitutional Limitations on Injunctive Relief*

Because an injunction directed at defamatory speech necessarily involves a judicial order that is intended to either stop speech before it is published or preclude its further dissemination, injunctions raise significant First Amendment concerns. Indeed, in the vast majority of cases in which courts have considered granting an injunction directed at defamatory speech, they refuse to do so on the basis that the injunction would be an unconstitutional prior restraint.<sup>134</sup>

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132. See, e.g., *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970); *MacElree v. Phila. Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996).

133. Chemerinsky, *supra* note 11, at 171.

134. See, e.g., *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *Oakley, Inc.*, 819 F. Supp. 2d at 1092; *Mahmoodian v. Pirnia*, No. 3:11-CV-00005, 2012 WL 4458160, at \*9 (W.D. Va. June 7, 2012); *Am. Univ. of Antigua Coll. of Med. v. Woodward*, No. 10-10978, 2010 WL 5185075, at \*3 (E.D. Mich. Dec. 16, 2010); *Gunder's Auto Ctr. v. State Farm Ins.*, 617 F. Supp. 2d 1222, 1225 (M.D. Fla. 2009), *aff'd*, 442 F. App'x 819 (11th Cir. 2011); *Kisser v. Coal. for Religious Freedom*, No. 95-MC-0174, 1995 WL 590169 (E.D. Pa. Oct. 4, 1995); *Tilton v. Capital Cities/ABC Inc.*, 827 F. Supp. 674, 682 (N.D. Okla. 1993); *Konigsberg v. Time, Inc.*, 288 F. Supp. 989, 989 (S.D.N.Y. 1968); *Am. Malting Co. v. Keitel*, 217 F. 672, 674 (S.D.N.Y. 1914); *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 519 (Ct. App. 1991); *Animal Rights Found. of Fla., Inc. v. Siegel*, 867 So. 2d 451, 458 (Fla. Dist. Ct. App. 2004); *Cohen v. Advanced Med. Grp. of Ga., Inc.*, 496 S.E.2d 710, 711 (Ga. 1998); *Ellerbee v. Mills*, 422 S.E.2d 539, 541 (Ga. 1992); *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 357 S.E.2d 576, 577 (Ga. 1987); *Brannon v. Am. Micro Distributions, Inc.*, 342 S.E.2d 301, 302-03 (Ga. 1986); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Emps.*, 70 N.E.2d 75, 87 (Ill. 1948); *St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Am. Broad. Cos. v. Smith Cabinet Mfg. Co.*, 312 N.E.2d 85, 91 (Ind. Ct. App. 1974); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 305 (Ky. 2010); *Guste v. Connick*, 5115 So. 2d 436, 438 (La. 1987); *Greenberg v. Burglass*, 229 So. 2d 83, 87 (La. 1969); *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 746 (1882); *Wolf v. Harris*, 184 S.W. 1139, 1141 (Mo. 1916); *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 395 (Mo. 1902); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 806 (Mo. 1892); *Lindsay & Co. v. Mont. Fed'n of Labor*, 96 P. 127, 131 (Mont. 1908); *Pebble Brook, Inc. v. Smith*, 356 A.2d 48 (N.J. Super. Ct. Ch. Div. 1976); *O'Leary v. Police Dep't of N. Y.*, 409 N.Y.S.2d 676, 678 (Sup. Ct. 1978); *League*



The prior restraint doctrine is generally understood to bar government restrictions on speech that are imposed in advance of publication. Although many kinds of government acts can be prior restraints, injunctions directed at speech are considered to be an archetypal form of prior restraint.<sup>135</sup> An injunction may restrain specific aspects of a communication or prohibit all speech entirely.<sup>136</sup> The classic example of a speech injunction is Judge Gurfein's order enjoining the New York Times Company from publishing news articles based on the Pentagon Papers.<sup>137</sup>

The idea that an injunction might run afoul of the First Amendment is a relatively new development in the Supreme Court's free speech jurisprudence.<sup>138</sup> It was not until 1931, in *Near v. Minnesota*, that the Supreme Court first invoked the First Amendment's free speech guarantees to invalidate an injunction.<sup>139</sup> In *Near*, local officials used a "public nuisance" law to charge that *The Saturday Press* was printing defamatory stories about them to obtain an injunction that barred the paper from publishing or distributing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."<sup>140</sup> According to the Court, the injunction was unconstitutional because it "would lay a

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for Peace with Justice in Palestine v. Newspaper P.M., 65 N.Y.S.2d 480, 481 (Sup. Ct. 1974); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983); *Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920); Corpus Christi Caller-Times v. Mancias, 794 S.W.2d 852, 854 (Tex. App. 1990); Pirmantgen v. Feminelli, 745 S.W.2d 576, 578 (Tex. App. 1988); Mitchell v. Grand Lodge, Free & Accepted Masons of Tex., 121 S.W. 178, 179 (Tex. Civ. App. 1909).

135. See Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 290, 295 (2000); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 426 (1983).

136. EMERSON, *supra* note 5, at 656.

137. *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971) (issuing temporary restraining order against "The New York Times, its publisher and other officers and employees to restrain them from further dissemination or disclosure of certain alleged top secret or secret documents of the United States"), *rev'd*, 403 U.S. 713 (1971).

138. Long before the Supreme Court struck down its first speech injunction in *Near v. Minnesota*, 283 U.S. 697 (1931), several state courts had already held that that an injunction directed at defamatory speech violated the federal Constitution or their state constitution. See, e.g., *Dailey v. Superior Court of S.F.*, 44 P. 458, 459 (Cal. 1896) (California Constitution); *State ex rel. Liversey*, 34 La. Ann. at 746 (U.S. and Louisiana Constitutions); *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 180 (1876) (Missouri Constitution).

139. 283 U.S. 697 (1931).

140. *Id.* at 706. For background on the case, see FRED W. FRIENDLY, *MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS* (1981).

permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication.”<sup>141</sup> Chief Justice Hughes concluded that “[t]his is the essence of censorship.”<sup>142</sup>

Although the Court cautioned that the principle it was applying was “not absolutely unlimited,”<sup>143</sup> it did not elucidate any limits.<sup>144</sup> Instead, it noted in dicta four “exceptional cases” where an injunction might be permitted.<sup>145</sup> Subsequent decisions by the Court have clarified to some degree the scope of these exceptions, suggesting that an injunction may be permissible when the harm is grave and the threat to First Amendment values is not significant.<sup>146</sup>

The Court’s prior restraint cases, however, have not provided a clear definition of what constitutes a prior restraint, nor has the Court evidenced a consistent theoretical approach to the exceptions that mark the limits of the doctrine.<sup>147</sup> Instead, the Court’s application of the prior restraint doctrine has been largely ad hoc, turning on the specific facts in each case. Not surprisingly, “[t]he lack of a generally accepted definition, plus the unprincipled gaps created by the exceptions, has led to a situation in which the prior restraint

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141. 283 U.S. at 712. The publisher would be free from punishment if it was able “to satisfy the judge that the charges are true and are published with good motives and for justifiable ends.” *Id.* at 713.

142. *Id.*

143. *Id.* at 716.

144. See Meyerson, *supra* note 11, at 1087 (noting that the Court in *Near* “neither defined prior restraint, nor explained precisely why injunctions fit within a definition of prior restraint”).

145. 283 U.S. at 715-16. These exceptions are: (1) “actual obstruction [of the Government’s] recruiting service or the publication of the sailing dates of transports or the number and location of troops”; (2) “primary requirements of decency ... against obscene publications”; (3) “incitements to acts of violence and the overthrow by force of orderly government[,] ... words that may have all the effect of force”; and (4) “[protection of] private rights according to the principles governing the exercise of the jurisdiction of courts of equity.” *Id.* at 716. The Court added that “[t]here is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.” *Id.* at 715.

146. See THOMAS IRWIN EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 51-53 (1966); LAYCOCK, *supra* note 44, at 168; Bendor, *supra* note 135, at 299. The Court also has held that the prior restraint doctrine does not foreclose injunctions that neutrally regulate the time, place, and manner of speech. See *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 763-64 (1994).

147. See, e.g., Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) (“[R]elevant case law does not provide a concise and logically coherent definition of prior restraint on speech.”).

doctrine is increasingly derided by legal scholars and frequently misunderstood by the Court itself.”<sup>148</sup> Nevertheless, the doctrine continues to exert a strong pull on judges and is frequently invoked as a shorthand way of saying that an injunction is presumptively unconstitutional.

But what is it about defamation injunctions that strikes courts as highly suspect? There are two characteristics that raise particular concerns. First, when the injunction is imposed before speech has been uttered or published, it denies society access to expression that has not been subject to public evaluation. Second, if the injunction is issued before a final determination that the speech is defamatory, it is likely that speech that cannot be sanctioned will be restrained. Both of these concerns are discussed in more detail in the following sections.

### *1. Prior Restraints and Subsequent Sanctions*

The prior restraint doctrine initially arose as a response to government efforts to restrict speech prior to its public expression.<sup>149</sup> Sir William Blackstone summarized the view that such restrictions were anathema to liberty when he wrote in his *Commentaries* that “liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.”<sup>150</sup>

As Blackstone’s commentary reveals, the law’s antipathy for restraints instituted prior to publication did not extend to subsequent sanctions imposed in response to expressive activity.<sup>151</sup> This

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148. Meyerson, *supra* note 11, at 1087-88.

149. *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“[T]he main purpose of [the First Amendment’s free speech protections] is ‘to prevent all such previous restraints upon publications as had been practised by other governments.’”) (quoting *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313-14 (1825)).

150. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151 (1769) (alteration in original).

151. *See id.* at 151-52. Of course, other First Amendment doctrines may limit what civil and criminal sanctions can be imposed on speakers. *See, e.g.*, *Smith v. Daily Mail Publ’g. Co.*, 443 U.S. 97, 105-06 (1979) (striking down a statute making it a crime for a newspaper to publish the name of a juvenile without the court’s prior approval); *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 845 (1978) (invalidating criminal sanctions imposed on the newspaper for publishing confidential information from judicial inquiry).

conclusion has been the subject of considerable debate, however, with some scholars saying that distinguishing between prior and subsequent sanctions is essential for the prior restraint doctrine to retain any coherence,<sup>152</sup> whereas others argue that the distinction is unnecessary or even illusory.<sup>153</sup> “After all, the point of subsequent punishment is to restrain speech in advance, too.”<sup>154</sup>

Yet an injunction that forecloses defamatory speech prior to publication strikes many judges as qualitatively different from criminal or civil sanctions imposed after speech has been publicly disseminated. Indeed, in most of the cases in which a court held that an injunction would be an unconstitutional prior restraint, the court concluded that the injunction was impermissible because it would curtail speech prior to publication.<sup>155</sup> The Texas Supreme Court’s opinion in *Ex parte Tucker* exemplifies the view that an injunction restraining defamatory speech prior to publication is incompatible with fundamental notions of liberty:

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152. See, e.g., Martin Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) (arguing that the prior restraint doctrine “assumes that prior restraints are more harmful to free speech interests than other forms of regulation”); Scordato, *supra* note 147, at 30-31 (lamenting the confusion between prior and subsequent sanctions and proposing that prior restraint doctrine be revised to cover “only those government actions, that result in the physical interception and suppression of speech prior to its public expression”).

153. See, e.g., Jeffries, *supra* note 135, at 429 (“[I]t seems entirely plausible that the specifically targeted commands of an injunction are actually likely to be less threatening to the system of freedom of expression than the inevitably more general proscriptions of a penal statute.”); Siegel, *supra* note 1, at 735 (“Modern commentators find the prior restraint/subsequent punishment distinction overdrawn because both regimes deter and chill speech.”).

154. Steven Helle, *Prior Restraint*, in COMMUNICATION AND THE LAW 62 (W. Wat Hopkins ed., 2012).

155. See *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089, 1092-93 (C.D. Cal. 2012); *Brannon v. Am. Micro Distributions, Inc.*, 342 S.E.2d 301, 302-03 (Ga. 1986); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep’t Store Emps.*, 70 N.E.2d 75, 84 (Ill. 1948); *St. Margaret Mercy Healthcare Cntrs., Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Am. Broad. Cos. v. Smith Cabinet Mfg. Co.*, 212 N.E.2d 85, 91 (Ind. Ct. App. 1974); *Greenberg v. Burglass*, 229 So. 2d 83, 89 (La. 1969); *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 746 (1882); *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 395 (Mo. 1902); *Lindsay & Co. v. Mont. Fed’n of Labor*, 96 P. 127, 131 (Mont. 1908); *O’Leary v. Police Dep’t of N. Y.*, 409 N.Y.S.2d 676, 679 (Sup. Ct. 1978); *Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920); *Corpus Christi Caller-Times v. Mancias*, 794 S.W.2d 852, 854 (Tex. App. 1990); *Pirmantgen v. Feminelli*, 745 S.W.2d 576, 578 (Tex. App. 1988); *Mitchell v. Grand Lodge, Free & Accepted Masons of Tex.*, 121 S.W. 178, 179 (Tex. Civ. App. 1909).

It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more violative or destructive of freedom.... There can be no justification for the utterance of a slander. It cannot be too strongly condemned. The law makes it a crime. But there is no power in courts to make one person speak only well of another. The Constitution leaves him free to speak well or ill; and if he wrongs another by abusing this privilege, he is responsible in damages or punishable by the criminal law.<sup>156</sup>

The idea that the government can punish speech after it occurs but cannot restrict speech before it is uttered is evident in much of First Amendment jurisprudence. As Justice Blackmun remarked in *Southeast Promotions, Ltd. v. Conrad*, “Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”<sup>157</sup>

Categorizing a speech restriction as either prior restraint or subsequent sanction, however, can sometimes be difficult.<sup>158</sup> This is especially so in the context of injunctions, in which the apparatus of enforcement is a contempt proceeding. When judges issue injunctions, they are threatening to sanction a party if it refuses to obey the court’s directive. In fact, in many of the cases where courts have enjoined defamatory speech, the court simply ordered the defendant not to make any future defamatory statements about the plaintiff, in essence saying: “[O]bey the law or you will face punishment.”<sup>159</sup> Given that the threatened sanction—contempt of court—is not imposed until after the speech has occurred, one might naturally ask whether the prior restraint doctrine is implicated at all.

Such a view, however, overlooks the limited procedures available to challenge injunctive remedies. Under what is called the “collateral bar rule,” when a party faces an injunction, it is compelled to

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156. 220 S.W. 75, 76 (Tex. 1920).

157. 420 U.S. 546, 559 (1975).

158. See Lemley & Volokh, *supra* note 11, at 171 n.113 (“This area has been considerably confused by the Court’s penchant for occasionally condemning speech restrictions as prior restraints when not even subsequent punishment of the speech would be permissible.”).

159. See discussion *infra* Part III.B.2.

obey the injunction, notwithstanding any constitutional right to engage in the enjoined conduct, until the injunction is set aside by the issuing court or by a higher court on appeal.<sup>160</sup> In other words, a defendant can be jailed or fined for violating an injunction, even if a court later finds that the injunction was improperly issued or that the First Amendment fully protects the enjoined speech.<sup>161</sup> The injunction in *Near v. Minnesota* was therefore a greater threat to the First Amendment than the Minnesota statute the plaintiffs invoked because once the statute was found to be unconstitutional its violation could not be punished, whereas violation of the unconstitutional injunction remained punishable by contempt.<sup>162</sup>

Failing to distinguish between injunctions issued prior to publication and subsequent sanctions also overlooks the coercive effect of injunctions, which in practical terms operate as immediate restraints on speakers.<sup>163</sup> Indeed, the cases themselves reveal that parties facing a judicial directive to refrain from speaking typically

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160. See *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980) (“[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.”); *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (justifying the collateral bar rule on the grounds that “respect for judicial process is a small price to pay for the civilizing hand of law”). Because of concern about the chilling effect of the collateral bar rule, some courts have been unwilling to apply the rule in cases involving speech. For example, in *Walker*, the Supreme Court suggested that the rule would not apply if an injunction is “transparently invalid.” 388 U.S. at 315. A number of lower courts have interpreted this language to mean that a transparently invalid injunction can, under certain circumstances, be ignored and then challenged. See, e.g., *In re Providence Journal Co.*, 820 F.2d 1342, 1344, (1st Cir. 1986), *modified on reh’g*, 820 F.2d 1354 (1st Cir. 1987); *Phx. Newspapers, Inc. v. Superior Court*, 418 P.2d 594, 592 (Ariz. 1966) (allowing reporter to defeat contempt of court charge on constitutional grounds); *State v. Coe*, 679 P.2d 353, 365 (Wash. 1984) (overturning contempt judgment against broadcaster for airing recording previously played in open court).

161. See Meyerson, *supra* note 67, at 1140-41; Redish, *supra* note 152, at 93. Even an injunction that is ultimately reversed can be a prior restraint: “Enjoined speakers must hold their tongues while they move to have the injunction vacated or modified.” Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 32 (1981). Due to this delay, the speech either “never reaches the marketplace at all” or “may have become obsolete or unprofitable.” Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 657 (1955).

162. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975); Chemerinsky, *supra* note 11, at 165.

163. In *Near v. Minnesota*, the Supreme Court looked past the “mere details of procedure” to conclude that the “operation and effect” of the statute was to restrain speech. 283 U.S. 697, 713 (1931).

remain silent, even when they believe their speech is fully protected from subsequent sanction.<sup>164</sup>

Chief Justice Burger noted the pernicious effect such orders have in *Nebraska Press Ass'n v. Stuart*, in which the Court held that a state trial judge's injunction prohibiting the news media from publishing or broadcasting accounts of a criminal defendant's confession was an impermissible prior restraint.<sup>165</sup> "A prior restraint ... has an immediate and irreversible sanction," Chief Justice Burger warned. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>166</sup>

These cases highlight the most salient arguments against permitting judges to enjoin speech prior to its publication: the desire to maximize the amount of speech available to society; the inevitable overbreadth that accompanies injunctions; and the absence of procedural protections that precede the imposition of subsequent civil and criminal sanctions.

## *2. Prior Restraints and Full Adjudication*

The Supreme Court's earliest prior restraint decisions left the impression that only restraints on speech instituted before publication were presumptively unconstitutional as prior restraints. More recently, the Court added in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."<sup>167</sup> In

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164. See, e.g., 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22.7 (2013) (noting similar impact of injunctions in copyright cases, even when defendants have meritorious defenses); Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 574 (2001) (noting that plaintiffs often seek preliminary injunctions to force settlements).

165. 427 U.S. 539, 565-67 (1976).

166. *Id.* at 559.

167. 413 U.S. 376, 390 (1973). Although the Court stated that certain categories of speech are "unprotected by the First Amendment," no speech is entirely invisible to the Constitution. *Id.* See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) ("[S]tatements [that speech is unprotected by the First Amendment] must be taken in context ... and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.'").



*Pittsburgh Press*, the Court approved an injunction prohibiting the publication of classified ads that violated civil rights laws, noting that the expression being enjoined was clearly illegal, and that this illegality had been judicially determined before the court issued the injunction.<sup>168</sup>

Following *Pittsburgh Press*, the Supreme Court has repeatedly rejected speech restrictions that were imposed based on a mere “likelihood of success” or other speculative standard.<sup>169</sup> According to the Court, “[O]ur cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove [speech] from circulation.”<sup>170</sup> Not surprisingly, most courts that have addressed the propriety of granting a preliminary injunction or temporary restraining order directed at defamatory speech have concluded that such relief would be unconstitutional.<sup>171</sup>

Even if an injunction follows a finding of defamation, however, it remains an open question whether the First Amendment would permit a court to enjoin further publication. The Supreme Court has never held that an injunction directed at defamatory speech is constitutional. The Court recently had the chance to do so in *Tory v. Cochran*,<sup>172</sup> but when the plaintiff died a week after oral argument, the Court decided the case on narrow grounds.<sup>173</sup>

In *Tory*, a client of widely renowned attorney Johnnie Cochran, Jr.’s law firm felt that the firm had treated him badly and that

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168. 413 U.S. 376, 390-91. The Court also noted that the injunction did not prohibit political expression. *Id.*

169. *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (“[I]njunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (“[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.”) (Brennan, J., concurring). *But see* *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (suggesting that preliminary injunctions against alleged obscenity may be permissible, so long as the injunction creates only a relatively slight delay before full adjudication).

170. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989).

171. *See, e.g.*, *Am. Malting Co. v. Keitel*, 217 F. 672, 674 (S.D.N.Y. 1914); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 868 (App. 2008); *Cohen v. Advanced Med. Grp. of Ga., Inc.*, 496 S.E.2d 710, 710 (Ga. 1998); *Ellerbe v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992); *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 357 S.E.2d 576, 576 (Ga. 1987); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 305 (Ky. 2010); *Wolf v. Harris*, 184 S.W. 1139, 1141 (Mo. 1916); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 806 (Mo. 1892).

172. 544 U.S. 734, 735-36 (2005).

173. *Id.* at 737-38.



Cochran owed him money.<sup>174</sup> Ulysses Tory complained to the local bar association, wrote threatening letters to Cochran demanding ten million dollars, picketed Cochran's office holding up signs containing insults and obscenities, and, along with others, pursued Cochran while chanting similar threats and insults.<sup>175</sup> Cochran sued and requested a temporary restraining order, preliminary injunction, and permanent injunction to stop the defamatory speech.<sup>176</sup> Cochran did not seek money damages.<sup>177</sup>

The California trial court granted Cochran's request for a preliminary injunction and after a bench trial, concluded that Tory was engaging in a continuous pattern of libelous and slanderous activity in order to coerce Cochran to pay money that Tory was not owed, and that Tory would continue to engage in this activity in the absence of a court order.<sup>178</sup> It then issued a permanent injunction enjoining Tory and his wife Ruth Craft, who was not a defendant in the case, from making any statements about Johnnie Cochran or the law offices of Johnnie Cochran in any public forum.<sup>179</sup> In other words, the injunction was not limited to defamatory speech; it prohibited Tory and Craft from saying *anything* about Cochran or his law firm. The California Court of Appeals upheld the injunction.<sup>180</sup>

The United States Supreme Court granted Tory and Craft's petition for certiorari and noted that the question before the Court was: "Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."<sup>181</sup> Seven days after the case was

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174. *Id.*

175. *Id.* at 735.

176. *Id.*

177. Erwin Chemerinsky, who represented Ulysses Tory and his wife Ruth Craft in the Supreme Court, noted that "Tory was judgment-proof, there were no assets to be had." Erwin Chemerinsky, *Tucker Lecture, Law, and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1459 (2009).

178. *Tory*, 544 U.S. at 735-36.

179. *Id.* Dean Chemerinsky gives us a little more flavor on the result: "Ulysses Tory, who has a tenth grade education, represented himself. You can guess who prevailed at trial. The trial judge said to Johnnie Cochran's lawyer, 'Draft an injunction,' and the lawyer did what any zealous attorney would do: He wrote a really broad injunction." Chemerinsky, *supra* note 177, at 1459 (citation omitted).

180. *Tory*, 544 U.S. at 736, *vacating* 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003).

181. *Tory*, 544 U.S. at 736 (internal quotation marks omitted).

argued before the Court, Johnnie Cochran died.<sup>182</sup> Writing for the majority, Justice Stephen Breyer explained that the case was not moot because the injunction remained in effect.<sup>183</sup> Nevertheless, Breyer concluded that because of Cochran's death, there was no need to consider whether injunctions are permissible in defamation cases, noting that "Johnnie Cochran's death makes it unnecessary, indeed unwarranted, for us to explore petitioners' basic claims.... Rather, we need only point out that the injunction, as written, has now lost its underlying rationale."<sup>184</sup> Offering little in the way of additional guidance, Breyer explained:

Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (i.e., coercing Cochran to pay a "tribute" for desisting in this activity), the grounds for the injunction are much diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.<sup>185</sup>

The Court left unanswered whether a more narrowly tailored injunction would be constitutional. If, for example, the injunction only prohibited Ulysses Tory from repeating the specific statements the court had found at trial were defamatory, would such an order have passed constitutional muster? Perhaps it would. While cautioning that "[w]e express no view on the constitutional validity of any such new relief,"<sup>186</sup> the *Tory* Court left the door open by stating that an injunction "may still be warranted," if it were "tailored to these changed circumstances."<sup>187</sup> As discussed below, any such relief would undoubtedly have to be preceded by a judicial determination that the enjoined speech is properly subject to restraint.<sup>188</sup>

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182. *Id.*

183. *Id.*

184. *Id.* at 737-38.

185. *Id.* at 738.

186. *Id.* at 738-39.

187. *Id.*

188. See *infra* Part IV.A.1. Dean Chemerinsky appears to have adopted this position as well. Initially, in his brief to the Court in *Tory* and in a contemporaneous law review article he argued that even injunctions that follow a trial are impermissible prior restraints. See Chemerinsky, *supra* note 11, at 163. Several years later, he wrote that an injunction "limited

### III. A NEW APPROACH EMERGES IN THE TWENTIETH CENTURY

As Part II reveals, as late as the second half of the twentieth century, American courts considered it settled that libelous speech could not be enjoined, even after a finding of defamation. In the later part of the twentieth century, this started to change, as an increasing number of courts began granting and upholding injunctions in defamation cases. This section traces that change and examines the justifications judges proffered when departing from the no-injunction rule.

A survey of more than 242 decisions involving injunctions directed at defamatory speech reveals that at least fifty-six decisions have granted or affirmed injunctions, with an especially sharp increase in such decisions after 2000.<sup>189</sup> While these cases covered a broad range of expression, including oral statements,<sup>190</sup> books,<sup>191</sup>

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to specific speech that is proven to be false” would be the best solution, noting, “the position that I took as an advocate is different from that which I would argue as a scholar I think the Court should take.” Chemerinsky, *supra* note 177, at 1458, 1460.

189. Of the fifty-six decisions the author could find granting or affirming injunctive relief, thirty-one were issued after January 1, 2000. Only six decisions prior to 1950 granted or affirmed an injunction directed at libelous or slanderous speech. See *Chamber of Commerce of Minneapolis v. Fed. Trade Comm’n*, 13 F.2d 673, 696-97 (8th Cir. 1926); *Am. Malting Co. v. Keitel*, 209 F. 351, 361 (2d Cir. 1913); *Emack v. Kane*, 34 F. 46, 52 (C.C.N.D. Ill. 1888); *Carter v. Knapp Motor Co.*, 11 So. 2d 383, 386 (Ala. 1943); *Menard v. Houle*, 11 N.E.2d 436, 437 (Mass. 1937); *Hawks v. Yancey*, 265 S.W. 233, 239 (Tex. App. 1924).

190. See *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 858 (Cal. 1999); *Barlow v. Sipes*, 744 N.E.2d 1, 4 (Ind. Ct. App. 2001); *Hawks*, 265 S.W. at 236.

191. See *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 5-6 (Minn. 1984).

letters,<sup>192</sup> trade publications,<sup>193</sup> signs,<sup>194</sup> and even cars,<sup>195</sup> nearly half involved speech on the Internet.<sup>196</sup>

Although some courts neglected to address the relevant constitutional and equitable principles involved before granting an injunction,<sup>197</sup> those courts that did analyze the propriety of injunctive relief invariably noted the no-injunction rule, but nevertheless relied on at least one of three justifications for departing from the rule: (1) the speech impugned the plaintiff's property interest; (2) the defendant engaged in a continuing course of conduct that caused

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192. See *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1203 (6th Cir. 1990); *Am. Malting Co.*, 209 F. at 352.

193. See *Chamber of Commerce of Minneapolis*, 13 F.2d at 682; *Emack*, 34 F. at 47.

194. See *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233 (9th Cir. 1997); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 979 (D. Or. 1963); *Wallace v. Cass*, No. 04CC05117, 2008 WL 626475, at \*2 (Cal. Ct. App. Mar. 10, 2008); *Cochran v. Tory*, No. BC239405, 2002 WL 33966354, at \*1 (Cal. Super. Ct. Apr. 24, 2002) (order granting permanent injunction), *vacated*, 544 U.S. 734 (2005); *Guion v. Terra Mktg.*, 523 P.2d 847, 848 (Nev. 1974); *Bingham v. Struve*, 591 N.Y.S.2d 156, 157 (App. Div. 1992); *Mazzocone v. Willing*, 369 A.2d 829, 830 (Pa. Super. Ct. 1976), *rev'd*, 482 Pa. 377 (1978).

195. See *Carter v. Knapp Motor Co.*, 11 So. 2d 383, 383 (Ala. 1943) (enjoining defendant from driving a car with a white elephant and the word "Hudson" painted on it); *Hajek v. Bill Mowbray Motors, Inc.*, 645 S.W.2d 827, 829-30, 834 (Tex. App. 1982) (enjoining use of the word "lemon" on defendant's car), *rev'd*, 647 S.W.2d 253 (Tex. 1983).

196. Twenty-seven of the fifty-six decisions granting injunctive relief involved speech on the Internet. See *N. Am. Recycling, LLC v. Texamet Recycling, LLC*, No. 3283380, 2012 WL 3283380, at \*2 (S.D. Ohio Aug. 10, 2012); *Am. Univ. of Antigua Coll. of Med. v. Woodward*, 837 F. Supp. 2d 676, 689 (E.D. Mich. 2011); *Bluemile, Inc. v. Yourcolo, LLC*, No. 2:11-CV-497, 2011 U.S. Dist. LEXIS 62178, at \*5 (S.D. Ohio June 10, 2011); *Eppley v. Iacovelli*, No. 1:09-CV-386-SEB-JMS, 2009 WL 1035265, at \*1 (S.D. Ind. Apr. 17, 2009); *Int'l Profit Assocs., Inc. v. Paisola*, 461 F. Supp. 2d 672, 680-81 (N.D. Ill. 2006); *In re Davis*, 334 B.R. 874, 889 (Bankr. W.D. Ky. 2005), *rev'd in part*, 347 B.R. 607, 610 (W.D. Ky. 2006); *Stutz Artiano Shinoff & Holtz v. Larkins*, No. 37-2007-007218, 2011 WL 3425629, at \*1 (Cal. Super. Ct. Oct. 30, 2009), *rev'd*, 2011 WL 3425629 (Cal. Dist. Ct. App. Aug 5, 2011); *Evans v. Evans*, No. GIC881162, 2007 WL 5490538, at \*1 (Cal. Super. Ct. May 25, 2007), *rev'd*, 76 Cal. Rptr. 3d 859 (Ct. App. 2008); *Giordano v. Romeo*, 76 So. 3d 1100, 1101 (Fla. Dist. Ct. App. 2011); *Griffis v. Luban*, No. CV-01-1350, 2002 WL 338139, at \*1 (Minn. Ct. App. Mar. 5, 2002); *Apex Tech. Grp., Inc. v. Does*, No. MID-L-7878-09 (N.J. Super. Ct. Law Div. Dec. 23, 2009); *Glassman v. Feldman*, No. 102988/2012 (N.Y. Sup. Ct. Oct. 2, 2012) (Bloomberg Law); *Rombom v. Weberman*, No. 1378100, 2002 WL 1461890, at \*1 (N.Y. Sup. Ct. June 13, 2002), *aff'd*, 766 N.Y.S.2d 88 (App. Div. 2003); *Cullum v. White*, No. 04-09-0095, 2010 WL 3333056, at \*1 (Tex. App. Aug. 25, 2010); *Bat World Sanctuary v. Cummins*, No. 352-248169-10, 2012 WL 4050469 (Tex. Dist. Ct. Aug. 27, 2012); *Burfoot v. May4thCounts.com*, No. CL10-2735 (Va. Cir. Apr. 21, 2010), *withdrawn*, 80 Va. Cir. 306 (Apr. 22, 2010).

197. See generally *Bluemile, Inc.*, 2011 U.S. Dist. LEXIS 62178; *Apex Tech. Grp., Inc.*, No. MID-L-7878-09; *Bat World Sanctuary*, 2012 WL 4050469; *Dietz Dev., LLC v. Perez*, No. 2012-16249 (Va. Cir. Ct., Dec. 5, 2012).

the plaintiff harm; or (3) the speech had been adjudged to be defamatory.

### A. *Exceptions to the No-Injunction Rule*

#### 1. *Speech That Impugns Property Interests*

One of the earliest exceptions to the no-injunction rule was based on the belief that a court could issue an injunction if the order was directed at preserving business or other property interests.<sup>198</sup> We see this solicitude for property rights in cases in which the defendant is alleged to have defamed the plaintiff by questioning the legitimacy of his patents<sup>199</sup> or the quality of his products or services,<sup>200</sup> and in claims for tortious interference with contracts or business relationships.<sup>201</sup> In essence, these courts held that an injunction was proper because the plaintiff had an interest in something other than personal reputation.

The indulgent treatment accorded to plaintiffs when property interests are at stake is evident in other doctrinal areas as well, especially in copyright cases, in which courts are “unquestionably more favorable to plaintiffs than to defendants.”<sup>202</sup> According to

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198. See *Brandreth v. Lance*, 8 Paige Ch. 24, 27 (N.Y. Ch. 1839) (“The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property.”). There is some disagreement over whether, in addition to an interest in property, the plaintiff must also allege acts of conspiracy, intimidation, or coercion. See *Carter*, 11 So. 2d at 385 (discussing disagreement on this point).

199. See, e.g., *A.B. Farquhar Co. v. Nat'l Harrow Co.*, 102 F. 714, 715 (3d Cir. 1900); *Warren Featherbone Co. v. Landauer*, 151 F. 130, 134 (C.C.E.D. Wis. 1903); *Emack v. Kane*, 34 F. 46, 52 (C.C.N.D. Ill. 1888).

200. See, e.g., *Barlow v. Sipes*, 744 N.E.2d 1, 8 (Ind. Ct. App. 2001); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984); *Guion v. Terra Mktg. of Nev., Inc.*, 523 P.2d 847, 847-48 (Nev. 1974); *Mazzocone v. Willing*, 369 A.2d 829, 831 (Pa. Super. Ct. 1976), *rev'd*, 393 A.2d 1155 (Pa. 1978); *Hajek*, 645 S.W.2d at 834, *rev'd*, 647 S.W.2d 253 (Tex. 1983).

201. See, e.g., *Am. Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913); *Wolf v. Gold*, 193 N.Y.S.2d 36, 38 (App. Div. 1959); *W. Willow Realty Corp. v. Taylor*, 198 N.Y.S.2d 196, 199 (Sup. Ct. 1960); *Guion*, 523 P.2d at 848; *Amalgamated Acme Affiliates v. Minton*, 33 S.W.3d 387, 394-96 (Tex. App. 2000).

202. *Lemley & Volokh*, *supra* note 11, at 165. As early as the eighteenth century, English courts of chancery had jurisdiction to restrain publications “that infringed copyright, whether based on statute, common law, or the Crown’s or Parliament’s prerogative monopolies over publishing certain subjects.” Siegel, *supra* note 1, at 678.

Professors Mark Lemley and Eugene Volokh, who wrote the definitive treatment of injunctive relief in intellectual property cases, injunctions—even preliminary injunctions—are granted as “a matter of course” to prevent copyright infringement.<sup>203</sup> Indeed, in intellectual property cases, courts view protection of the plaintiff’s property interests as clearly superior to any countervailing speech interests. As Professor Wendy Gordon noted, “The incantation ‘property’ seems sufficient to render free speech issues invisible” in such cases.<sup>204</sup>

Given that “property interests” enjoy no special dispensation under the First Amendment,<sup>205</sup> this justification for granting an injunction directed at defamatory speech makes little sense. Moreover, it seems perverse to say that a plaintiff who is being ostracized by her neighbors due to defamatory speech is not entitled to equitable relief, whereas the owner of the local car repair shop can get an injunction because his business is suffering. This is precisely the reasoning an Indiana court relied on in *Barlow v. Sipes*:

A business flourishes or folds on its reputation in a community, and it appears that Sipes Body has cultivated a very good reputation in the Lawrence County area. However, the record indicates that the Barlows’ statements have somewhat eroded this good name, and equitable relief is the most efficient and practical means of ensuring that the good will of Sipes Body is not destroyed pending the resolution of the tort suits.... Therefore, the grant of equitable relief was proper not only to provide

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203. Lemley & Volokh, *supra* note 11, at 150. This may be changing due to the Supreme Court’s decision in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). See DiSarro, *supra* note 74, at 84 (observing that some courts have interpreted *eBay* as barring presumptions of irreparable harm in copyright cases).

204. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 (1993).

205. See *id.* at 1537 (“Lawyers, law professors, and even judges are on record pleading for the law to subject intellectual property to the same free speech principles that limit other assertions of governmental power.”); Lemley & Volokh, *supra* note 11, at 182 (“The argument that copyright law should be exempted from standard First Amendment procedural rules because it protects property rights strikes us as a non sequitur.”); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 737-38 (1992) (criticizing the use of a property analysis to grant injunctive relief in light of free speech law’s disapproval of prior restraints).

a complete remedy for Sipes Body's economic injury, but also for its reputational harm.<sup>206</sup>

Where the speech relates to products or services, some courts also have held that the lesser constitutional protection afforded to “commercial speech” permitted them to issue injunctive relief.<sup>207</sup> The argument here is that commercial speech “is more objective, and hence more verifiable, than other types of speech.”<sup>208</sup> Furthermore, “because of its importance to business profits, and because it is carefully calculated, [it] is also less likely than other forms of speech to be inhibited by proper regulation.”<sup>209</sup>

## 2. *Speech That Is Part of a Continuing Course of Conduct*

Recall that in *Cochran v. Tory*, the California Court of Appeals stated that an injunction was warranted because Ulysses Tory conceded that he would continue to picket Johnnie Cochran’s office, even if he were held liable for defamation.<sup>210</sup> Other courts have also found it relevant that the speech at issue was part of a continuing course of tortious conduct or that the defendant had given clear indications he would continue to defame or harass the plaintiff.<sup>211</sup>

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206. 744 N.E.2d 1, 8-9 (Ind. Ct. App. 2001).

207. See *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 394 (Tex. App. 2000). It is highly questionable whether these cases actually involved commercial speech. See, e.g., Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1081 (2000) (“[S]peech can’t be commercial just because it relates to commerce, or else the *Wall Street Journal*, union leaflets and newsletters, newspaper reviews of commercial products, and speech by disgruntled consumers criticizing what they consider poor service by producers would be deprived of full constitutional protection.”) (footnotes omitted).

208. *Amalgamated Acme Affiliates*, 33 S.W.3d at 394 (citing *Friedman v. Rogers*, 440 U.S. 1, 10 (1979)).

209. *Id.* at 394 (internal quotation marks omitted) (quoting *Friedman*, 440 U.S. at 10); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (noting in dicta that commercial speech “may also make inapplicable the prohibition against prior restraints”).

210. No. B159437, 2003 WL 22451378, at \*3 (Cal. Ct. App. Oct. 29, 2003) (“Based upon his prior unlawful conduct and his admissions in court that, absent restraint by the court, he would continue to picket Cochran, Tory has no basis for his challenge to the breadth of the injunction.”), *vacated*, 544 U.S. 734 (2005).

211. See, e.g., *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990)



Unlike in *Tory*, however, most of these courts held that the continuing conduct was a sufficient justification for granting an injunction even though there had not been a final determination that the speech was defamatory.<sup>212</sup>

The gravamen of these cases is that the publication is part of a conspiracy to coerce or intimidate the plaintiff. In many of the decisions, however, it is difficult to identify any added harm the plaintiff will suffer due to the speaker's tortious conduct that would not also be attributable to the defamatory speech. Moreover, the quantum of additional conduct that can bring a case within this exception is often quite minimal. For example, in *Eppley v. Iacovelli*, the court relied on the defendant's very act of publishing websites and videos accusing the plaintiff doctor of causing her ailments in concluding that injunctive relief was proper because the defendant had "engaged in an intentional 'smear campaign' through defamatory Internet publications."<sup>213</sup> Similarly, in *West Willow Realty Corp. v. Taylor*, the court held that the defendant's picketing of plaintiffs' business with signs and pamphlets complaining that it had sold him a home with defects was sufficient to justify an injunction because the defendant's actions were "designed and put into effect for the purpose of intimidating plaintiffs and coercing a

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(Wellford, J., concurring in part and dissenting in part); Chamber of Commerce of Minneapolis v. Fed. Trade Comm'n, 13 F.2d 673, 686 (8th Cir. 1926); Emack v. Kane, 34 F. 46, 52 (C.C.N.D. Ill. 1888); N. Am. Recycling, LLC v. Texamet Recycling, LLC, No. 2:08-CV-579, 2012 WL 3283380, at \*1 (S.D. Ohio Aug. 10, 2012); Eppley v. Iacovelli, No. 1:09-CV-386-SEB-JMS, 2009 WL 1035265, at \*1 (S.D. Ind. Apr. 17, 2009); Martin v. Reynolds Metals Co., 224 F. Supp. 978, 984 (D. Or. 1963), *aff'd*, 337 F.2d 780 (9th Cir. 1964); Carter v. Knapp Motor Co., 11 So. 2d 383, 384-85 (Ala. 1943); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 350 (Cal. 2007); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 852-53 (Cal. 1999); Wallace v. Cass, No. 6036490, 2008 WL 626475, at \*2 (Cal. Ct. App. March 10, 2008); Bingham v. Struve, 591 N.Y.S.2d 156, 158 (App. Div. 1992); Rombom v. Weberman, No. 1378100, 2002 WL 1461890, at \*13 (N.Y. Sup. Ct. June 13, 2002), *aff'd*, 766 N.Y.S.2d 88 (App. Div. 2003); W. Willow Realty Corp. v. Taylor, 198 N.Y.S.2d 196, 198 (Sup. Ct. 1960); Guion v. Terra Mktg. of Nev., Inc., 523 P.2d 847, 847-48 (Nev. 1974); Hajek v. Bill Mowbray Motors, Inc., 645 S.W.2d 827, 829-31 (Tex. App. 1982), *rev'd*, 647 S.W.2d 253 (Tex. 1983); Hawks v. Yancey, 265 S.W. 233, 239 (Tex. App. 1924).

212. See, e.g., *Eppley*, 2009 WL 1035265; *Martin*, 224 F. Supp. at 984; *W. Willow Realty Corp.*, 198 N.Y.S.2d at 198; *Guion*, 523 P.2d at 848; *Hajek*, 645 S.W.2d at 834; *Hawks*, 265 S.W. at 239.

213. *Eppley*, 2009 WL 1035265, at \*4.

settlement of the claims of and the action brought by defendant against [plaintiffs' business]."<sup>214</sup>

### 3. *Speech That Has Been Adjudged to Be Defamatory*

The reason courts most often cite when departing from the no-injunction rule is that the injunction will restrain speech that has been held to be defamatory. In 1975, Ohio and Georgia became the first states to adopt this exception, holding that "[o]nce speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper."<sup>215</sup> Nearly a decade later, the Minnesota Supreme Court adopted this approach in *Advanced Training Systems v. Caswell Equipment Co.*, affirming a permanent injunction restraining the defendant from publishing marketing materials that the jury found contained libelous statements about the plaintiff's products.<sup>216</sup> The court reasoned:

Under the recent decisions of this court and the United States Supreme Court, the permanent injunction below is not unconstitutional.... Other courts have also upheld the suppression of libel, so long as the suppression is limited to the precise statements found libelous after a full and fair adversary proceeding. We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand.<sup>217</sup>

The California Supreme Court found this reasoning persuasive in *Balboa Island Village Inn v. Lemen*,<sup>218</sup> one of the most influential decisions rejecting the no-injunction rule. The case, not unlike many

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214. 198 N.Y.S.2d at 199.

215. *O'Brien v. Univ. Cmty. Tenants Union*, 327 N.E.2d 753, 755 (Ohio 1975); *see also* *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62 (Ga. 1975) (affirming injunction because the "jury verdict necessarily found the statements of [defendant] to have been false and defamatory, and the evidence authorized a conclusion that the libel had been repetitive"); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) (permitting an injunction "so long as the suppression is limited to the precise statements found libelous after a full and fair adversary proceeding").

216. 352 N.W.2d 1, 12 (Minn. 1984).

217. *Id.* at 11 (citing *Retail Credit Co.*, 218 S.E.2d at 62; *O'Brien*, 327 N.E.2d at 755).

218. 156 P.3d 339, 348 (Cal. 2007).

defamation cases, involved a disturbing pattern of behavior. Anne Lemen owned a home across an alley from the Balboa Island Village Inn and was a vocal critic of the establishment, having contacted the authorities numerous times to complain of excessive noise and the behavior of inebriated customers leaving the bar.<sup>219</sup> In an effort to document these problems, Lemen photographed and videotaped customers entering and leaving the building, sometimes calling them “drunks” and “whores.”<sup>220</sup> She told customers entering the Inn that “the food is shitty” and told neighbors that “there was child pornography and prostitution going on in the Inn, and that the Village Inn was selling drugs and [] alcohol to minors.”<sup>221</sup> In its lawsuit, the Village Inn alleged causes of action for nuisance, defamation, and intentional interference with business relations and sought injunctive relief against the defendant.<sup>222</sup> Following a bench trial, the court issued a permanent injunction that prohibited, inter alia, the defendant from making defamatory statements about the plaintiff to third persons.<sup>223</sup> The court of appeals affirmed the trial court’s decision, but substantially limited the injunction.<sup>224</sup>

Acknowledging that an injunction directed at defamatory speech raised significant constitutional concerns, the California Supreme Court distinguished the present case from earlier decisions invalidating injunctive relief: “Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful.”<sup>225</sup>

After reviewing the equitable and constitutional principles that led to the no-injunction rule, the California Supreme Court held

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219. *Id.* at 341.

220. *Id.*

221. *Id.* at 341, 342.

222. *Id.* at 342.

223. *Id.*

224. The court of appeals affirmed the provision in the injunction that precluded the defendant from filming within twenty-five feet of the Village Inn, but invalidated the provisions that limited the defendant’s contact with the plaintiff’s employees and prohibited her from making defamatory statements about the plaintiff, holding that they violated the defendant’s right to free speech under the California and Federal Constitutions. *Id.*

225. *Id.* at 344-45.

that an injunction that is narrowly tailored, directed at stopping a continuing course of repetitive speech, and granted after a final determination that speech is unprotected does not constitute an unlawful prior restraint.<sup>226</sup> The court ultimately affirmed the injunction, but remanded the case with instructions that any injunction be “limited to prohibiting Lemen personally from repeating her defamatory statements.”<sup>227</sup>

The Kentucky Supreme Court recently announced that it too was joining Ohio, Georgia, Minnesota, and California and adopting the “modern rule” that defamatory speech may be enjoined after a final determination that “the speech at issue is, in fact, false.”<sup>228</sup> Several decisions by the Missouri Supreme Court also appear to suggest in dicta that an injunction is permissible if it follows a jury’s verdict that the speech is defamatory.<sup>229</sup> To date, no state supreme court has expressly rejected this approach as violative of the federal Constitution, although several courts have held that the free speech guarantees in their state constitutions pose an independent bar to injunctive relief in defamation cases.<sup>230</sup>

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226. *Id.* at 349.

227. *Id.* at 352.

228. *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 309 (Ky. 2010) (vacating an injunction on grounds of overbreadth, but stating that narrowly tailored injunctions would be permissible). The Kentucky decision, however, deviates from the approach taken by Ohio, Georgia, Minnesota, and California in that it appears to require that the plaintiff prove only that the speech in question is false, rather than requiring proof of all of the elements of defamation. *See Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) (discussing adoption of the rule in Ohio, Georgia, and Minnesota); *Balboa Island Vill. Inn*, 156 P.3d at 350. As discussed *infra* Part IV.A.1, a plaintiff must establish all of the elements of a defamation claim before a court can issue any sanction directed at the allegedly defamatory speech, let alone an injunction.

229. *See Ryan v. Warrensburg*, 117 S.W.2d 303, 308 (Mo. 1938); *Wolf v. Harris*, 184 S.W. 1139, 1141-42 (Mo. 1916); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 806 (Mo. 1892).

230. *See, e.g., Dailey v. Super. Ct.*, 44 P. 458, 460 (Cal. 1896) (California Constitution); *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 746 (1882) (Louisiana Constitution); *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173, 179-80 (1876) (Missouri Constitution); *Lindsay & Co. v. Mont. Fed’n of Labor*, 96 P. 127, 131 (Mont. 1908) (Montana Constitution); *Howell v. Bee Pub. Co.*, 158 N.W. 358, 359 (Neb. 1916) (Nebraska Constitution); *Willing v. Mozzacone*, 339 A.2d 1155, 1157 (Pa. 1978) (Pennsylvania Constitution); *Mitchell v. Grand Lodge, Free & Accepted Masons of Tex.*, 121 S.W. 178, 179 (Tex. Civ. App. 1909) (Texas Constitution). My focus here, however, is on the limitations imposed by the U.S. Constitution.

Of the five federal circuit courts of appeal to have addressed this issue, three have held that injunctions are permissible if there has been a finding of defamation.<sup>231</sup> Only the Second Circuit has expressly rejected this justification for granting injunctive relief, remarking that “[w]e have never held in this Circuit that a libel becomes subject to an injunction once its libelous character has been adjudicated.”<sup>232</sup> Although the Seventh Circuit recently invalidated an injunction on the basis of overbreadth, it echoed the Supreme Court’s decision in *Tory v. Cochran*, stating: “[W]e vacate the injunction as written and express no opinion on the constitutional validity of any new, narrowed injunctive relief the district court might think appropriate after considering all of the relevant factors.”<sup>233</sup>

In summary, although the overall number of decisions granting injunctions is small relative to the total number of cases in which plaintiffs requested injunctive relief, it is clear that a trend is emerging within both state and federal courts that permits injunctions if the speech in question was adjudged to be defamatory.

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231. See *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997) (affirming the injunction and stating “the district court correctly found that the Union’s display of the banner was fraudulent[;] ... the First Amendment does not protect fraud”); *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992) (remanding and ordering the district court to “narrow its previous language so as to enjoin the dissemination of information relating to the tests and samples that were the subject of the underlying suit”); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1208-09 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part) (permitting an injunction, but limiting the “application of such injunction to the statements which have been found in this and prior proceedings to be false and libelous”). The Ninth Circuit’s decision in *San Antonio Community Hospital*, however, diverges from the other decisions because it affirmed a *preliminary injunction* where no jury or court had made a final determination that the speech was defamatory. See 125 F.3d at 1240 (Kozinski, J., dissenting) (citations omitted) (“An interlocutory injunction based on a ‘reasonable probability’ of malice, is, by hypothesis, not based on ‘actual malice.’”).

232. *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 178 (2d Cir. 2001). The Third Circuit also refused to recognize an exception for post-adjudication injunctions in *Kramer v. Thompson*, noting that the Pennsylvania Supreme Court had rejected the “modern” view as violative of the Pennsylvania Constitution in *Willing v. Mozzacone*, 339 A.2d 1155 (Pa. 1978), and that “Pennsylvania would appear firmly bound to the traditional rule.” 947 F.2d 668, 678 (3d Cir. 1991).

233. *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 603, 606 (7th Cir. 2007) (vacating injunction that prohibited the defendant from “alleg[ing] or assert[ing] that [p]laintiffs are spammers or other like term”).

### *B. Problems of Overbreadth and Underinclusiveness*

Before we declare the no-injunction rule dead—and it is far too early to do so—it should be noted that not all injunctions are created equal. Even in cases in which an injunction follows a finding that the speech is defamatory, the injunction may still be an impermissibly broad restraint on speech. It is no easy task to craft a narrowly tailored injunction that will achieve a plaintiff's purposes without being overbroad or underinclusive.

A review of the cases reveals that courts have indeed struggled with how to fashion an injunction that is both broad enough to prevent further reputational harm to the plaintiff and sufficiently narrow to allow the defendant to engage in the lawful exercise of his speech rights. To aid in the analysis of the injunctions courts have issued, the injunctions can be placed into four general category types, I-IV, roughly in order from broadest to narrowest in scope.

#### *1. Type I Injunctions*

A number of courts have issued what we will call a “Type I” injunction, which prohibits a party from making *any statements* about the plaintiff.<sup>234</sup> In fact, this was precisely the type of injunction at issue in *Cochran v. Tory*, where the trial judge permanently enjoined the defendant and his non-party wife from “orally uttering statements about Cochran and/or Cochran’s law firm.”<sup>235</sup> Apart from ordering someone not to speak at all—an obviously impermissible injunction that does not appear in the cases—Type I injunctions are the broadest and most problematic of the four types of injunctions courts have issued. Because Type I injunctions invariably restrain

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234. *Eppley v. Iacovelli*, No. 1:04-CV-386-SEB-JMS, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009) (ordering defendant to remove “[a]ll posting on the internet, made by the defendant ... subsequent to this action ... which refer to” the plaintiff or his attorneys); *Stutz Artiano Shinoff & Holtz v. Larkins*, No. 34-2007-0076218 (Cal. Super. Ct. Dec. 11, 2009), *rev’d*, No. D057190, 2011 WL 3425629 (Cal. Ct. App. Aug. 5, 2011); *Cochran v. Tory*, No. BC239405, 2002 WL 33966354, at \*1 (Cal. Super. Ct. Apr. 24, 2002) (ordering that defendant is “permanently enjoined from ... orally uttering statements about Cochran and/or Cochran’s law firm”), *vacated*, 544 U.S. 734 (2005); *Apex Tech. Grp., Inc. v. Doe*, No. MID-L-7879-09 (N.J. Super. Ct. Law Div. Dec. 23, 2009) (issuing a preliminary injunction ordering, inter alia, removal from websites of any postings referring to plaintiffs).

235. *Cochran*, 2002 WL 33966354, at \*1.

speech not adjudged to be defamatory—speech that even under the most generous application of libel law, could never be found defamatory—they are plainly overbroad and therefore unconstitutional.<sup>236</sup> Not surprisingly, in many of the cases in which a court granted such an injunction, it was reversed or vacated on appeal, or subsequently dissolved by the trial court.<sup>237</sup>

## 2. Type II Injunctions

No less problematic are “Type II” injunctions, which prohibit a party from publishing any *defamatory* statements about the plaintiff.<sup>238</sup> Type II injunctions are overbroad because they are not precise enough to put the defendant on notice as to what speech will violate the injunction.<sup>239</sup> In *Near v. Minnesota*, the Supreme Court

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236. See *supra* Part II.B.2.

237. See *Tory v. Cochran*, 544 U.S. 734, 738-39 (2005); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *Stutz Artiano Shinoff & Holtz*, 2011 WL 3425629, at \*7-10; *Wallace v. Cass*, No. G036490, 2008 WL 626475, at \*8-9 (Cal. Ct. App. 2008); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W.2d 740, 744, 747 (Neb. 1997); *Cullum v. White*, No. 04-09-00695-CV, 2011 WL 6202800, at \*13 (Tex. App. Dec. 14, 2011).

238. See *Chamber of Commerce v. Fed. Trade Comm’n*, 13 F.2d 673, 682, 696-97 (8th Cir. 1926) (discussing the order issued by the district court and upholding the injunction); *Ordonez v. Icon Sky Holdings LLC*, No. 10-60156-CIV, 2011 WL 3843890, at \*7-9 (S.D. Fla. Aug. 30, 2011); *Bluemile, Inc. v. Yourcolo, LLC*, No. 2:11-CV-497, 2011 U.S. Dist. LEXIS 62178, at \*2 (S.D. Ohio June 10, 2011); *Evans v. Evans*, No. GIC881152, 2007 WL 5490 538 (Cal. Super. Ct. May 25, 2007), *rev’d*, 76 Cal. Rptr. 3d 859 (App. 4th 2008); *Barlow v. Sipes*, 744 N.E.2d 1, 5, 11 (Ind. Ct. App. 2001); *W. Willow Realty Corp. v. Taylor*, 198 N.Y.S.2d 196, 200 (Sup. Ct. 1960), *appeal dismissed*, 205 N.Y.S.2d 810 (App. Div.) 1960.

239. See 13 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 65.60[2] (3d. ed. 2013) (“A restraining order or injunction must state its terms specifically. An injunction is impermissibly overbroad if it seeks to restrain the defendant from engaging in legal conduct or from engaging in illegal conduct that is not fairly the subject of the litigation.”). As a result, in many of the cases in which a court granted such an injunction, it was reversed on appeal or subsequently dissolved by the trial court. See *Near v. Minnesota ex rel Olson*, 283 U.S. 697, 706, 722-23 (1931) (overturning a state statute permitting broad injunctions and the specific injunction at issue); *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 86 (5th Cir. 1976); *Oorah, Inc. v. Schick*, No. 09-CV-00353, 2012 WL 3233674, at \*4 (E.D.N.Y. Aug. 6, 2012) (denying request for injunction because plaintiff failed to show that remedies available at law were inadequate); *Wilson v. Super. Ct.*, 532 P.2d 116, 122-23 (Cal. 1975) (“[P]etitioner was placed in the untenable position of speculating on whether his attempts to comply with the court orders were satisfactory.”); *Evans*, 76 Cal. Rptr. 2d at 867-69 (“This sweeping prohibition fails to adequately delineate which of Linda’s future comments might violate the injunction.”); *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 524 (Ct. App. 1991); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 311 & n.5 (Ky. 2010); *Rosenberg Diamond Dev. Corp. v. Appel*, 735 N.Y.S.2d 528, 528 (App. Div. 2002); *Brammer v. KB Home Lone Star, L.P.*, 114



struck down just such an injunction that barred the defendant from publishing or distributing “any publication whatsoever which is a malicious, scandalous or defamatory newspaper.”<sup>240</sup> In practical terms, Type II injunctions place the judge in the perpetual role of censor, deciding on a contempt-by-contempt basis what speech is permissible.<sup>241</sup> As Chief Justice Hughes warned in *Near*, this type of injunction is “the essence of censorship.”<sup>242</sup>

### 3. Type III Injunctions

“Type III” injunctions prohibit a party from publishing certain enumerated statements about the plaintiff without limiting the injunction to the specific statements that have been found to be defamatory.<sup>243</sup> A Type III injunction, for example, might order the

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S.W.3d 101, 114 (Tex. App. 2003) (rejecting portions of a temporary injunction prohibiting the defendant from defaming the plaintiff).

240. *Near*, 283 U.S. at 706.

241. *See, e.g., Wilson*, 532 P.2d at 122-23 (reversing injunction and noting that the trial court “aggressively assumed the role of governmental censor, approving its version of a ‘fair’ presentation, and disapproving a ‘too narrow view of the truth’”).

242. *Near*, 283 U.S. at 713.

243. *See San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997) (affirming a preliminary injunction prohibiting display of a banner stating, “This medical facility is full of rats”); *Emack v. Kane*, 34 F. 46, 50-51 (C.C.N.D. Ill. 1888) (enjoining defendant from making statements aimed at scaring plaintiff’s customers away and ruining his reputation); *N. Am. Recycling, LLC v. Texamet Recycling, LLC*, No. 2:08-CV-579, 2012 WL 3283380, at \*2 (S.D. Ohio 2012) (enjoining future statements that are “significantly similar” to those that had been found to be defamatory); *Frontier Mgmt. Co. v. Balboa Ins. Co.*, 622 F. Supp. 1016, 1021 (D. Mass. 1985) (issuing a preliminary injunction directed at specific false statements that “the program was unprofitable”); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 984 (D. Or. 1963) (ordering removal of signs pending completion of case), *aff’d*, 337 F.2d 780 (9th Cir. 1964); *In re Davis*, 334 B.R. 874, 888 (Bankr. W.D. Ky. 2005) (ordering removal of website and enjoining defendant from creating another similar website), *aff’d in part and rev’d in part*, 347 B.R. 607 (W.D. Ky. 2006); *Carter v. Knapp Motor Co.*, 11 S. 2d 383, 386 (Ala. 1943) (affirming a preliminary injunction prohibiting defendant from driving a car painted with a white elephant); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 863 (Cal. 1999) (prohibiting “derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees”); *Giordano v. Romeo*, No. 09-68539-CA25 (Fla. Cir. Ct. Dec. 28, 2010) (directing operator of website to cease “maintaining the statements about Plaintiffs posted by Romeo”), *withdrawn*, No. 09-68539-LA25 (Fla. Cir. Ct. Feb. 18, 2011); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) (upholding the injunction issued by lower court because it was limited to material previously adjudicated to be libel); *Glassman v. Feldman*, No. 102988/2012 (N.Y. Sup. Ct. Oct. 2, 2012) (granting a temporary restraining order ordering removal of specified allegedly defamatory statements from the Internet); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393, 398-99

defendant to take down an entire website, even though only a few statements on the site have been found to be defamatory, or it might prohibit speech when there has been no finding of defamation at all. This type of injunction is common when the defendant has not put on a vigorous defense. This includes cases in which the defendant did not appear, and the court either converted the complaint into an injunction or relied on the plaintiff to draft the language in the order.<sup>244</sup> Although a Type III injunction can be narrower than a Type II injunction because it gives the defendant specific guidance as to what is prohibited, Type III injunctions are, nevertheless, overbroad because they enjoin speech that has not been adjudged defamatory. Indeed, in several of the cases in which a judge issued such an injunction it was ultimately withdrawn or overturned on appeal.<sup>245</sup>

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(Tex. App. 2000) (affirming the lower court's injunction prohibiting enumerated communications); *Hajek v. Bill Mowbray Motors, Inc.*, 645 S.W.2d 827, 834 (Tex. App. 1982) (affirming the lower court's issuance of an injunction prohibiting defendant from publishing and circulating statements that the van sold by plaintiff was a lemon), *rev'd*, 647 S.W.2d 253 (Tex. 1983); *Hawks v. Yancey*, 265 S.W. 233, 236, 239 (Tex. App. 1924) (reversing the lower court's denial of an injunction prohibiting the defendant from speaking to the plaintiff or to any of plaintiff's employers about her relations or association with the defendant); *Bat World Sanctuary v. Cummins*, No. 352-248169-10, 2012 WL 4050469 (Tex. Dist. Ct. Aug. 27, 2012) (prohibiting the defendant from posting anywhere on the Internet or publishing in any way any of the statements and photographs listed in plaintiff's complaint); *Burfoot v. May4thCounts.com*, No. CL102735 (Va. Cir. Ct. Apr. 21, 2010) (ordering removal of website), *vacated*, 80 Va. Cir. 306 (2010).

244. *See, e.g., Glassman*, No. 102988/2012, at \*3 (granting a temporary restraining order because defendant failed to appear); *Bat World Sanctuary*, No. 352-248169-10 (enjoining the publication of statements and photographs listed in plaintiff's complaint). Paul Alan Levy, an attorney who frequently defends clients facing speech injunctions, observed that "[t]hese orders are often made because they are sought ex parte and the judge does not do original research leading to clear law forbidding ex parte injunctions against speech, or because the defendant's lawyer lacks enough sophistication to recognize and argue the prior restraint issue, or, in the end, because the trial judge just wants to do what he sees as fair." Paul Alan Levy, *Prior Restraint Doctrine Protects Negative Yelp Review Against Preliminary Injunction*, CONSUMER L. & POL'Y BLOG (Dec. 26, 2012), <http://pubcit.typepad.com/clpblog/2012/12/prior-restraint-doctrine-protects-negative-yelp-review-against-preliminary-injunction.html>.

245. *See* e360 Insight v. Spamhaus Project, 500 F.3d 594, 606 (7th Cir. 2007); *Animal Rights Found. of Fla., Inc. v. Siegel*, 867 So. 2d 451, 458 (Fla. Dist. Ct. App. 2004); *St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Am. Broad. Cos. v. Smith Cabinet Mfg. Co.*, 312 N.E.2d 85, 91-92 (Ind. Ct. App. 1974); *Krebiozen Research Found. v. Beacon Press, Inc.*, 134 N.E.2d 1, 9 (Mass. 1956); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Perez v. Dietz Dev., LLC*, No. 122157, 2012 WL 6761997 (Va. Dec. 28, 2012); *Burfoot*, 80 Va. Cir. at 309.

#### 4. Type IV Injunctions

The narrowest of the four injunction categories is a “Type IV” injunction, which only prohibits further publication, or orders the removal of the specific statements a court or jury has found are defamatory.<sup>246</sup> The injunction approved by the California Supreme Court in *Balboa Island Village Inn* is an example of a Type IV injunction.<sup>247</sup> It began, as many injunctions do, as an overbroad restraint on the defendant’s ability to contact the plaintiff’s employees and to film customers entering and leaving the plaintiff’s establishment. The California Supreme Court, however, narrowed the injunction so that it only prohibited the defendant “from repeating to third persons statements about the Village Inn that were determined at trial to be defamatory.”<sup>248</sup>

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246. See *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992) (ordering trial court to narrow injunction to cover information that was “the subject of the underlying suit”); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1209 (6th Cir. 1990), (Wellford, J., concurring in part and dissenting in part) (dissenting from affirming district court’s denial of an injunction and limiting the “injunction to the statements which have been found in this and prior proceedings to be false and libelous”); *Am. Univ. of Antigua Coll. of Med. v. Woodward*, 837 F. Supp. 2d 686, 701-02 (E.D. Mich. 2011) (prohibiting publication of eight enumerated statements found to be defamatory); *Int’l Profit Assoc., Inc. v. Paisola*, 461 F. Supp. 2d 672, 679-80 (N.D. Ill. 2006) (enjoining “defendants’ false representation that IPA offered to settle with Paisola, and that as part of this settlement IPA agreed to pay Paisola and to allow Paisola to participate in the management of the company”); *Balboa Island Vill. Inn v. Lemen*, 156 P.3d 339, 352 (Cal. 2007) (narrowing injunction so that it only prohibited the plaintiff “personally from repeating her defamatory statements”); *Wallace v. Cass*, No. G036490, 2008 WL 626475, at \*10 (Cal. Ct. App. Mar. 10, 2008) (instructing the lower court to narrowly draft an injunction to prohibit defendant “from placing signs containing the kinds of statements already adjudicated defamatory”); *Noval v. Gorman*, No. RIC 10020292, at \*2 (Cal. Super. Ct. June 13, 2011); *Advanced Training Sys., Inc.*, 352 N.W.2d at 11 (enjoining publication of specific deceptive marketing materials); *Griffis v. Luban*, No. CX-01-1350, 2002 WL 338139, at \*7 (Minn. Ct. App. Mar. 5, 2002) (remanding to lower court to narrow injunction “so that it restricts only those statements found to be defamatory”); *Rombom v. Weberman*, No. 1378100, 2002 WL 1461890, at \*12 (N.Y. Sup. Ct. June 13, 2002) (granting an injunction “to the extent of directing defendants to remove any and all published statements about plaintiffs and plaintiff Rombom’s family from their website ... found by the jury to be libelous”), *aff’d*, 766 N.Y.S. 2d 88 (App. Div. 2003).

247. 156 P.3d 339 (Cal. 2007). For a discussion of the facts of the case, see *supra* notes 218-24 and accompanying text.

248. *Balboa Island Vill. Inn*, 156 P.3d at 342. The injunction prohibited the defendant from making the following defamatory statements about the plaintiff to third persons: “Plaintiff sells alcohol to minors; Plaintiff stays open until 6:00 a.m.; Plaintiff makes sex videos; Plaintiff is involved in child pornography; Plaintiff distributes illegal drugs; Plaintiff has Mafia connections; Plaintiff encourages lesbian activities; Plaintiff participates in prostitution

Because a Type IV injunction restrains only speech that a court or jury has adjudged to be defamatory, it is unlikely to run afoul of the prior restraint doctrine. But even these injunctions can still be overbroad if the prohibition on the use of certain words is not limited to specific contexts. For example, in *Griffis v. Luban*, the plaintiff succeeded in obtaining a default judgment against a commenter who had, among other things, called her a liar and accused her of falsifying her credentials as an Egyptologist in an Internet newsgroup.<sup>249</sup> The trial court enjoined the defendant from making a number of statements, including stating that the plaintiff “is a liar.”<sup>250</sup> The Minnesota Court of Appeals upheld the injunction, but remanded to the lower court to narrow its scope:

[The trial] court found that Luban defamed Griffis by calling her “a liar” with respect to Griffis’s postings to an Egyptology newsgroup. As a result, the court enjoined Luban from saying “that [Griffis] is a liar.” But because this provision is not restricted to any particular context, i.e., postings to the Egyptology newsgroup, the injunction has the effect of prohibiting Luban from calling Griffis “a liar” even if to do so in another context would not be defamatory. For example, the injunction prohibits Luban from calling Griffis “a liar” even if Griffis were to say that “John F. Kennedy was never President of the United States.”<sup>251</sup>

As these cases demonstrate, even if constitutional and equitable principles allow a judge to issue an injunction, drafting an injunction that will remedy the reputational harm a plaintiff is suffering, without being overbroad or underinclusive, is a formidable challenge. The next section revisits this challenge and identifies principles that can guide courts in crafting injunctions that are both narrowly tailored and effective.

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and acts as a whorehouse; Plaintiff serves tainted food.” *Id.*

249. No. CX-01-1350, 2002 WL 338139, at \*1 (Minn. Ct. App. Mar. 5, 2002).

250. *Id.* at \*6.

251. *Id.* at \*6-7.

#### IV. AN EQUITABLE REMEDY THAT ACCORDS WITH FREE SPEECH PRINCIPLES

The Supreme Court's rhetoric strongly disfavoring speech injunctions as prior restraints has led many commentators to conclude that all injunctions in defamation cases are forbidden. As Part II revealed, however, it is an overstatement to say that the First Amendment bars every injunction that restrains speech. An injunction targeting published speech that a court has found defamatory would likely be constitutional. In fact, a narrowly tailored injunction may be less burdensome on speech than subsequent money damages because the injunction can specifically target speech that is false and defamatory. As Professor John Jeffries explains:

There is less risk of deterring activities beyond the adjudicated target of suppression—activities plainly outside the injunctive ban but arguably within the necessarily more general prohibition of a penal law. And many find even an uncertain prospect of criminal conviction and punishment sufficient incentive to steer well clear of arguably proscribed activities. In terms, therefore, of the system of free expression and of the aggregate of arguably protected First Amendment activity that might be inhibited under these regimes, it is anything but clear that injunctions are more costly.<sup>252</sup>

Moreover, when the defendant engages in a continuing course of conduct that requires the plaintiff to bring multiple damage actions, an injunction may also be less burdensome on the parties and the court.<sup>253</sup> “If courts confine themselves to narrow injunctions against specific communications instead of broad decrees, judicial supervision need be no more continuous than in damage actions.”<sup>254</sup>

If there is to be a formal retreat from the no-injunction rule, the First Amendment and equitable principles necessitate that certain safeguards accompany injunctions directed at defamatory speech.

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252. Jeffries, *supra* note 135, at 429.

253. See Rendleman, *supra* note 15, at 357 (“[A]dministrative celerity may favor equity, for injunctions may serve efficient, economical administration.”).

254. *Developments in the Law: Injunctions*, 78 HARV. L. REV. 996, 1009 (1965).

These safeguards require that: (1) the injunction be preceded by a judicial finding that the speech sought to be enjoined is defamatory; (2) the defendant be given the opportunity to have a jury decide whether the plaintiff has established all of the elements of defamation; (3) the injunction be narrowly tailored so that it only targets speech that has been found to be defamatory; (4) the speech restrained relates only to matters of private concern; and (5) the plaintiff demonstrate that money damages are inadequate and that an injunction will actually be effective in reducing her harm.

#### *A. Requiring Full-Adjudication of Claims*

As a threshold matter, no court should issue an injunction unless it has found after a full and fair adversary proceeding that the speech in question is defamatory. As the Supreme Court cautioned in *Pittsburgh Press Co.*, the “special vice of a prior restraint is that [speech] will be suppressed ... before an adequate determination that it is unprotected by the First Amendment.”<sup>255</sup> This means that a judge cannot issue a preliminary injunction, temporary restraining order, or any other restraint directed at defamatory speech based on a mere “likelihood of success” or other speculative standard.<sup>256</sup>

Beyond the First Amendment concerns raised by such injunctions, there are important practical reasons to be wary of courts issuing injunctions before a case has come to completion. “The grant or denial of a preliminary injunction is often the most crucial decision a trial judge can make, one that has the frequent effect of completely ending litigation” before a court has had an opportunity to assess whether the speech in question is defamatory.<sup>257</sup> This is due both to the coercive power of judicial orders and to the realities of the litigation process. Many defendants lack the money to file an

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255. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973); see also *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 590 (1976) (Brennan, J., concurring).

256. See *supra* note 169 and accompanying text. This is not a particularly controversial requirement, as most scholars agree that preliminary injunctions in speech cases are highly suspect. See, e.g., Lemley & Volokh, *supra* note 11, at 171; Siegel, *supra* note 1, at 735; Wells, *supra* note 11, at 65.

257. John M. Newman, Note, *Raising the Bar and the Public Interest: On Prior Restraints, “Traditional Contours,” and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 327 (2011).

interlocutory appeal, if one is allowed, or the time to wait for a court to rescind the injunction. As a result, they “face a Hobson’s choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings.”<sup>258</sup> The granting of an injunction, therefore, is often “the end of the ball game; the parties simply cannot await the results of a full-scale trial.”<sup>259</sup>

Once a court has made an adequate determination that the targeted speech is defamatory, the First Amendment likely would not preclude injunctive relief.<sup>260</sup> The question, however, is how exhaustive the finding of defamation must be and what procedural safeguards are necessary to ensure that when speech is not properly subject to restraint, it is protected.<sup>261</sup> At a minimum, there must be a finding on the merits that the speech is false and defamatory.<sup>262</sup> It is less clear whether a plaintiff must also prove fault on the part of the defendant, although the weight of authority seems to support such a requirement.

The gravamen of a defamation claim is falsity, so no relief—whether equitable or monetary—should be granted without a determination that the speech is false *and* defamatory.<sup>263</sup> If the claim only involves a request for injunctive relief, however, the plaintiff may argue that she need not also prove that the defendant was at fault when he published the defamatory statement. Professor Marc Franklin, a leading proponent of libel reform, has suggested that a libel plaintiff should be able to obtain a declaratory judgment that speech is false without the burden of proving fault.<sup>264</sup> He and

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258. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 793-94 (1994) (Scalia, J., concurring in part and dissenting in part).

259. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 774 (1982).

260. See *supra* notes 198-233 and accompanying text.

261. See Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 520 (1970) (“The government ... may regulate certain types of activity, but it must make sure, via proper procedural safeguards, that protected speech is not the loser.”).

262. For a discussion of the elements of a defamation claim, see *supra* notes 263-65 and accompanying text.

263. These are separate, although not always distinct, inquiries: not all false statements of fact create actionable harm sufficient to support a defamation claim. Ardia, *supra* note 12, at 282-95; accord *Wolf v. Gold*, 193 N.Y.S.2d 36, 38 (App. Div. 1959) (“Equity will not restrain the publication of unjust and malicious matter simply on a showing of its falsity.”).

264. Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 810 (1986). In return for this expansion of the scope of liability, Professor



others who support declaratory judgment actions assert that the elimination of libel damages would remove the “chilling effect” that impelled the Supreme Court to interject a fault standard into the common law tort of defamation in *New York Times v. Sullivan*.<sup>265</sup>

Regardless of whether a court could issue a *declaratory judgment* without concluding that the defendant was at fault, it is almost certainly the case that an *injunction* would not be constitutional without such a finding.<sup>266</sup> Although the defendant would not need to pay monetary damages, an injunction is still a coercive sanction. In *Sullivan*, the Court imposed a fault requirement because it recognized that “erroneous statement is inevitable in free debate” and speakers must have the breathing room necessary to risk errors in order to engage in public discourse.<sup>267</sup> A speaker who fears that a court will enjoin him from speaking whenever he makes a mistake will undoubtedly engage in the very same self-censorship the Court worried about in *Sullivan*.<sup>268</sup>

Moreover, speakers—even if they do not face the risk of a damage award—must still contend with the litigation costs and threat of reputational harm that come from having to defend against an action for injunctive relief. As Rodney Smolla observed, “Whether a suit is settled, won, or lost, the legal fees alone can be chilling. From

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Franklin would preclude any recovery of damages and require that the plaintiff prove all elements of the cause of action by clear and convincing evidence, including falsity. *Id.* at 832-35.

265. See David A. Barrett, *Libel Reform and Declaratory Judgments: A Better Alternative*, 74 CALIF. L. REV. 847, 863-64 (1986); Franklin, *supra* note 264, at 820; Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287, 1289-90 (1988).

266. There are a number of concerns associated with dropping the fault requirement, including some that have been raised by its proponents. See Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, in REFORMING LIBEL LAW 229, 273-74 (John Soloski & Randall P. Bezanson eds., 1992). Professor Smolla, an early backer of declaratory judgment actions, conceded:

I have come to the conclusion that the ultimate empirical question whether the declaratory judgment device will or will not excessively chill free speech cannot be separated from the question of psychological perception. There is a self-fulfilling quality to the phenomenon of chilling effects: If reporters *perceive* the declaratory judgment as oppressive, they will act as if it is oppressive.

*Id.* at 274.

267. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

268. Cf. Smolla, *supra* note 266, at 274 (“Because so many journalists instinctively blanch at any version of involuntary ‘truth trial,’ as a practical matter such a regime would tend to chill free expression.”).

the media's perspective, the big chill in libel litigation comes more from legal fees than from jury verdicts—for most jury verdicts are overturned on appeal, while the legal bills come anyway.<sup>269</sup> The high cost of defending a libel lawsuit has not gone unnoticed by judges.<sup>270</sup> In *Sullivan*, the Court's rationale for imposing a fault requirement rested, at least in part, on the self-censorship that would result from a defendant's "fear of the expense" of having to prove that its speech is true.<sup>271</sup> As others have noted, "It is inaccurate, then, to isolate damage verdicts as the sole component of the 'chilling effect' of libel suits."<sup>272</sup>

Permitting a court to grant injunctive relief without a finding of fault would intolerably chill free speech and public debate. Defamatory statements that are published without the requisite degree of fault are constitutionally protected and should not be considered grounds for any form of relief, injunctive or otherwise.<sup>273</sup> Consequently, courts should require that plaintiffs establish all elements of a defamation claim before considering whether an injunction is appropriate.

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269. RODNEY A. SMOLLA, *SUING THE PRESS* 74 (1986). *But see* Franklin, *supra* note 264, at 820 (arguing that declaratory judgment actions would eliminate both the fear of large damage awards and the "large and unrecoverable defense costs" that those awards induce).

270. *See, e.g.,* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 610 n.40 (1976) (Brennan, J., concurring) (quoting a letter from the editor of a small town newspaper, which stated in part: "We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack."); Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) ("[T]he costs of defending against the claim of libel ... can themselves impair vigorous freedom of expression."); Seth Goodchild, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 324 n.58 (1986) (listing additional cases).

271. 376 U.S. at 279 ("[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

272. Paul Gaffney, *First Amendment Analysis of the Annenberg Libel Reform Proposal*, 1990 U. CHI. LEGAL F. 601, 610 (1990).

273. *See* N.Y. Times Co., v. Sullivan, 376 U.S. 254, 273 ("[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct."); Lowell v. Hayes, 117 P.3d 745, 757 (Alaska 2005) ("In sum, where 'false statements of fact' regarding a public figure are made without malicious intent, they are constitutionally protected and should not be considered grounds for any form of relief, declaratory or otherwise.").

*B. Preserving the Jury's Role as a Check on Judicial Power*

Because jury participation is essential to the proper functioning of defamation law, juries must be an integral part of any system of injunctive relief. The no-injunction rule serves as an important constraint on a judge's ability to unilaterally censor speech. To preserve this check on judicial power, juries must be involved in at least two ways. First, no injunction should be issued unless a jury determines that the plaintiff established all of the elements of her defamation claim, or the defendant waived his right to a jury trial. Second, if a party is charged with contempt for violating an injunction, a jury should be empanelled to assess whether the injunction's terms have been violated and whether the speech at issue is false and defamatory.

As discussed in Part II, juries play a critical role in defamation cases, not only in terms of assessing whether speech is defamatory, but also "as a tribune of the people; to be a popular institution with veto power over government sanctions for speech."<sup>274</sup> This is not to say that juries always protect defendants from government censorship, particularly when the speaker is accused of espousing views that challenge prevailing orthodoxy. The casebooks are rife with appellate decisions criticizing juries for punishing speakers who have done little more than offend a community's sensibilities. This has led some scholars to question the reliance on juries to protect First Amendment rights, warning that "when public sentiment [runs] strongly in favor of the government, juries could readily become *ex post facto* censors ... in libel cases."<sup>275</sup> Indeed, the Supreme Court recently observed in *Snyder v. Phelps* that when the jury "dislike[s] particular expression," it is "unlikely to be neutral with respect to the content of [the] speech,' posing a real danger of becoming an instrument for the suppression of ... expression."<sup>276</sup>

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274. Siegel, *supra* note 1, at 729.

275. Monaghan, *supra* note 261, at 528-29; see also Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 765 (1986); Siegel, *supra* note 1, at 729.

276. 131 S. Ct. 1207, 1219 (2011) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984)).

But the fact that juries do not always serve as a bulwark against government overreaching does not mean they are superfluous. Times change and public sentiment may shift, especially if jurors perceive that government or other powerful interests are using defamation law to stifle criticism.<sup>277</sup> Although imperfect, juries remain an important part of the checks and balances within our free speech jurisprudence.<sup>278</sup> These checks allow judges to limit the power of juries through procedural devices, such as summary judgment, directed verdicts, and judgments *non obstante veredicto*.<sup>279</sup> Meanwhile, judges themselves are subject to independent appellate review in defamation cases<sup>280</sup> and are constrained in their ability to enjoin speech through the no-injunction rule. As the historian Stephen Siegel notes, “[T]he no injunction for defamation rule was part of a system of free speech that barred government from censoring or punishing speech without popular participation and approval.”<sup>281</sup>

The right to have a jury determine whether the elements of a defamation claim have been established must exist even in cases in which the plaintiff only requests equitable relief. Concededly, this would require a change in the way most courts handle injunctions. Unlike money damages, which are awarded by the fact finder, a judge typically determines on her own whether an injunction is warranted. Although the judge can take a jury’s findings into account when fashioning such a remedy, there is no requirement in most states that she do so.<sup>282</sup> “For fair or for foul, the injunction

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277. See, e.g., *The Trial of Mr. John Peter Zenger (1735)*, 17 HOWELL’S ST. TRIALS 675 (1816); LAYCOCK, *supra* note 5, at 166 (“[J]uries sometimes provide another layer of protection for speech ... [and] might have protected labor speakers in the heyday of the antistrike injunction, or antiwar speakers in the late stages of the Vietnam War.”).

278. See, e.g., RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 27 (2003) (“[J]uries fit into an overall scheme of a government of checks and balances.”).

279. See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 443-45, 489-91 (1996).

280. See *Bose Corp.*, 466 U.S. at 502-11 (requiring de novo review by appellate courts over findings of actual malice in defamation cases).

281. Siegel, *supra* note 1, at 729. Even those who have been critical of the no-injunction rule acknowledge that the desire to ensure jury participation in defamation cases is an important rationale for refusing to grant injunctive relief. See, e.g., Bertlesman, *supra* note 6, at 323; Pound, *supra* note 6, at 656-57; Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 153-54 (1969).

282. See Rendleman, *supra* note 47, at 1645; Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 615-16 (2001). Several states do appear to provide a jury

process concentrates power in the judge to find the facts, apply the law, formulate relief, and enforce the order.”<sup>283</sup>

Under a system in which juries do not play a role in awarding injunctive relief, plaintiffs could only request an injunction in order to deprive their opponents of a jury trial.<sup>284</sup> In fact, in a number of defamation cases in which plaintiffs sought injunctive relief, they did not also ask for money damages.<sup>285</sup> Although there is no way to know whether these plaintiffs only requested an injunction to avoid a jury trial, the end result is the same: a remedy that is solely at the discretion of the judge. The no-injunction rule has traditionally limited such strategic behavior.<sup>286</sup> If the rule is relaxed, trial by jury should be an option for all defendants who are facing requests for injunctive relief.

### *C. Ensuring Narrow Tailoring*

Even if a court or jury has determined that speech is defamatory, it does not automatically follow that any injunction would be an appropriate or constitutional remedy. In *Tory v. Cochran*, the injunction followed a three-day bench trial,<sup>287</sup> yet the Supreme Court still held that it was unconstitutional.<sup>288</sup> In vacating the injunction, Justice Breyer made a point of noting that “the injunc-

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trial even in actions for equitable relief. See M.T. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C. L. REV. 157, 158 (1953) (noting the practice in Georgia, Texas, Tennessee, and North Carolina). Arizona also provides for a right to a jury trial in equity, “although the verdict is only advisory,” *Mozes v. Daru*, 420 P.2d 957, 963 (Ariz. 1966), as does Louisiana, see *Bonneau v. Blalock*, 484 So. 2d 275 (La. Ct. App. 1986).

283. Rendleman, *supra* note 47, at 1650; see also *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 793 (1994) (“The right to free speech should not lightly be placed within the control of a single man or woman.”) (Scalia, J., concurring in part and dissenting in part); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 189-91 (1930) (voicing concern about the power of a single judge in labor injunction cases).

284. LAYCOCK, *supra* note 5, at 213-14.

285. See, e.g., *Tory v. Cochran*, 544 U.S. 734, 735-36 (2005); *Goldblum v. Nat’l Broad. Corp.*, 584 F.2d 904, 905 (9th Cir. 1978); *Robinson v. Am. Broad. Co.*, 441 F.2d 1396, 1397 (6th Cir. 1971); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 341 (Cal. 2007).

286. See *supra* notes 77-79 and accompanying text.

287. No. BC239405, 2002 WL 34075951 (Cal. Super. Ct. Apr. 24, 2002). The trial judge bifurcated the case and “proceeded to hear and adjudicate the factual and legal questions necessary to determine whether Cochran was entitled to the permanent injunctive relief he sought.” *Id.* *Tory*, who represented himself, apparently did not object to the absence of a jury.

288. See *supra* notes 172-87 and accompanying text.

tion, as written, amounts to an *overly broad* prior restraint on speech.”<sup>289</sup> Indeed, how could it not be overbroad when it restrained Ulysses Tory and his wife from saying anything about Johnnie Cochran in any public forum, including statements lauding Cochran’s representation of O.J. Simpson? Far from being narrowly tailored, the injunction reached beyond the specific statements the trial court found defamatory.

It is a central precept of First Amendment law that content-based restrictions on speech must be precise and narrowly tailored.<sup>290</sup> Narrow tailoring in this context requires that an injunction directed at defamatory speech must not be overinclusive and must be the least restrictive alternative available to achieve a compelling government interest.<sup>291</sup> In other words, an injunction is not narrowly tailored if it restricts non-defamatory speech.<sup>292</sup> Nor is it narrowly tailored “if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.”<sup>293</sup>

Because a court has no power to restrain speech that is not defamatory or otherwise amenable to sanction under the First Amendment, narrow tailoring requires that an injunction must be limited to speech that has previously been uttered or published.<sup>294</sup> It would not otherwise be possible for a court or jury to make the necessary factual finding of defamation.<sup>295</sup> Whether a statement is defamatory is a highly fact-specific inquiry. Courts are instructed not to evaluate a statement in isolation; they must take into account contextual factors such as the time, place, and manner of the

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289. *Tory*, 544 U.S. at 738 (emphasis added).

290. *See id.* at 738 (stating that an “order issued in ‘the area of First Amendment rights’ must be ‘precis[e]’ and narrowly ‘tailored’ to achieve the ‘pin-pointed objective’ of the ‘needs of the case’”) (quoting *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

291. *See Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421-22 (1996).

292. *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

293. Volokh, *supra* note 291, at 2422.

294. *See supra* Part II.B.

295. As Justice Blackmun warned, “[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *See Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

speech.<sup>296</sup> Accordingly, a court cannot determine whether speech is properly subject to an injunction unless it can examine the specific words used and the setting in which their expression occurs.<sup>297</sup> Injunctions that prohibit future speech on the basis of speculation about what might be said or how it might be expressed invariably lack a factual basis for a finding of defamation.<sup>298</sup>

Exploring how a narrowly tailored injunction could be used in practice will help to illustrate the appropriate scope of injunctive relief. First, it is clear that Type I injunctions, which order the defendant to desist from saying anything about the plaintiff, as was the case in *Tory v. Cochran*, are not permissible.<sup>299</sup> Similarly, Type II injunctions, which order the defendant not to utter any *defamatory* statements about the plaintiff, are overbroad because they are not precise enough to put the defendant on notice as to what speech will violate the injunction.<sup>300</sup>

Narrow tailoring requires that an injunction must clearly identify—and be limited to—the specific statements the court or jury has found are defamatory. For example, if a single page on a website is held to be defamatory, an injunction must be limited to only prohibiting the further publication of that page; if an injunction orders the removal of the entire website, it is impermissibly overbroad. This rules out Type III injunctions. Such injunctions,

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296. See, e.g., *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970); David A. Logan, *Of "Sloppy Journalism," "Corporate Tyranny," and Mea Culpas: The Curious Case of Moldea v. New York Times*, 37 WM. & MARY L. REV. 161, 193 n.210 (1995) ("In real estate, the three most important factors are 'location, location and location;' in defamation law the three most important factors in determining whether you have a defamatory factual statement ... are 'context, context and context.'") (quoting Karl Olson *On Review, a New Standard for Reviews*, RECORDER, May 25, 1994); see also Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 345-51 (1999) (explaining the importance of context in ascertaining defamatory meaning).

297. See *Griffis v. Luban*, No. CX-01-1350, 2002 WL 338139, at \*6 (Minn. Ct. App. Mar. 5, 2002) (noting the importance of context in determining whether speech is defamatory); cf. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say.").

298. See Blasi, *supra* note 161, at 87 ("[A] major element in the case for a presumption against prior restraint is the undesirably abstract quality of any adjudication that occurs prior to the time the communication at issue is initially disseminated to the public.").

299. *Tory v. Cochran*, 544 U.S. 734, 738 (holding that the injunction was overbroad); see also *supra* note 237 (citing cases rejecting Type I injunctions).

300. See *supra* note 238 and accompanying text (citing cases rejecting Type II injunctions).



because they are not limited to statements that have been found to be defamatory, invariably fail the narrow tailoring requirement by enjoining speech that is not properly subject to any sanction.<sup>301</sup>

This leaves Type IV injunctions, which only prohibit the publication of the specific statements a court or jury has found are defamatory. *Saadi v. Maroun*, which was discussed in Part I, provides an illustration of a narrowly tailored Type IV injunction.<sup>302</sup> In that case, the jury found that the defendant defamed Mr. Saadi by posting statements online falsely stating that he was a terrorist, a criminal, and that he had received money stolen from the Lebanese government.<sup>303</sup> After the jury awarded \$90,000 in compensatory and punitive damages,<sup>304</sup> the district court issued a permanent injunction prohibiting the defendant from continuing to publish the “statements contained in Trial Exhibits 19 and 20 that were found by the jury to be defamatory.”<sup>305</sup> The court made it clear that “the scope of the injunction must be limited to those statements.”<sup>306</sup>

Several other courts have issued similarly narrow Type IV injunctions.<sup>307</sup> Because such injunctions are limited to speech that has been found to be defamatory, and thus subject to government sanction under the First Amendment, they would not be impermissibly overbroad.

#### *D. Allowing Robust Debate on Issues of Public Concern*

Even a narrowly tailored injunction will still be problematic, however, if it restricts a speaker’s ability to engage in public debate. Because speech on public issues receives heightened protection under the Constitution, injunctions directed at defamatory speech must be limited to speech on matters of private concern.<sup>308</sup> There are

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301. See *supra* note 245 (citing cases rejecting Type III injunctions).

302. No. 807-CV-01976-T-24-MAP, 2009 WL 3617788 (M.D. Fla. Nov. 2, 2009).

303. See *id.* at \*1; *Saadi v. Maroun*, DIGITAL MEDIA LAW PROJECT, [www.dmlp.org/threats/saadi-v-maroun](http://www.dmlp.org/threats/saadi-v-maroun) (last visited Sept. 20, 2013).

304. *Saadi*, 2009 WL 3617788, at \*1.

305. *Id.* at \*3.

306. *Id.*

307. See *supra* note 246 (citing cases granting or affirming Type IV injunctions).

308. As Professor Siegel observes, “[T]here is the principle that no injunction should issue when the defamatory speech involves a matter of public interest. That principle is of such obvious constitutional dimension that it was recognized by the *Balboa Island* court ... and is recommended by all commentators who oppose the no-injunction rule.” Siegel, *supra* note 1,

three reasons for imposing this requirement. First, the First Amendment's protections are greatest when speech relates to a matter of public concern. Second, the State's interest in providing an injunctive remedy is less substantial when the speech involves a matter of public concern. Third, injunctions directed at speech on matters of public concern are less likely to be effective because the court would be attempting to restrain speech that is of widespread interest.

Speech on matters of public concern has long received additional solicitude under the First Amendment.<sup>309</sup> As the Supreme Court has admonished, speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>310</sup> Indeed, the Court has repeatedly held that the First Amendment protects such speech, even if it is offensive and harmful.<sup>311</sup> In *New York Times Co. v. Sullivan*, the Court emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>312</sup> This debate would be excessively chilled, the Court reasoned, if speakers faced liability for every erroneous statement.<sup>313</sup>

In contrast, speech solely on matters of private concern has received far less First Amendment protection.<sup>314</sup> This divergent treatment first appeared in the defamation context in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, in which the Court held

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at 736 n.434 (citing Bertlesman, *supra* note 6, at 322; Gold, *supra* note 6, at 257–58; Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 159 (1964)).

309. Such speech, according to the Court, "is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)); *see also* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) (discussing *Cohen v. California*, 403 U.S. 15 (1971)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Robinson v. Am. Broad. Cos.*, 441 F.2d 1396, 1401 (6th Cir. 1971) (refusing to grant an injunction directed at allegedly defamatory speech and noting that "[e]specially when discussion centers around matters of public concern or public interest, zealous protection of First Amendment rights is required").

310. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

311. *See, e.g., Snyder*, 131 S. Ct. at 1219; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964); *Bridges v. California*, 314 U.S. 252, 270–71 (1941).

312. 376 U.S. at 270.

313. *Id.* at 271–72.

314. *See Leading Cases*, 125 HARV. L. REV. 172, 192 (2011).

that punitive damages can be awarded without a showing of “actual malice” when the defamation is not on a matter of public concern.<sup>315</sup> In *Dun & Bradstreet*, a plurality of the Court concluded that a state could award presumed and punitive damages because of the “reduced constitutional value of speech involving no matters of public concern.”<sup>316</sup> States could not, according to the Court’s prior decisions in *Sullivan* and *Gertz*, award such damages without a showing of actual malice when the speech involved a public official or a matter of public concern.<sup>317</sup>

A number of scholars have criticized the Court’s efforts to distinguish speech on matters of public concern because it has led, in some cases, to a category of privileged “public issue” speech that alone is given protection under the First Amendment.<sup>318</sup> Nevertheless, the Supreme Court further ingrained the distinction in First Amendment doctrine in *Snyder v. Phelps*, which held that the intentional infliction of emotional distress tort cannot be used to impose

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315. 472 U.S. 479, 761 (1985). More than a decade before *Dun & Bradstreet*, a plurality of the Court held in *Rosenbloom v. Metromedia, Inc.* that the actual malice standard applied even in private figure libel cases if the defamatory statements were about the plaintiff’s “involvement in an event of public or general interest,” 403 U.S. 29, 31-32 (1971), but the *Rosenbloom* plurality’s reliance on the subject matter of the speech was subsequently rejected in *Gertz v. Robert Welch, Inc.*, where the Court focused on the plaintiff’s status, 418 U.S. 323, 343 (1974).

316. See *Dun & Bradstreet*, 472 U.S. at 749.

317. *Dun & Bradstreet* only involved one of the two limitations on defamation actions established in *Gertz*, which held that even private figure plaintiffs must prove fault and cannot recover punitive damages without a showing of actual malice. See *Gertz*, 418 U.S. at 349. Justice White noted in his concurrence in *Dun & Bradstreet* that “it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases [not involving matters of public concern],” 472 U.S. at 774 (White, J., concurring), but the Court did not answer that question in *Dun & Bradstreet*. One year later, the Court noted in *Philadelphia Newspapers v. Hepps* that this was not merely an oversight, remarking that “[w]hen the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.” 475 U.S. 767, 775 (1986).

318. See, e.g., Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 40 (2012). Distinguishing between speech on matters of public and private concern initially arose as an effort by courts to identify expressive conduct that should receive heightened First Amendment protection, see Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 28 (1990), but has since become a test that courts apply to determine whether speech is entitled to any First Amendment protection, see Calvert, *supra*, at 42-43 (describing the test’s application in privacy, government employee speech, and reporter’s privilege cases).

liability if the distress is caused by speech on a matter of public concern.<sup>319</sup> Chief Justice Roberts explained that government efforts to restrict speech on matters of public concern raise additional constitutional problems:

Whether the First Amendment prohibits holding [the defendant] liable for its speech in this case turns largely on whether that speech is of public or private concern.... “[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public import.<sup>320</sup>

In addition to receiving heightened protection under the First Amendment, speech on matters of public concern also implicates less substantial state interests in providing judicial remedies for those harmed by the speech.<sup>321</sup> Put simply, the government’s interest in providing an injunctive remedy for plaintiffs is not as significant when the speech relates to a matter of public concern because such plaintiffs likely have the ability to counteract false statements themselves. Whether we examine the state’s interest as part of the traditional balancing of interests that courts apply when evaluating equitable remedies,<sup>322</sup> or as an element in the strict scrutiny test under the First Amendment, which requires a “compelling government interest,”<sup>323</sup> some examination of the state’s interest in providing an injunctive remedy is necessary before a court can issue an injunction.

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319. 131 S. Ct. 1207, 1220 (2011).

320. *Id.* at 1215-16 (internal citations omitted).

321. *See Dun & Bradstreet*, 472 U.S. at 760 (“In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not ‘substantial’ in view of their effect on speech at the core of First Amendment concern.”).

322. *See* 1 DOBBS, *supra* note 43, § 2.9, at 227-30 (describing how courts balance the equities before granting injunctive relief).

323. *See Volokh*, *supra* note 291, at 2418-21.

Of course, the reason for considering an equitable remedy in the first place is the belief that an injunction will provide benefits to the plaintiff that surpass what is already available to her, including self-help.<sup>324</sup> When the speech relates to a matter of public concern, however, a defamed party likely will have an interested—if not always receptive—audience for her counterspeech because the issue is of interest to the community.<sup>325</sup> As a result, an injunction directed at speech that relates to a matter of public concern may not be supported by a compelling state interest because an effective self-help remedy likely exists.<sup>326</sup>

The preference for self-help is deeply embedded in First Amendment doctrine and necessitates that courts look to the availability of private remedies, including counterspeech, in determining whether the state has a compelling interest in the proposed remedy and whether the government restriction on speech is the least restrictive means available.<sup>327</sup> In *Gertz v. Robert Welch, Inc.*, for example, the Court required that public figures must prove actual malice to make out a defamation claim, noting that they have greater opportunity to redress the harm caused by defamatory speech.<sup>328</sup> According to the Court:

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324. See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 778 (2003). Professor Tom Bell defines “self-help” as “a private party’s act, neither prohibited nor compelled by law, of preventing or remedying a legal wrong without any public official’s assistance.” *Id.* at 744 n.5.

325. Speech on matters of “public concern” and speech that is of “public interest” are not necessarily coterminous, although the line separating the two categories is difficult to draw. See R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 34-37 (1987) (internal quotation marks omitted). See *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999) (stating that when speech relates to a matter of public concern, “we believe that in most instances there is little disparity in the ability of private versus public individuals to obtain access ‘to the channels of effective communication’ in order to ‘counteract false statements’”).

326. See Bell, *supra* note 324, at 749-69; cf. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 29 (2000) (“Given that there are ways for private actors to protect original content through voluntary transactions, the government arguably does not have a compelling interest in restricting speech through copyright.”).

327. See Bell, *supra* note 324, at 749-69; Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 845-47 (2006). *But see* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 526 (1991) (calling the self-help argument an “unconvincing rationalization[ ]”).

328. 418 U.S. 323, 344 (1974). The *Gertz* Court also stated that public figures should have

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 access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.<sup>329</sup>

To be clear, a rule that limits injunctive relief to speech on matters of private concern will make it very difficult for public officials and public figures to get an injunction because speech that defames such plaintiffs will typically relate to a matter of public concern. But this section advances an argument that goes one step further, barring injunctions even in cases involving private figures if the speech relates to a matter of public concern. Although *Gertz* involved the legal distinctions that flow from the public figure status of the plaintiff, the rationale the Court relied on for imposing a heightened standard of fault on public figures—that they can utilize self-help—is applicable in the context of any speech that implicates a matter of public concern, even when the person being discussed is a private figure. After all, counterspeech is a viable alternative for public officials and public figures because the public has an interest in their activities. This is not to say, of course, that every plaintiff will be able to effectively counteract defamatory speech that relates to a matter of public concern, but in those cases where they can, the state’s interest in providing an injunction will be substantially diminished.<sup>330</sup>

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to prove actual malice because they voluntarily “assumed roles of especial [sic] prominence in the affairs of society.” *Id.* at 345.

329. *Id.* at 344; see also *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 163-69 (1979) (“[P]ublic figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective ‘self-help.’ They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements.”).

330. See *Aafco Heating & Air Conditioning Co. v. Nw. Publications, Inc.*, 321 N.E.2d 580, 587 (Ind. App. 1974) (rejecting a lower standard of fault for private figure plaintiffs and concluding that “[d]rawing a distinction between ‘public’ and ‘private’ figures makes no sense in terms of our constitutional guarantees of free speech and press”).

Furthermore, when speech relates to a matter of public concern and the plaintiff can engage in self-help through counterspeech, an injunction will not be the least restrictive remedy available.<sup>331</sup> Because “courts seek the most efficient means of alleviating the social costs of free speech,”<sup>332</sup> the availability of self-help must serve as a limit on the issuance of injunctive relief in defamation cases. In his concurrence in *Whitney v. California*, Justice Brandeis explained why corrective self-help was a preferred remedy: “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.”<sup>333</sup>

Indeed, one of the rationales underlying the no-injunction rule is that speakers should be able to contest their sanction not only in a court of law, but also in the court of public opinion.<sup>334</sup> First Amendment protections have long been justified by the idea that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>335</sup> Injunctions that prohibit speech from entering the public sphere distort the marketplace of ideas.<sup>336</sup> By prohibiting the government from restraining speech before its public dissemination, the no-injunction rule permits speakers to present their speech to their fellow citizens and potentially convince them that they should not face sanction; “when the Government seeks to punish the most effective speakers, it runs the risk that the people will see this as punishment for eloquence, not criminality.”<sup>337</sup>

Moreover, when speech relates to a matter of public concern, some speakers may actually be more interested in succeeding in the court of public opinion than in a court of law. Professor Harry Kalven believes this objective led the defendants to publish the Pentagon Papers:

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331. See Bell, *supra* note 324, at 762-69; Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 157 (1997).

332. *Id.* at 763.

333. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

334. See Siegel, *supra* note 1.

335. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

336. See Bendor, *supra* note 135, at 314 (“The central rationale for the doctrine of prior restraint and its recognized exceptions is the production of maximal amounts of speech.”).

337. See Brief Amici Curiae of Historians, *supra* note 67, at 45.



It is, I think, reasonably clear that Daniel Ellsberg, and also the *New York Times* and *Washington Post*, were engaged in a kind of political action, akin to civil disobedience. Their belief in the value of what they were doing was so high that they were willing to publish and take the consequences. The point was to get the message to the public. Therefore in this context prior and subsequent restraints are not coterminous.<sup>338</sup>

Finally, injunctions that target speech on matters of public concern are more likely to be ineffective at stopping the continued dissemination of defamatory speech. Speech on matters of public concern naturally engenders greater public interest. By attempting to restrain members of a community “from discussing a subject intimately affecting life within it,”<sup>339</sup> an injunction directed at such speech will face significant efficacy challenges. The next section explores this issue more fully, but it is sufficient to note here that an injunction targeting speech on a matter of public concern will raise such challenges.

Of course, the line between speech on matters of public and private concern can sometimes be difficult to draw.<sup>340</sup> Although much work remains to be done in formulating a consistent approach to divining this line, the Supreme Court has offered some guidance to lower courts in making this determination. In *Snyder v. Phelps*, the Court instructed that:

Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other

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338. Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 34 (1971).

339. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976) (invalidating gag order on the press and remarking that “plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it”).

340. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-18 (2011); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 578-79 (2007) (“Making legal distinctions based on whether the content is a matter of public concern or newsworthy has posed significant difficulties in a number of different areas of media law.”). In *Dun & Bradstreet*, for example, the plurality held that a credit report falsely reporting a company's bankruptcy was not a matter of public concern. This sentiment “would surprise the company's employees, creditors, and customers, as well as local journalists who might well cover the bankruptcy of even a small company in their small town.” Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 744 (2003).

concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.<sup>341</sup>

Conversely, speech that is “solely in the individual interest of the speaker and its specific ... audience,” is not speech on a matter of public concern.<sup>342</sup>

The reality is that courts already apply the distinction between speech on matters of public concern and private concern in a number of doctrinal areas,<sup>343</sup> including in defamation law, where several states use it to determine the level of fault a plaintiff must prove in order to make out a prima facie claim for libel.<sup>344</sup> Furthermore, a handful of courts have relied on the distinction between public and private concern when assessing whether an injunction

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341. *Snyder*, 131 S. Ct. at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)) (internal quotation marks omitted); *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492-94 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967). Commentators have come up with their own definitions as well. See, e.g., Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997) (defining public discourse as “the speech necessary for the formation of public opinion”).

342. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). For a court to determine whether defamatory speech is of public or private concern, it must examine the “content, form, and context” of that speech, “as revealed by the whole record.” *Id.* at 761 (quoting *Connick*, 461 U.S. at 147-48) (internal quotation marks omitted).

343. See *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 516 A.2d 220, 230 (N.J. 1986) (citing cases); Papandrea, *supra* note 340, at 579-80 (describing its application in defamation and privacy cases).

344. See, e.g., *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 64 (2d Cir. 1993) (finding that under New York law, private figures involved in matters of public concern must show that the defendant was “grossly irresponsible”); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1110 (Colo. 1982) (requiring that private figure plaintiffs prove actual malice in cases involving matters of public or general concern); *Journal-Gazette Co. v. Bandido’s, Inc.*, 712 N.E.2d 446, 453 (Ind. 1999) (adopting actual malice standard in all cases involving matters of public or general concern).

directed at defamatory speech is<sup>345</sup> or is not<sup>346</sup> an unconstitutional prior restraint.

The Massachusetts Supreme Judicial Court's decision in *Krebiozen Research Foundation v. Beacon Press* is illustrative of the reasoning courts have applied when analyzing whether speech on a matter of public interest should be enjoined.<sup>347</sup> In *Krebiozen*, the

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345. See *Robinson v. Am. Broad. Cos.*, 441 F.2d 1396, 1401 (6th Cir. 1971) (refusing to grant injunction and noting, "Especially when discussion centers around matters of public concern or public interest, zealous protection of First Amendment rights is required"); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (dissolving injunction that barred a credit-reporting agency from reporting that the past proprietor of a business had been convicted of fraud and noting that "[s]uch an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know"); *Lassiter v. Lassiter*, 456 F. Supp. 2d 876, 884 (E.D. Ky. 2006) (stating that no injunction should issue where subject matter is "imbued with the public interest"), *aff'd*, 280 F. App'x 503 (6th Cir. 2008); *Bihari v. Gross*, 119 F. Supp. 2d 309, 325–26 (S.D.N.Y. 2000) (finding that the speech was "arguably within the sphere of legitimate public concern, which imbues the speech with a heavy presumption of constitutional protection") (quoting *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983)) (internal quotation marks omitted); *Queen v. Tenn. Valley Auth.*, 508 F. Supp. 532, 536 (E.D. Tenn. 1980) ("[I]n view of the public interest in energy conservation and energy saving devices, we hold that plaintiffs' claim for declaratory and injunctive relief must be denied."), *aff'd*, 689 F.2d 80 (6th Cir. 1982); *St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996) (holding that an injunction "is not permissible for either a publication or a republication of a statement of public interest"); *Am. Broad. Cos. v. Smith Cabinet Mfg. Co.*, 312 N.E.2d 85, 91 (Ind. Ct. App. 1974) (reversing injunction and noting the "television segment in question dealing with the combustibility of a baby crib was a matter of great public interest"); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 309 n.2 (Ky. 2010); *Krebiozen Research Found. v. Beacon Press, Inc.*, 134 N.E.2d 1, 6–8 (Mass. 1956) (refusing to grant injunction prohibiting publication of book about plaintiff because research on the alleged cancer drug was a matter of public interest); *Howell v. Bee Pub. Co.*, 158 N.W. 358, 359 (Neb. 1916) ("It follows that a court cannot use its equity powers to prevent the publication of political matter.").

346. See *Eppley v. Iacovelli*, No. 1:09-CV-386-SEB-JMS, 2009 WL 1035265, at \*5 (S.D. Ind. Apr. 17, 2009) (granting preliminary injunction and stating the "statements do not materially advance society's interest in 'uninhibited, robust, and wide-open' debate on public issues" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964))); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 985 (D. Or. 1963) (concluding that the "language of the sign ... pertains only to the interest of the parties involved in the controversy [and is] not in the public interest or for the public interest"); *Barlow v. Sipes*, 744 N.E.2d 1, 10 (Ind. Ct. App. 2001) (affirming injunction and noting, "We believe that the speech enjoined by the preliminary injunction is of little constitutional import and that the injunction primarily operates to address alleged private wrongs"); *Bingham v. Struve*, 591 N.Y.S.2d 156, 158 (App. Div. 1992) (affirming injunction and concluding that allegation of rape "does not advance ... societal interests and, indeed, concerns a private individual"); *Mazzocone v. Willing*, 369 A.2d 829, 834 (Pa. Super. Ct. 1976) (finding no public interest), *rev'd*, 393 A.2d 1155 (Pa. 1978).

347. 134 N.E. 2d at 7.

plaintiff filed suit to permanently enjoin the publication of a book it claimed falsely impugned a cancer drug it was developing.<sup>348</sup> The court refused to grant the injunction, noting that the effectiveness of the drug was a matter of public interest:

The establishment of the truth about Krebiozen as soon as possible is critically important to the public. If it is a cure it will be one of the great discoveries of modern times.... We grant that it could conceivably be here, as claimed, that this attack which the demurrer admits for present purposes to be false and defamatory will impede progress in the testing of Krebiozen. But basing a rule on that possibility would end or at least effectively emasculate discussion in the very controversial fields where it is most important.<sup>349</sup>

As a coda to its decision, the Supreme Judicial Court made it clear that the public interest in the speech was determinative: “The constitutional protections are clear and controlling, but were they absent, the weight, in the balance, of the public interest in the discussion of cancer cures would be sufficient basis here for the denial of an injunction.”<sup>350</sup>

### *E. Demonstrating Effectiveness*

Before a court may issue any injunction, even one that is narrowly tailored and only directed at speech on a matter of private concern, the plaintiff must demonstrate that money damages are an inadequate remedy and the injunction will actually be effective in reducing her harm. Under both constitutional and equitable principles, an injunction that does not offer additional benefits to a plaintiff, beyond what money damages provide, is not a suitable remedy.

As noted in Part II, in most cases it should be relatively easy for a plaintiff to establish that money damages are an inadequate remedy. It may not be so easy, however, for many of these plaintiffs to also show that injunctive relief will be effective in reducing their

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348. *Id.* at 2.

349. *Id.* at 7.

350. *Id.* at 9.

reputational harms. Where injunctions directed at speech are concerned, effectiveness is not a given. When a court issues an injunction, a speaker does not suddenly lose his voice. Words do not disappear from the page. Digital bits do not dissolve into the ether. An injunction's effectiveness is dependent on the behavior of individuals who weigh the benefits of continuing to engage in the proscribed conduct against the likelihood and costs of sanction if they are found to be in violation.<sup>351</sup>

Although a plaintiff may argue that an injunction is a valuable form of vindication regardless of whether it is effective in stopping further reputational harm, courts have been reluctant to recognize such an attenuated benefit as a sufficient justification for granting an injunction.<sup>352</sup> Equitable relief is discretionary, and judges are naturally disinclined to waste their resources and risk undermining respect for the legal system by issuing an order that will be ineffectual or ignored.<sup>353</sup> Moreover, “[w]here an injunction is

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351. John M. Golden, *Injunctions as More (or Less) than “OFF Switches”: Patent-Infringement Injunctions Scope*, 90 TEX. L. REV. 1399, 1402 (2012) (“In practical situations, an injunction might amount to little more than a threat of higher-than-normal monetary sanctions delivered at higher-than-normal speed.”).

352. See, e.g., *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (vacating orders enjoining the publication of names mentioned in grand jury proceedings because “the cat [was] out of the bag... [t]he district court did not close the hearing and the disclosure was made in the courtroom, a particularly public forum”); *In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986) (refusing to enjoin the publication of law enforcement records referencing the plaintiff, in part because “portions of the information disclosed by the FBI had already been ‘disseminated’ by the media,” and “[i]t is therefore hard to imagine a finding that the prior restraint would accomplish its purpose”).

353. See, e.g., *Oakley v. McWilliams*, 879 F. Supp. 2d 1087, 1090-91 (C.D. Cal. 2012) (quoting Chemerinsky, *supra* note 11, at 171) (alteration in original) (internal quotation marks omitted) (noting that a narrowly tailored injunction would “be useless because a defendant [could] avoid its restrictions by making the same point using different words”); *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (“The Court is not convinced that Plaintiffs have made an adequate showing that any restraining injunction in this case would serve its intended purpose.”); *Jordan v. Metro. Life Ins. Co.*, 280 F. Supp. 2d 104, 112 (S.D.N.Y. 2003) (finding that it would be impossible for an injunction to be sufficiently narrow while also preventing the defendant from making defamatory statements); *Devine v. Devine*, 90 A.2d 126, 129 (N.J. Super. Ct. Ch. Div. 1952) (noting the “inherent difficulties involved in the enforcement” of a proposed injunction preventing the plaintiff’s mother-in-law from making defamatory statements that would damage the plaintiff’s marriage); *Frick v. Stevens*, 43 Pa. D. & C.2d 6, 29 (C.P. Cumberland Cnty. 1967) (observing that “injunctive relief cannot be applied with practical success in this case and without imposing an impossible burden on the court, or bringing its processes into disrepute”).

unenforceable, it is difficult to see that it has a greater vindicatory effect than an award of damages.”<sup>354</sup>

The admonition that a court must assess whether an injunction will be effective is both a long-standing equitable principle<sup>355</sup> and an essential part of a court’s assessment of whether a restriction on speech is constitutional. The Supreme Court has repeatedly warned that the government may not suppress speech by means that are ineffective,<sup>356</sup> or that fail to serve,<sup>357</sup> further,<sup>358</sup> or directly advance<sup>359</sup> the state’s interest. We see this quite clearly in the Supreme Court’s decision in *Nebraska Press Ass’n v. Stuart*, which invalidated an injunction that restricted the press’s ability to report certain “implicative” information about a murder defendant.<sup>360</sup> Writing for the Court, Chief Justice Burger instructed that judges must “assess the probable efficacy of [a] prior restraint on publication as a workable method” and “cannot ignore the reality of the problems of managing” such orders.<sup>361</sup> Among the challenges he identified were the limited “territorial jurisdiction of the issuing court” and the need for personal jurisdiction, which “presents an obstacle to a restraining order that applies to publication at large.”<sup>362</sup> Examining the likely effectiveness of the gag order issued by the trial court, Chief Justice Burger concluded:

[T]he events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly

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354. Normann Witzleb, *Equity Does Not Act in Vain: An Analysis of Futility Arguments in Claims for Injunctions*, 32 SYDNEY L. REV. 503, 506 (2010).

355. See JOSEPH ALEXANDER SHEARWOOD & CLEMENT SMILES MOOR, AN INTRODUCTION TO THE PRINCIPLES OF EQUITY 8 (1885) (“When the Court cannot effectually carry out what it attempts, it will not attempt to do so at all; for it will not submit to be made an object of ridicule by an ineffectual performance.”).

356. See, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 567 (1976); Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a “Futility Principle” in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1, 3 (1995); see also Volokh, *supra* note 291, at 2421-22.

357. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 (1982).

358. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968).

359. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

360. *Stuart*, 424 U.S. at 541, 570.

361. *Id.* at 565.

362. *Id.* at 565-66.

by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.<sup>363</sup>

As Chief Justice Burger noted, speech injunctions may also be ineffective because of the limits of judicial authority.<sup>364</sup> A court cannot enforce its decrees beyond its geographic boundaries nor can it exercise power over parties who are not subject to the personal jurisdiction of the court.<sup>365</sup> As a result, principles of due process and state sovereignty limit a court's ability to compel parties to cease or refrain from speech activities. Unlike money damages, which can be enforced anywhere a defendant has assets, injunctions are *in personam* orders; if an injunction is to be effective in restraining speech, the court must be able to reach every speaker and extend its jurisdiction to the locations where the speech is being disseminated.<sup>366</sup>

Moreover, even when judicial power can reach the speech in question, there is reason to question whether an injunction will have sufficient practical effect to be worthwhile. All speech now has digital echoes.<sup>367</sup> In order to be effective, an injunction must therefore restrain speech in multiple communication mediums.<sup>368</sup> This requires the plaintiff to be able to identify where the defama-

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363. *Id.* at 567.

364. *Id.* at 565-66 (noting the limited "territorial jurisdiction of the issuing court" and the need for personal jurisdiction, which "presents an obstacle to a restraining order that applies to publication at large"); *see also* Frick v. Stevens, 43 Pa. D. & C.2d 6, 29 (C.P. Cumberland Cnty. 1967) ("Injunctive relief cannot be applied in this case with practical success because the court lacks jurisdiction to order the publisher and distributor, Random House, Inc., of New York, to change the publication, as they are without the jurisdiction and not parties to this suit.").

365. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 404 (1985).

366. *See* Witzleb, *supra* note 354, at 520.

367. *See supra* notes 12-14 and accompanying text.

368. *Cf.* Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989) (invalidating statute that applied only to an "instrument of mass communication" because it did "not prohibit the spread by other means of the identities of victims of sexual offenses [which] may have consequences as devastating as the exposure of her name to large numbers of strangers"); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 104-05 (1979) (invalidating criminal statute directed only at newspapers because harm sought to be prevented could also be caused by broadcast and electronic media).



tory speech is occurring and the court to be capable of coercing compliance from those who are responsible for disseminating the harmful speech. As to this second requirement, due to the broad protections afforded to Internet intermediaries by § 230 of the Communications Decency Act, courts cannot enjoin or impose liability on many of the parties that host, distribute, or otherwise make such speech available online, including Facebook, Google, and YouTube.<sup>369</sup>

An injunction likely would have its greatest utility in situations where there is a danger of recurrent violation by the defendant and the speech has not been widely disseminated. Surprisingly, a number of defendants have actually conceded that they would continue to defame the plaintiff absent a court order enjoining their behavior.<sup>370</sup> In such situations, an injunction prohibiting the defendant from continuing to publish his defamatory speech might be an effective remedy. Narrow tailoring necessitates, however, that the injunction be limited to prohibiting the repetition of the specific statements the court has found are defamatory, rather than preventing all defamation in the future.<sup>371</sup>

An injunction may also be a useful and appropriate remedy if the defamatory material is only circulating within a limited community and the injunction prohibits dissemination of the speech outside that community. For example, if a defamatory statement has been published in a print newspaper and the plaintiff seeks to prevent the speech from being posted online or stored in an electronic database where it would be accessible to a far wider audience, an injunction may be effective at reducing the plaintiff's harm. Similarly, an injunction may be an effective remedy where the defendant has created banners, distributed flyers, posted billboards, or has otherwise communicated the defamatory speech only to a limited audience.

In sum, before a court may issue an injunction it must assess whether the information sought to be enjoined has been disclosed so widely that it can no longer be effectively restrained through an injunction. Judges should ask where and in what form the defama-

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369. *See supra* note 28 and accompanying text.

370. *See, e.g.*, *Tory v. Cochran*, 544 U.S. 734, 736 (2005); *Balboa Island Vill. Inn v. Lemen*, 156 P.3d 339 (Cal. 2007).

371. *See supra* notes 289-93 and accompanying text.

tory speech has been published. Which audiences have access to the speech? Has anyone republished the speech? Does the court have jurisdiction over all necessary parties? The answers to these questions will determine whether an injunction has any chance of being effective. If the court can enforce its orders against the speaker(s) and the speech has been limited in scope, duration, medium, and recipients, then an injunction may be an effective remedy.

### CONCLUSION

Most constitutional law scholarship examining injunctions in defamation cases has focused on the problems that arise when courts issue preliminary injunctions restraining speech prior to publication. To be sure, such injunctions raise significant First Amendment concerns. But much of the current action in defamation cases is in the area of post-publication injunctions, which raise related, but in important ways different, challenges for courts. The most pressing question is whether an injunction directed at defamatory speech is ever permissible under the prior restraint doctrine. Although we do not have a definitive answer from the Supreme Court, it does appear that ground exists within the Court's First Amendment jurisprudence for narrowly tailored injunctions directed at published speech that a court found defamatory.

This fertile ground has not gone uncolonized. As this Article shows, a more permissive attitude toward injunctions in defamation cases is emerging across the country. Although not all courts are following this approach—and many remain confused about the constitutional and equitable limits on injunctive relief—it is clear that the adage that equity will not enjoin a libel is no longer an accurate statement of the law. It is not clear, however, what rule has replaced it.

This Article argues that if there is to be a formal retreat from the no-injunction rule, the First Amendment and equitable principles necessitate that certain safeguards accompany injunctions directed at defamatory speech. Although courts should be cautious when granting injunctions, a limited form of injunctive relief would be constitutional and consistent with equitable principles if it were

limited solely to false statements on matters of private concern that a court has found—after full adjudication—are defamatory.